IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE GOVERNMENT OF PROVINCE OF MANITOBA, Plaintiff, v. KEN SALAZAR, *et al*., Defendants.	)	Case No. 1:02CV02057-RMC (consolidated with 09-373)

PLAINTIFF'S CROSS-MOTION
FOR SUMMARYJUDGMENT

Plaintiff, the Government of the Province of Manitoba, respectfully moves this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 7(h), for summary judgment on the claims set forth in its Supplemental Complaint for Declaratory and Injunctive Relief, charging that Defendants' *Northwest Area Water Supply Project Final Environmental Impact Statement on Water Treatment*, issued December 5, 2008, fails to meet the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq*., and the related Record of Decision, dated January 15, 2009, is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

Plaintiff's motion is based on the grounds that (a) there is no genuine issue as to any material fact , and (b) Plaintiff is entitled to judgment as a matter of law. In support of its motion, Plaintiff relies upon the pleadings; the Administrative Record as filed with the Court by Defendants; and the supporting memorandum of points and authorities filed herewith, in which the grounds for this motion are fully set forth.

Plaintiff requests a hearing on its motion.

Respectfully submitted,

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Dated: September 28, 2009
Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE GOVERNMENT OF THE PROVINCE OF MANITOBA,	)	
Plaintiff,	)	
v.	)	**Case No. 1:02CV02057-RMC**
	)	**(Consolidated with 09-373)**
KEN SALAZAR, *et al.*,	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE FEDERAL DEFENDANTS' AND DEFENDANT-INTERVENOR'S MOTIONS TO LIFT THE INJUNCTION AND FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff, the Government of the Province of Manitoba (the "Province" or "Manitoba"), submits this memorandum of points and authorities in opposition to the motions of the Federal Defendants and Defendant-Intervenor, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, to lift the injunction issued by this Court on April 15, 2005, to permit design, planning and construction to proceed for the Water Treatment Plant (the "WTP") for the Northwest Area Water Supply Project ("NAWS" or the "Project"), and for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the claims asserted in Plaintiff's supplemental complaint, and in support of Plaintiff's cross-motion for summary judgment. As explained below, the Federal Defendants have taken an unduly narrow view of the scope of their review obligations under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq*. ("NEPA"), and have failed adequately to analyze the environmental consequences of and alternatives to the Project. Therefore, both the Federal Defendants' and North Dakota's motions should be denied, Plaintiff's cross-motion should be granted and the injunction should be maintained in full force and effect, pending full compliance by the Federal Defendants with their statutory duties under NEPA.

BACKGROUND

The NAWS project is a municipal, rural and industrial bulk water distribution system designed to supply communities and rural water systems in ten North Dakota counties. As conceived by the Federal Bureau of Reclamation (the "Bureau"), the Project would withdraw about 3.6 billion gallons annually of Missouri River water from Lake Sakakawea south of the divide between the Hudson Bay Basin and the Missouri River Basin. *See* Bureau of Reclamation, *Final Environmental Assessment*, dated April 2001, at 114 (DK-600-97-03) (the "EA") (2002 AR 588).[2]

[2] References to "2002 AR [Page Number]" in parentheses are to the initial administrative record filed with the Court on March 8, 2004. References to "2009 AR [Year] [Document Number] at [Page Number]" in parentheses are to the supplemental administrative record filed with the Court on May 27, 2009.

The water would be "pre-treated" at Max, North Dakota, and would then be piped across the divide into the Hudson Bay Basin, a distance of approximately 45 miles, to Minot, North Dakota.[3] In Minot, a final treatment plant would bring the water up to Federal drinking water standards. Utilizing 304 miles of distribution pipeline, *see* EA at 24 (2002 AR 495), the system would deliver about ten million gallons per day of finished water to eleven communities and five rural water systems north of the divide in North Dakota. *See* EA at viii, Tables 4 and 5 (2002 AR 460, 474, 475).[4] Water from the system would drain into rivers and streams, most notably the Souris River, flowing north into Manitoba. *See* EA at 71 (2002 AR 545).

The Project, whose cost is now estimated to be $218 million, *see* Declaration of Dennis Breitzman, dated August 12, 2009, ¶ 3 (Dkt. No. 131-2) (the "Breitzman Declaration"), just under one-third of which has been expended to date, would for the first time in human history link two ecologically distinct watersheds, the Missouri River Basin and the Hudson Bay Basin (which includes large areas of North Dakota and Minnesota, as well as Manitoba), which are notable for their different species compositions, including pathogenic species such as bacteria, viruses, protozoa, fungi and other microscopic plant and animal parasites. Manitoba has long been and remains deeply concerned about breaching this barrier because we know there are often severe consequences associated with the introduction of non-indigenous invasive species, which can include dramatic changes to aquatic ecosystems, the introduction of new diseases to native populations, a decline in native species, the annihilation of rare or endangered species, and other changes that can

[3] Minot itself is approximately 50 miles south of the Canadian border.

[4] The State of North Dakota has authorized an annual withdrawal from the Missouri River of 15,000 acre feet (*see* 2009 AR 2007_50). Thus, hypothetically, the Project could be expanded to withdraw about 4.9 billion gallons per year (one acre foot = 325,851 gallons), with the result that some 13.4 million gallons could be delivered daily to NAWS users. The Project would also have the capacity to meet a peak demand of 26 million gallons per day (2002 AR 737).

fundamentally alter genetic integrity, reproductive success and overall biodiversity (*e.g.*, 2002 AR 9815-9818). No project of this magnitude and impact should be allowed to proceed without the fullest examination of its risks and consequences, both domestic and international.

On October 22, 2002, Plaintiff filed its initial complaint in this action charging that the Federal Defendants had violated NEPA and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (the "APA"), in connection with the Bureau's environmental review of the Project (Dkt. No. 1). At that time, Plaintiff contended that the EA was inadequate under NEPA and that the associated Finding of No Significant Impact, dated May 18, 2001, and revised September 10, 2001 (the "FONSI") (2002 AR 672, 751, 10066), was therefore arbitrary and capricious under the APA.

On February 3, 2005, this Court ruled that the EA was inadequate and that the FONSI was therefore arbitrary and capricious. *Government of the Province of Manitoba v. Norton*, 398 F. Supp. 2d 41 (D.D.C. 2005) (2009 AR 2005_9). Noting that the introduction of non-indigenous species into the Hudson Bay Basin as a result of the Project could potentially cause "catastrophic" and "devastating" harm, *id*. at 65, 66, that there had been "no study of the *consequences* of leakage from the pipeline (whether slow leakage from the joints or a major break) and, therefore, no evaluation of the consequences of failure compared to more complete treatment at the source," *id*. at 63 (emphasis in original), and that the Bureau had failed to analyze the option of "full treatment" at the point of intake from the Missouri River, *id*. at 64, the Court called for "an integrated analysis of the possibility of leakage and the potential consequences of the failure to fully treat the Missouri River water at its source." *Id*. at 65. The Court remanded the matter to the Bureau "for completion of a more searching EA." *Id*. On April 15, 2005, in response to Plaintiff's request for injunctive relief, the Court issued a further order which allowed certain construction activities to proceed while the NEPA review was underway, as long as the Government could "demonstrate why the proposed

additional construction would not influence or alter the agency's ability to choose between water treatment options." Memorandum Opinion and Order, dated April 15, 2005, at 6 (Dkt. No. 95) (2009 AR 2005_21 at 6).[5]

Thereafter, on March 6, 2006, the Bureau announced that, instead of revising the EA to respond to the Court's order, it intended to prepare a full environmental impact statement ("EIS") in accordance with the requirements of Section 102(2)(C) of NEPA and solicited comments on the scope of such document. *See* 71 *Fed. Reg*. 11226 (March 6, 2006) (2009 AR 2006_10). The scoping notice, however, indicated that the Bureau intended to continue to rely on the EA for most purposes. The notice narrowly defined the scope of the EIS, indicating that the purpose of the Project was to deliver "treated [Missouri River] water" to communities in North Dakota north of the continental divide, and that the Bureau only intended to assess alternative designs for the WTP, rather than the Project as a whole. In other words, it would not address any Project alternatives in the Hudson Bay Basin. The scoping notice also noted that the geographic scope of the Department's proposed NEPA review only included "areas and resources within the United States affected by water diversion and delivery for NAWS Project purposes." 71 *Fed. Reg*. at 11227. In other words, the review would not address any impacts in Canada.

In response to the "scoping notice," on May 5, 2006, Manitoba submitted comments to the Bureau (2009 AR 2006_80). Manitoba's comments highlighted concerns about the proposed scope of the Bureau's NEPA review and urged that the Bureau take a broader view of what needed to be covered in the EIS, including, *inter alia*, framing the Project's purpose and need "in terms of providing water of sufficient quality and quantity to meet user needs from whatever appropriate

[5] Upon the Government's motions, additional construction was in fact approved by the Court on March 4, 2006, and March 18, 2008.

sources may be available;" defining the "no action" alternative to mean "no new project for water supply;" considering a "full range of reasonable alternatives" that would encompass "new and enhanced in-basin sources of water supply;" taking a truly "hard look" at environmental consequences**,** including consequences in Canada; and thoroughly assessing cumulative impacts from other Federal and State projects which "could have serious and permanent effects on Manitoba's aquatic environment." Comments making many of the same points were submitted to the Bureau by the Government of Canada (2009 AR 2006_79), the States of Missouri and Minnesota (2009 AR 2006_60 and 2009 AR 2006_73), various environmental organizations, including the Minnesota Center for Environmental Advocacy (2009 AR 2006_78) and the National Wildlife Federation (2009 AR 2006_49, 2009 AR 2006_74), and Indian tribes such as the Red Lake Band of Chippewa Indians (2009 AR 2006_77).

On December 21, 2007, the Bureau announced the availability of a draft environmental impact statement (the "DEIS") for review. 72 *Fed. Reg*. 72756 (December 21, 2007) (2009 AR 2007_176, 2009 AR 2007_206). However, notwithstanding its label, the DEIS (2009 AR 2007_181) was little more than a supplemental EA: a truncated analysis of different treatment methodologies only, which ignored broader issues related to the purpose of and need for the Project. Among other things, the DEIS identified the "no action" alternative as simply constructing the WTP as planned in 2001, rather than declining to build the Project at all. Further, the DEIS constricted the range of alternatives considered just to four different treatment options for Missouri River water, ignoring altogether the possibility of reliance on in-basin sources. Additionally, in reliance on its conclusion that Project risks are "low," the DEIS only cursorily considered the environmental consequences of an inter-basin transfer of Missouri River water to the Hudson Bay Basin, ignoring altogether

consequences to the Canadian environment, and avoided any discussion of cumulative impacts by asserting that there were none.

On March 26, 2008, Manitoba submitted a critique of the DEIS to the Bureau. *See Northwest Area Water Supply Project Final Environmental Impact Statement on Water Treatment*, Appendix C (the "FEIS") (2009 AR 2008_172 at 389-530). Manitoba's critique pointed out that the DEIS, as a result of the deficiencies noted above, fell short of the legal requirements for an EIS under NEPA; dramatically over-estimated non-Project risks of biota transfer; seriously under-estimated Project-related risks of biota transfer; improperly concluded that there was little difference between the Project as planned in 2001 and more sophisticated treatment systems that would provide a much higher degree of protection against invasive species; and substantially over-estimated the costs of such more protective treatment systems. FEIS, Appendix C (2009 AR 2008_172 at 389-393). Building on an earlier, detailed review of proposed pre-treatment processes prepared by its environmental consultants, EarthTech and TetrES (2009 AR 2007_190), Manitoba presented a comprehensive evaluation of the "no action" alternative, setting out proposed treatment standards and detailing the costs and parameters of an enhanced treatment process which Manitoba deemed preferable. *Id*. Criticisms, many of which echoed those of Manitoba, were also leveled against the Bureau in comments submitted by the Government of Canada, FEIS, Appendix C (2009 AR 2008_172 at 577-582), the States of Missouri and Minnesota, FEIS, Appendix C (2009 AR 2008_172 at 325-330, 375-388), the National Wildlife Federation, FEIS, Appendix C (2009 AR 2008_172 at 543-568) and local and regional Upper Midwest citizen and environmental organizations, including the Peterson Coulee Outlet Association and the Great Lakes Environmental Law Center. FEIS Appendix C (2009 AR 2008_172 at 367-374, 261-264). The U.S. Environmental Protection Agency ("EPA"), while it stated that the no action alternative "adequately reduce[d]" the

invasive species transfer risk, underscored that potential system failure "could result in irreparable and irreversible environmental consequences," and indicated that the "optimal way" to reduce risk would be to adopt an alternative other than the no action alternative. FEIS, Appendix C (2009 AR 2008_172 at 355-363).

On December 5, 2008, the Bureau announced the availability of the FEIS. 73 *Fed. Reg*. 74191 (December 5, 2008) (2009 AR 2008_179 at 2). The FEIS did not fundamentally change the Bureau's approach to its NEPA review of the Project, and the scope of the Bureau's review is determinedly narrow. Almost eight years after issuance of the EA, the FEIS still relied on the EA for the most basic conclusions about the Project's need, scope, impacts and alternatives. No substantial modification was made to the statement of purpose and need, the identification of the "no action alternative," the geographic scope of the environmental review, the anticipated costs or the range of alternatives considered. The FEIS identified the WTP as planned in 2001, that is, the "no action alternative," with the addition of application of ultraviolet ("UV") technology, as its "preferred alternative" in accordance with 40 C.F.R. § 1502.14(e) and 43 C.F.R. §§ 46.420(d), 46.425.[6] Essentially, the Bureau ignored all the constructive criticism that it received, and it did not adjust in any way the analytical approach that it followed prior to the Court's 2005 invalidation of the EA. The Bureau's choice of the preferred alternative is remarkable, given that, for the Bureau's other major inter-basin water transfer project in North Dakota, the Red River Valley Water Supply Project (the "RRVWSP"), the Bureau rejected such a weak alternative for *any* Missouri River water delivery system and instead indicated that more advanced conventional treatment, involving dissolved air flotation and filtration ("DAF-filtration"), would be adopted for all possible

[6] The addition of UV appears not to have been the Bureau's initial choice for the Project, but it was recommended by EPA, and the Bureau accepted the recommendation (*e.g*., 2009 AR 2007_179 at 1; 2009 AR 2009_30 at 2).

configurations of a Missouri River water delivery system. *See* Bureau of Reclamation, *RRVWSP Final Environmental Impact Statement* (December 21, 2007), (the "RRVWSP FEIS"), available at http://www.rrvwsp.com/rrvwsp_feis/rrvwsp/StartCD.pdf, Executive Summary, at 26-31, 32-33, 46.[7]

The Province, in a letter to the Bureau, dated January 11, 2009 (2009 AR 2009_7), contended that the FEIS was insufficient to support a decision to adopt the preferred alternative. Other critical comments were submitted to the Bureau by the States of Missouri and Minnesota (2009 AR 2009_6 and 2009 AR 2009_13), the Government of Canada (2009 AR 2009_14), the National Wildlife Federation (2009 AR 2009_12) and local environmental organizations (2009 AR 2009_23). Nonetheless, on January 15, 2009, just three days after the close of the comment period on the FEIS, the Bureau issued its Record of Decision (the "ROD") (2009 AR 2009_26), confirming the Bureau's choice of the "preferred alternative," that is, the treatment plant as planned in 2001 with the addition of UV treatment, as the WTP for the Project. The ROD states that "[a]ll of the alternatives, including No Action, evaluated in the Final EIS are considered environmentally preferable because they all present a low to very low risk of biological invasions." ROD at 4 (2009 AR 2009_26 at 4).

As described in the Breitzman Declaration and in the Declaration of Michelle Klose, dated August 12, 2009 (Dkt. No. 130-2) (the "Klose Declaration"), while substantial work on the Project has been completed, including the pipeline from Lake Sakakawea to Minot, much work still remains to be done. For example, several hundred miles of pipeline north of the divide have not yet been built; ten to eleven pump stations remain unbuilt; and construction has not started on three reservoirs. Klose Declaration, ¶ 5. All told, $67.9 million, including $48.1 million in Federal dollars, has been spent on the Project to date, or just under one-third of the total Project cost, leaving

[7] Notwithstanding that the FEIS responded to comments in the Response to Comments section (Appendix C to the FEIS), there was scarcely any change in analysis in the body of the document from the DEIS to the FEIS.

more than two-thirds of Project funds to be expended in the future. *Id*., ¶ 7; Breitzman Declaration, ¶ 3. If this Court's April 15, 2005 injunction is lifted, the Bureau would likely move ahead swiftly with the planning, design and construction of the WTP, a treatment plant little different than the plant it wanted to build in 2001, incorporating, as the Federal Defendants themselves state, only single "minor treatment design change" from the original plan. *See* Fed. Def. Mem., p. 11. *See also* FEIS, Appendix C (2009 AR 2008_172 at 361) (comments of EPA on DEIS).

ARGUMENT

1. The Government Bears the Burden of Demonstrating that Lifting the Injunction is Warranted.

At this stage in the NEPA process, it is incumbent upon the Government to demonstrate to the Court that the injunction should be lifted. It is for this reason that both the Federal Defendants and North Dakota have filed motions for relief under Rule 60(b) of the Federal Rules of Civil Procedure. It is their burden to show that lifting the injunction is appropriate.

Fed. R. Civ. P. 60(b)(5) provides that "the court may relieve a party . . . from a final judgment, order or proceeding . . . [if] the judgment has been satisfied, released or discharged, or . . . it is no longer equitable that the judgment should have prospective application." *Northern Alaska Environmental Center v. Lujan*, 961 F.2d 886, 889 (9th Cir. 1992), *quoting* Fed. R. Civ. P. 60(b)(5). When defendants have returned to court in a NEPA case seeking to have an injunction lifted, courts have reviewed these efforts under Rule 60(b)(5). *See id*.; *see also Sierra Club v. Mason*, 365 F. Supp. 47, 49 (D. Conn. 1973). The Federal Defendants acknowledge that they "bear the burden of establishing that changed circumstances warrant relief." Fed. Def. Mem., p. 16. *See generally Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992).

Notwithstanding their acknowledgment of the burden under Section 60(b), the Federal Defendants, citing the generalized "presumption of administrative regularity," contend that Manitoba

still "bear[s] the affirmative burden of demonstrating a violation of NEPA," and that, absent such a demonstration, "the Court must presume that the FEIS and ROD comport with NEPA." Fed. Def. Mem., p 21. However, Rule 60(b) requires more than a "check-the-box" exercise. It is not enough for the Bureau merely to point to documents labeled an "FEIS" and "ROD" to shift the burden to the other side, and notably the Federal Defendants cite no case law under Rule 60(b) to support such a proposition.[8]

The courts have emphasized:

> NEPA requires something more of agencies that have once run afoul of the Act. At a minimum, the Administrative Record must show that the agency made a good faith and objective effort to evaluate the relevant environmental criteria. As the Ninth Circuit has correctly noted, an agency's NEPA analysis "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." And in cases where the agency has already violated NEPA, its vow of good faith and objectivity is often viewed with suspicion.

Citizens Advisory Comm. on Private Prisons, Inc. v. U.S. Dep't of Justice, 197 F. Supp.2d 226 (W.D. Pa. 2001) (internal citations omitted). To that end, the Court must pay particular attention to whether the agency is preparing an EIS simply to justify decisions they have already made. *See Natural Resources Defense Council v. U.S. Army Corps of Engineers*, 457 F. Supp. 2d 198, 222 (S.D.N.Y. 2006); 40 C.F.R. § 1502.2(g). To avoid the risk of "post-hoc rationalization," the Court must conduct a "searching and careful" review of each element of the NEPA documents, to determine whether the agency presented its explanations objectively and in good faith. *Id*. at 222-23; *see also, e.g., Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) (careful scrutiny required of an agency's attempt to cure a NEPA violation, where it was highly likely that the subsequently prepared

[8] Neither *Peshlakai v. Duncan*, 476 F. Supp. 1247 (D.D.C. 1979), nor *Weiss v. Kempthorne*, 580 F. Supp. 2d 184 (D.D.C. 2008), cited at Fed Def. Mem., p. 21, addresses Rule 60(b). Both cases, rather, deal with the burden on initial challenge to agency action under NEPA.

EA was "slanted in favor of finding that the ... proposal would not significantly affect the environment"). Given such law, it is apparent that the Federal Defendants must bear the burden of demonstrating that they have complied with both the Court's mandate and with the requirements of NEPA. *See, e.g., Save the Niobrara River Ass'n v. Andrus*, 483 F. Supp. 844, 863 n. 1 (D. Neb. 1979) (finding "[n]o policy reason. . .for . . . shifting the burden from the defendants"); *Daly v. Volpe*, 376 F. Supp. 987, 995 (W.D. Wash. 1974).[9]

If there were any doubt about where the burden lies, it is dispelled by the terms of this Court's orders. The injunction in this case provided that **"**[b]efore any other NAWS construction may proceed, the government must return to the Court to demonstrate why the proposed additional construction would not influence or alter the agency's ability to choose between water treatment options and, furthermore, provide the Court with an update on the status of the ongoing NEPA review." Memorandum Opinion and Order, dated April 15, 2005, at 6-7 (Dkt. No. 95) (2009 AR 2005_21 at 6-7). Notably, the Federal Defendants have not explained why, in light of the substantial increase in Project cost since 2005, this has not happened. More important, the Court's earlier order of February 3, 2005, remanded the matter to the Bureau for a "more searching" review that "considers an integrated analysis of the possibility of leakage and the potential consequences of the failure to fully treat the Missouri River water at its source given the agency's awareness of treatment-resistant biota." *Government of the Province of Manitoba v. Norton, supra*, 398 F. Supp. 2d at 65-66. The issue now is thus whether the Federal Defendants have met their obligation under the terms of the Court's orders. The obligation to conduct a "searching" review necessarily entails one that fully comports with the requirements of NEPA. The Court must be satisfied with that

[9] *Horne v. Flores*, 129 S. Ct. 2579 (2009), cited in Fed. Def. Mem., p. 16, does not stand for any different proposition. It simply does not speak to burden shifting of issues of statutory compliance.

demonstration of NEPA compliance before the Court lifts the injunction and allows the Government to proceed with its planned activities. *See, e.g., Northern Alaska Environmental Center v. Lujan, supra*, 961 F.2d at 887 (condition imposed regarding adequacy of EIS); *Habitat Education Center, Inc. v. Kimbell*, 250 F.R.D. 397, 399 (E.D. Wis. 2008) (condition imposed regarding adequacy of EIS).

2. The Bureau has Failed to Meet its Obligations under the Court's Orders and NEPA.

The Bureau failed to meet its obligations under this Court's orders and NEPA in three ways. First, the Bureau has taken an unreasonably narrow view of the scope of its NEPA review, claiming that it can properly limit its review to which particular configuration of a WTP for Missouri River water should be built and that it need not address broader questions related to the Project as a whole. Second, the Department has failed to undertake a searching review of the consequences of the Project and, in so doing, has perpetuated many of the same errors that infected its preparation of the EA. Third, the ROD has not adequately differentiated among alternatives in terms of their environmental preferability.

A. The Scope of the Bureau's NEPA Review is Unreasonably Narrow.

The central issue in this case relates to the proper scope of the Bureau's obligations under NEPA. Based upon their interpretation of both the Court's February 3, 2005, decision on the substance of the case and the April 15, 2005, order of injunctive relief, the Federal Defendants and North Dakota claim that no more was required of the Bureau than a review of alternative treatment options for Missouri River water. *E.g.*, Fed. Def. Mem., pp. 3, 8, 23-25; ND Mem., pp. 2, 4, 25. This is to load those rulings with more freight than they can bear, and North Dakota's and the Federal Defendants' arguments muddle the important differences in the roles of EAs and EISs under NEPA. Contrary to their arguments, the Bureau's obligations must be viewed in light of broader

NEPA principles, which compel the conclusion that the determinedly narrow scope of the FEIS is fundamentally flawed.

In their Response to Comments (Appendix C to the FEIS), the Bureau repeatedly attempts to justify the scope of its NEPA review by referring to the Court's remand order, contending that the Court "did not remand for additional analysis on all issues" but instead just "focused on treatment options." FEIS, Appendix C, Response to General Comment No. 1 (2009 AR 2008_172 at 237-238). Further, the Bureau repeatedly relies on the Court's authorization of construction activities unrelated to treatment as proof that there was no "need" for the Bureau to revisit issues related to Project purpose and need, for it to consider a "no action" alternative that would involve abandonment of the Project as a whole, or even abandonment of reliance on Missouri River water, or for it to evaluate any alternatives except those related to treatment methodology at Lake Sakakawea. *Id*. The Bureau claims that preparation of an EIS, instead of a revised EA, simply allowed it "to conduct additional studies" and ensure greater "public involvement," with little apparent relevance to the nature of the review undertaken. *Id*. However, the need for the Project was never addressed in a comprehensive EIS, and the Court's decision to allow parts of the Project to proceed was based on a balancing of the equities, not a substantive ruling on the scope of the Bureau's NEPA obligations. There is nothing in the Court's orders that authorizes or invites the Bureau to truncate its NEPA obligations.

Four years ago, this Court castigated the Bureau for failing to fulfill its NEPA responsibilities. It is apparent that Defendants have learned little in the intervening period. Indeed, Defendants are even in a state of denial regarding this Court's merits ruling in 2005, going so far as to state, "Reclamation disagrees with the statement that 'Judge Collyer held that the Final EA was inadequate to support the Bureau's decision to proceed with the project in 2001.'" FEIS, Appendix

C, Response to Comments, Response 37-14 (2009 AR 2008_172 at 404). *See also* Response 37-15 (2009 AR 2008_172 at 406). To the contrary, this Court indeed did find that the EA was inadequate for purposes of NEPA decision-making on the Project; otherwise there would have been no need for its remand order, which called not just for an assessment of treatment options, but for a "searching" review of "the possibility of leakage and the potential consequences of the failure to fully treat the Missouri River water at its source." 398 F. Supp. 2d at 65. The EA, the Court found, could not support a determination by the Bureau that the Project as a whole did not have significant environmental effects. As the Court reiterated in its April 15, 2005 order, the Court found that the Bureau had "failed to comply with [NEPA] when it issued its [EA] for [NAWS]" because "the agency had failed to take a 'hard look' at relevant environmental concerns." Memorandum Opinion and Order, dated April 15, 2005, at 1 (Dkt. No. 95) (2009 AR 2005_21 at 1). Necessarily, an EIS prepared in light of such ruling must address the Project as a whole, not just selective components of the Project as the Bureau has done in the FEIS.[10]

The Federal Defendants' and North Dakota's reliance on the Court's April 15, 2005 decision not to issue an injunction against all Project activities is likewise misplaced. At the time of such decision, there was no indication that the Bureau was going to do anything more than prepare a revised EA on treatment options in accordance with the Court's remand order. In any event, the Court's order was based upon a balancing of equities, not any particular view of the Bureau's NEPA obligations on remand or the merits of the case. Memorandum Opinion and Order, dated April 15, 2005, at 3, n. 2, and 4 (Dkt. No. 95) (2009 AR 2005_21 at 3, n. 2, and 4) (referring to a "particularized analysis," balancing injury to each side and considering the public interest). Indeed,

[10] The Court certainly did not determine, for example, that Project "need" had been adequately demonstrated. The validity of the analysis supporting the EA's statement of purpose and need was simply not litigated in 2004-2005.

the Court noted that Manitoba's concerns about Project momentum were "weighty," *id*. at 5, and underscored that it was permitting some construction to proceed because, as Manitoba conceded, the construction activities themselves did not entail "serious environmental effects." *Id*. While the Court did consider the need for reliable and high quality water in the region, *id*., as Plaintiff has been at pains to point out throughout this litigation, the construction of most infrastructure north of the Basin divide is as consistent with reliance on in-basin sources as it is with the Missouri River option. *See, e.g*., Plaintiff's Response to Defendants' Joint Motion to Modify Injunction, dated February 17, 2006, at 1 (Dkt. No. 100). In fact, as the State of Missouri pointed out in its comments on the FEIS, if the need for an out-of-basin treatment plant is obviated, an in-basin Project may still be cheaper overall, even considering abandonment of infrastructure south of the basin divide (2009 AR 2009_6 at 3). *See also* FEIS, Appendix C (2009 AR 2008_172 at 327) (Missouri comments on DEIS). Allowing such work to proceed thus did not mean that the Court gave its imprimatur to the Bureau's choice of a Project design that relied upon Missouri River water, no matter how "devastating" or "catastrophic" its consequences.

The Bureau, as one internal reviewer noted, is in effect seeking to "tier" the FEIS off the analysis in the EA/FONSI (*see* 2009 AR 2007_106 at 1). It has taken an EA on NAWS and seeks to rely upon that document for its NEPA decisions on a single, smaller component of that Project, the WTP. Indeed, the Federal Defendants candidly admit the extent to which the FEIS "incorporated by reference" numerous elements of the EA. Fed. Def. Mem., pp. 11, 22. Such tiering off an EA, however, is impermissible. The regulations of the Council of Environmental Quality (the "CEQ") and established case law make it clear that subsequent environmental reviews can only be tiered to another EIS. *See* 40 C.F.R. §§ 1500.4(i), 1505.20, 1508.28; *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 810 (9th Cir. 1999); *League of Wilderness Defenders-Blue Mountains*

Biodiversity Project v. U.S. Forest Service, 549 F.3d 1211, 1219 (9th Cir. 2008) . This is perfectly understandable. The purpose of an EA is only to determine whether the impact of an action is significant -- to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9. It does not provide the kind of comprehensive, inter-disciplinary, "finely tuned and 'systematic' balancing analysis" of the impacts and alternatives of an action that is significant. *See generally Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1113 (D.C. Cir. 1971).

The tiering, moreover, is doubly impermissible in this case because of the age of the document on which the Bureau purports to rely. The EA was released in April 2001 and was almost eight years old at the time the FEIS was published. The CEQ has clarified that, "[a]s a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement." CEQ, *NEPA's Forty Most Asked Questions*, 46 *Fed. Reg*. 18026, 18036 (March 23, 1981), available at *http://www.nepa.gov/nepa/regs/40/40p3.htm* (*see* Question 32). These concerns are not merely hypothetical. As the State of Missouri noted in its comments on the FEIS (2009 AR 2009_6 at 3), "demographic estimates that have been used to support the need for the project are both dated and suspect and they have not been corroborated by more recent population and demographic data," while "infrastructure changes that have already been constructed . . . might affect cost estimates," and the FEIS does not consider current local usage of in-basin resources, which could well "demonstrate that no water treatment plant is needed because no inter-basin transfer is needed." *See*

also FEIS, Appendix C (2009 AR 2008_172 at 327, 263) (Missouri comments on DEIS) (Great Lakes Environmental Law Center comments on DEIS).

Despite the purported justifications for their decisions regarding the scope of the FEIS, Defendants cannot administratively redefine what an EIS is. Just labeling a document an "EIS" does not make it so. As noted above, EAs and EISs are fundamentally different types of documents, prepared for different purposes, and an EA avoids the full evaluation of a project's potential impacts, including impacts in this case from the introduction of invasive species to the Hudson Bay Basin, that an EIS affords. Only the kind of comprehensive analysis described by the D.C. Circuit in *Calvert Cliffs'* can truly serve NEPA's purposes for an agency action which may have significant environmental effects. Indeed, had the Bureau proceeded to prepare an EA on treatment options pursuant to the remand order, and, had the conclusion of such review been that the impacts of the Project were significant, the Bureau could not then have satisfied its NEPA obligations simply by preparing an EIS on WTP alternatives. Rather, if the Project as a whole had significant effects, then it would have been incumbent on the Bureau to prepare a comprehensive EIS for the entire Project. The Bureau cannot now avoid those duties by claiming that the scope of review chosen for the FEIS is sufficient simply to allow more studies to be done or greater public involvement to take place.

In summary, once the Bureau determined to prepare a full EIS, it was obligated under NEPA to produce a thorough-going evaluation of the risks and consequences of, and alternatives to, the "agency action" at issue, that is, the Project as a whole, and not just a decision to construct the WTP. The Bureau, in effect, wants to have it both ways. On the one hand, it wants to claim that it has done a full EIS in compliance with NEPA, thus avoiding any charges that, even after preparation of a revised EA, the Bureau might have improperly determined that the Project did not have significant environmental effects. On the other hand, notwithstanding its obligations under NEPA, the Bureau

really does not want to revisit *any* earlier decisions about the Project -- most importantly the decision to rely on Missouri River water -- except those related to treatment methodology. The Bureau seems incapable of admitting, even for purposes of analysis, that the Project might involve water sources other than the Missouri River. Such a half-way, and half-hearted, approach to NEPA compliance is impermissible and cannot be sanctioned by the Court.

B. The FEIS' Statement of Purpose and Need is Unduly Narrow.

Under the CEQ's regulations and the NEPA regulations of the Department of the Interior (the "Department"), the first issue to be addressed in an EIS is the "underlying purpose and need" for the project. 40 C.F.R. § 1502.13; 43 C.F.R. § 46.415(a)(1). The FEIS states that the "purpose of the proposed action is to adequately treat the Project water from the Missouri River basin (Lake Sakakawea)." FEIS, Executive Summary, at 9 (2009 AR 2008_170 at 9). The effect of the Bureau's Statement of Purpose and Need is to take abandonment of the Project as a whole, as well as the "no Missouri River project" alternative, off the table, even though groundwater resources within the Hudson Bay Basin may be available to meet the needs of NAWS communities. Under the Department's approach to NEPA, no matter how "devastating" or "catastrophic" the consequences, even if the highest level of protection were adopted, a project relying on Missouri River water would still be built. This makes absolutely no sense and is inconsistent with the law.

The Federal Defendants claim that deference is due to the agency's statement of purpose and need, and that the Court "must uphold" the agency's statement as long as the objectives chosen are "reasonable." Fed. Def. Mem., p, 22, citing *Davis v. Latschar*, 202 F.3d 359, 367 (D.C. Cir. 2000). It is apparent, however, that the general argument from "reasonableness" has little application to this case. Rather, the issue comes down to whether, as the Federal Defendants state, "the Court had determined that further NEPA analysis was required *solely* for the treatment options." Fed. Def. Mem., p. 23 (emphasis added). If so, they argue, the statement of purpose and need must perforce be

reasonable. But, as Plaintiff has demonstrated above, the Federal Defendants misconstrue the Court's order. The case cannot be reduced that simply, for the Court was generally concerned with the consequences of the Project, not just treatment options. Consequently, the Federal Defendants cannot escape their obligations regarding the preparation of an EIS by relying on what the Court stated relative to preparation of a revised or supplemental EA.[11]

Once the Federal Defendants' argument based on the Court's prior rulings is disposed of, it is clear that the FEIS' Statement of Purpose and Need is unduly narrow and cannot pass muster under NEPA and its implementing regulations. Agencies may not define the objectives of their actions in unreasonably narrow terms, since "[o]ne obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)." *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997). Yet, this is precisely what the Bureau has done here. The Bureau's perspective presumes that completion of the Project is a *fait accompli* and erroneously assumes that the Federal Defendants' subsequent evaluation of the environmental consequences of system failure, resulting in the release of invasive organisms into the Hudson Bay Basin, when viewed through the lens of the Project as a whole, would not have resulted in a need for a more in-depth EIS that would have fully considered the impacts of the Project and all reasonable alternatives.

The *Simmons* case is particularly on point. As the Court there stated, "If NEPA mandates anything, it mandates this: a federal agency cannot ram through a project before first weighing the pros and cons of the alternatives." *Simmons*, 120 F.3d at 670. In *Simmons*, the Seventh Circuit referred to the case before it as a "textbook vindication of the wisdom of Congress in insisting that

[11] Nor is it sufficient to claim, as the Federal Defendants do, that the broader issues regarding purpose and need for the Project, addressed in the EA, are "incorporated by reference." Fed. Def. Mem., p. 22. As Plaintiff has explained, the Bureau cannot "tier" from an EA to an EIS.

agencies follow [NEPA] procedures in the first place." *Id*. at 666. In that case, a city applied to the U.S. Army Corps of Engineers (the "Corps") for permission to construct a dam and reservoir that would block a creek and create a lake that would supply water to both the city and an area water district. The city and the Corps had defined the project's purpose as supplying two water users (the city and the water district) from a single source (the lake that would be created). As such, the Corps prepared an EIS that confined the analysis to single-source alternatives. The Court strongly disagreed with this approach, holding that the *purpose* of the project was to provide water to two communities, *not* to build a single reservoir to supply that water, and as a result, the EIS was too narrowly focused:

> [A] single source may well be the best solution to the putative water shortages … [t]he Corps' error is in accepting this parameter as a given. To conclude that a common problem *necessarily* demands a common solution defies common sense. We conclude that the [Corps] defined an impermissibly narrow purpose for the contemplated project. The Corps therefore failed to examine the full range of reasonable alternatives and vitiated the EIS.

Simmons, 120 F.3d at 667. The Bureau's artificial narrowing of the purpose of the FEIS to water treatment options is similarly impermissible and has precluded a full examination of the range of alternatives that might otherwise have been considered under a fully NEPA-compliant EIS.

The Federal Defendants' position appears to be based on the theory that completion of the Project, given the extent of construction already undertaken, is a foregone conclusion. However, as pointed out above, more than two-thirds of the Project's total cost has yet to be spent, and the Bureau's approach ignores the fact that Federal projects have frequently been halted for further NEPA review, despite being well along in construction, with a substantial investment already having been made. *See, e.g., Crutchfield v. U.S. Army Corps of Engineers*, 192 F. Supp. 2d 444, 460 (E.D. Va. 2001) (granting injunction against $33 million project for which $10.3 million was already spent); *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1183-84 (6th Cir. 1972) (preliminary

injunction upheld where $29 million of total estimated cost of $69 million already expended). *See generally Daingerfield Island Protective Soc'y v. Lujan*, 920 F.2d 32, 38 (D.C. Cir. 1990) (noting that "in environmental suits, the amount of money spent in reliance has not been considered the prime factor in the prejudice inquiry"); *Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't (I)*, 446 F.2d 1013, 1028, n.29 (5th Cir. 1971) (noting that "courts should not shrink from halting construction of projects . . . which are being erected in clear violation of the law").

Finally, notwithstanding the Bureau's effort to write off any Project configuration that does not rely on Missouri River water, all the communities which will be served by the Project can be supplied, at least on an interim basis, with water treated at Minot that is derived from in-basin sources. *See* Declaration of Michelle Klose, dated February 24, 2006, ¶¶ 5-7 (Dkt. No. 102), and Declaration of Michelle Klose, dated February 15, 2008, ¶¶ 6-9 (Dkt. No. 106-2). There seems little question, moreover, that water from in-basin sources treated at Minot could supply the needs of some downline communities for an indefinite period of time. *See* J. Schramm, "NAWS wants Minot water as stopgap measure," *Minot Daily News*, February 24, 2007, available at http://www.houstonengineeringinc.com/pdfs/NAWS-Minot-stopgap2-24-07.pdf (noting the view of Minot Public Works Director that "Minot can easily supply Berthold and Kenmare with water"). Certainly, given at least this interim ability, it was incumbent on the Bureau carefully and thoroughly to explore whether reliance on in-basin sources would also be feasible in the long-term. Finally, the EA itself noted that (1) there is sufficient groundwater supply north of the basin divide, EA at 13 (2002 AR 478), and (2) the rationale at the time for preferring an inter-basin transfer was that it

would be "less expensive for most contract users." EA at 24 (2002 AR 495).[12] Because the FEIS now estimates that treatment costs for the preferred alternative are in excess of those estimated in 2001, *see* FEIS at 2-15, Table 2.6 (2009 AR 2008_172 at 37), the Bureau must necessarily revisit the cost-benefit calculations it made in 2001. With higher treatment costs for an inter-basin transfer, an in-basin alternative is not only environmentally preferable because it avoids invasive species problems, but it may also appear more cost-effective today (*e.g.*, 2009 AR 2008_172 at 327) (Missouri comments on DEIS). As a result of this new cost information, the Bureau improperly relied on an analysis that was almost eight years old at the time.

The Bureau states that "[o]ther surface water and ground water sources were evaluated in the Final EA . . . [and] [t]he Missouri River was identified as the most reliable supply of water for the majority of the Project service area . . . ." FEIS at 1-10 (2009 AR 2008_172 at 20). That conclusion, however, as noted above, was based upon a different array of estimated Project costs. In any event, the EA's rejection of in-basin alternatives is insufficient to justify a narrow statement of purpose and need. It is elementary under NEPA that an EA, no matter how thorough or detailed, cannot substitute for a comprehensive EIS. *See, e.g.*, *Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2004); *Sierra Club v. Marsh*, 769 F.2d 868, 874-876 (1st Cir. 1985).

[12] The FEIS appears to back away from this statement. It thus notes, "Groundwater supplies in the Minot area, which would be key to the development of an integrated groundwater alternative, are inadequate based upon current information." FEIS, Appendix C, Response to Comments 41-10 (2009 AR 2008_172 at 556). For its part, North Dakota has attached to its brief the Declaration of Dale Frink, dated August 11, 2009 (Dkt. No. 130-3), which purports to establish that both the water quality and water quantity problem in the Project area are worse today than described in the EA. *See also* Minot *Amicus Curiae* Mem., p. 2 (claiming that water resources north of the divide are "insufficient in quality and quantity"). However, the Federal Defendants and North Dakota cannot have it both ways, relying on the EA when it suits their needs, but also trying to bolster their position by positing bits and pieces of additional information. If the water supply situation has truly changed, this should have been subject to a comprehensive analysis in the FEIS.

C. The FEIS Inappropriately Characterizes the "No Action" Alternative.

The Federal Defendants argue that the FEIS properly characterized the "no action" alternative simply as the Project as it was designed and approved in 2001. Fed. Def. Mem., pp. 23-25. Their argument is essentially the same as that regarding Project purpose and need, namely, that "the Court found that more analysis was required *only* with respect to water treatment alternatives." Fed. Def. Mem., p. 24 (emphasis added). Their argument, however, is once again at odds with the Court's order and must founder for much the same reasons.

NEPA requires the Bureau to take full, fair and unbiased look at all reasonable alternatives, specifically including the "no action" alternative. *See* 40 C.F.R. § 1502.14(d); 43 C.F.R. §§ 46.415(b)(1), 46.420(b); *e.g.*, *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988); *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986). The FEIS states that the "no action" alternative is simply the "selected action alternative in the FONSI." FEIS, Executive Summary, at 15 (2009 AR 2008_170 at 15). As a result, the FEIS not only does not examine the alternative of no project at all, but it also does not even consider "no Missouri River project" alternatives, including reliance on in-basin sources of water. There is thus no valid baseline against which to compare the risks and consequences of various treatment alternatives. Indeed, it is difficult to understand, regardless of what the Court ordered in 2005, how the Department can rationally choose among treatment alternatives without having analyzed in detail the consequences of not building the Project at all or not otherwise relying upon Missouri River water.

The Bureau, and the Federal Defendants in their brief, cite the guidance in the CEQ's *NEPA's Forty Most Asked Questions* in support of their position. FEIS at 2-6 (2009 AR 2008_172 at 28); Fed. Def. Mem., p. 24. However, they misconstrue the CEQ's guidance. The approach to the "no action" alternative adopted by the Bureau is only appropriate, according to the CEQ, where there are "ongoing *programs* initiated under existing legislation and regulations [that] will continue, even

as new plans are developed." *See* CEQ, *NEPA's Forty Most Asked Questions*, 46 *Fed. Reg*. 18026, 18027 (March 23, 1981), available at http://www.nepa.gov/nepa/regs/40/40p3.htm (Question 3) (emphasis added). It has no application in the context of "federal decisions on *proposals for projects*," such as NAWS. *Id*. (emphasis added). Indeed, such an approach would make no sense in the context of discrete projects, since it would mean that the project at issue, no matter how ill-conceived or damaging to the environment, would always be built. The Bureau's approach to NEPA compliance effectively flips NEPA on its head: "no action" becomes the option with the most damaging environmental consequences, whereas ordinarily it would represent the action with the least damaging consequences.

The Federal Defendants' focus on the first (or "program") interpretation implies that NAWS is like "*updating a land management plan* where ongoing programs initiated under existing legislation and regulations will continue," where "'no action' is 'no change' from current management direction or level of management intensity," and the "no action" alternative is akin to "continuing with the present course of action until that action is changed." *Id*. (emphasis added). The example cited by the CEQ as the type of proposal that would fall within the purview of this particular interpretation of a "no action" alternative (the updating of a land management plan), however, represents a wholly different situation than exists for NAWS. Unlike a land management program, there is no "ongoing program" associated with the Project. Indeed, until NAWS is completed, no water transfers or water treatment will commence, and municipalities and communities in the service area will continue to rely upon existing sources of groundwater. Unable to point to any actual "ongoing program," the Federal Defendants have presented what amounts to a fictitious scenario based on hypothetical eventualities for the purpose of avoiding a searching review of a true "no action" alternative in accordance with NEPA.

In reality, the NAWS Project is wholly consistent with the CEQ's second interpretation of the phrase "no action," which

> is illustrated in instances involving federal decisions on proposals for projects. "*No action" in such cases would mean the proposed activity would not take place*, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative activity to go forward.

Id. (emphasis added). This interpretation comports with case law that has long held that "no action" alternatives in project-specific EISs describe what would occur if no action were taken toward development of the project. *E.g., Kilroy v. Ruckelshaus*, 738 F.2d 1448, 1454 (9th Cir. 1984). *See also, e.g., Sierra Club v. Adams*, 578 F.2d 389, 395-96 (D.C. Cir. 1978) ("no action" alternative analyzed impact of not constructing a highway despite repeated Congressional authorizations for highway construction); *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1324 (10th Cir. 2004) ("no action" alternative considered other ways to increase electrical power on the island other than construction of natural gas pipeline); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312, n. 3 (9th Cir. 1990) ("no action" alternative to timber harvest contract meant evaluating the consequences of terminating or suspending timber harvesting within the sale area).

The Federal Defendants also argue that Congress has authorized NAWS as a Project that "has always contemplated the use of Missouri River water," pointing in particular to the Garrison Diversion Unit Reformulation Act of 1986, Pub. L. No. 99-294, § 5 (2002 AR 1983), as amended by the Dakota Water Resources Act of 2000, Pub. L. No. 106-554, App. D., Title VI (the "DWRA") (2002 AR 1988). Fed. Def. Mem., p. 24. However, there is nothing is this legislation that requires that a project be built relying on Missouri River water, and the legislation is entirely consistent with the Bureau's full compliance with its obligations under NEPA and the CEQ and Departmental implementing regulations. The rule is that the duties imposed on agencies under Section 102(2)(C) of NEPA "must be complied with to the fullest extent, unless there is a *clear conflict of statutory*

authority." *Calvert Cliffs' Coordinating Committee, Inc. v. AEC, supra*, 449 F.2d at 1115 (emphasis added). It is well-established that authorizing legislation, absent specific language, in no way alters an agency's NEPA obligations. *See, e.g., Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Commission*, 869 F.2d 719, 729-30 (3rd Cir. 1989). Neither does the passage of annual Congressional appropriations measures for a particular project relieve an agency from complying with NEPA or serve as confirmation regarding the sufficiency of an agency's NEPA analysis. *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783, 785-86 (D.C. Cir. 1971); *Realty Income Trust v. Eckerd*, 564 F.2d 447, 458, n. 38 (D.C. Cir. 1977); *Environmental Defense Fund v. U.S. Army Corps of Engineers*, 325 F. Supp. 749, 762-63 (E.D. Ark. 1971).

Moreover, the courts have stressed that, when there is a failure to analyze fully the consequences of agency action in an earlier environmental assessment, as there has been in the case of the Project, the agency's prior rejection of a "no action" alternative must be revisited in a new NEPA analysis. As one district court has stressed, "When an agency's initial analysis of alternatives involves a major deficiency . . . , the agency's decision was necessarily undertaken without a proper consideration of relevant alternatives." *Oregon Natural Resources Council Action v. U.S. Forest Service*, 445 F. Supp. 2d 1211, 1224 (D. Or. 2006) . In such circumstances, the agency is obligated to consider again "the complete abandonment of the project." *Id*. "Fresh consideration of a no action alternative . . . is consistent with the agency's obligation to take a meaningful look at the environmental consequences of the proposed action at a point early enough to contribute to the decisionmaking process, and not simply 'rationalize or justify decisions already made.'" *Id*. at 1225.

Similarly, even in the context of plans or programs, the courts have emphasized that it is impermissible for an agency, in formulating the "no action" alternative, to rely upon a prior decision or action that has been held invalid. *See Friends of Yosemite Valley v. Scarlett*, 439 F. Supp. 2d

1074, 1105 (E.D. Cal. 2006), *aff'd sub nom. Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008). In the case of NAWS, the basis on which the Bureau had previously proceeded has been declared invalid. *See Government of the Province of Manitoba v. Norton*, *supra*, 398 F. Supp. 2d at 65. It is thus equally clear here that the Bureau cannot now assume the existence of the Project as its baseline for proceeding forward. As the Court stated in *Scarlett*, "A no action alternative in an EIS is meaningless if it assumes the existence of the very plan that is being proposed." *Id*. *See also Oregon Natural Resources Council Action v. U.S. Forest Service*, *supra*, 445 F. Supp. 2d at 1223 ("[c]onsideration of alternatives must include whether a project should be totally abandoned"). The pre-supposition in the FEIS that a Missouri River water treatment will be built cannot be squared with this precedent.[13] Given that less than one-third of needed funds have been expended to date for the Project, there is ample opportunity for the full review of the Project that NEPA requires.

D. The FEIS' Discussion of Alternatives is Inadequate.

Plaintiff agrees with the Federal Defendants that the choice of the proper range of alternatives is closely related to NEPA's requirement that agencies "specify the underlying purpose and need to which the agency is responding." Fed. Def. Mem., p. 28, citing *Davis v. Latschar*,

[13] The Federal Defendants claim that the Bureau took "the only sensible approach" to the "no action" alternative, since otherwise the Bureau would have had to "ignore the already constructed portion of the Project." Fed. Def. Mem., p. 25. This is not so. As explained above, portions of the Project north of the basin divide could readily be integrated into a Project that relied upon in-basin resources. Further, while it is true that the portions of the Project south of the basin divide would lose their utility under a true no action alternative, this is not a reason at least not to analyze such an alternative. Since NEPA does not dictate substantive outcomes, there is nothing inevitable about the loss of this infrastructure. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). In any event, to date, the Bureau has only expended $48.1 million on the Project, while total Project expenditures have amounted to $67.9 million, most of which has been for infrastructure north of the divide. Breitzman Declaration, ¶ 3; Klose Declaration, ¶ 7. The vast majority of Federal, State and local funds thus has not been expended.

supra, 202 F.3d at 367-368.[14] However, Plaintiff submits that it follows from the analysis set out above that the "range of alternatives" considered in the FEIS is inadequate. The FEIS only looks at four alternatives -- the treatment process adopted by the Bureau in 2001, "basic treatment," "conventional treatment" (DAF-filtration) and "microfiltration." -- and it ignores not only reliance on in-basin sources but also water conservation and water recycling. FEIS, Executive Summary, at 15-17 (2009 AR 2008_170 at 15-17). Under NEPA, agencies must "[r]igorously explore and objectively evaluate *all* reasonable alternatives." 40 C.F.R. § 1502.14 (emphasis added); *see also* 43 C.F.R. §§ 46.415(b), 46.420(b),(c). The "existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Res. Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1994), quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992); *see also Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998).

The Federal Defendants claim that limiting the range of alternatives to treatment options was permissible because the Bureau properly determined to define "purpose and need" as related solely to the level of treatment for Missouri River water. Fed. Def. Mem., p. 28. Further, the FEIS itself attempts to justify the range of alternatives by claiming the EA effectively ruled out in-basin alternatives. FEIS at 1-10 (2009 AR 2008_172 at 20). However, as previously discussed, the EA itself was an inadequate document and, in any event, the analysis in an EA simply cannot substitute for that in a comprehensive EIS. *See, e.g., Anderson v. Evans*, *supra*, 371 F.3d at 494; *Sierra Club v. Marsh*, *supra*, 769 at 874-876.

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[14] The Federal Defendants again also point to authorizing legislation for NAWS, claiming that Congressional contemplation of an inter-basin transfer "informs a reasonable range of alternatives." Fed. Def. Mem., p. 28, n. 7. As we explained above, whatever kind of project some Members of Congress may have contemplated, Congress can in no way be deemed to have *mandated* an inter-basin transfer, and there is nothing in the legislation that would override NEPA's mandatory, and strictly enforced, review requirements.

Furthermore, even with respect to the alternatives evaluated, the FEIS is written in such a way that a fair comparison of the alternatives is difficult, if not impossible, to make, especially because the FEIS fails to set out any standards for judging the alternatives and significantly overstates the costs of more advanced treatment systems, such as conventional treatment and microfiltration. As a result, the analysis in the FEIS is inappropriately skewed in favor of the preferred alternative over other cost-effective choices.[15] In such circumstances, the Bureau's conclusions that its preferred alternative achieves an appropriate level of risk reduction and is "the most cost effective treatment for the Project," FEIS at 2-22 (2009 AR 2008_172 at 44), are not justified.[16]

The Federal Defendants' effort to distinguish the Bureau's approach to RRVWSP treatment is unavailing. *See* Fed. Def. Mem., pp. 31-32. The Federal Defendants cite the ROD, noting the difference between the preferred alternative for the RRVWSP, which involves release into an open body of water, and NAWS, which involves a closed pipeline delivering directly to a treatment plant.

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[15] The FEIS suggests, among other things, that the conventional treatment alternative would have increased construction costs and "operation difficulties" due to limits associated with "pipeline design." FEIS at 2-10 (2009 AR 2008_172 at 32). However, the Federal Defendants and North Dakota expressly represented to the Court that pipeline work, consistent with the Court's April 15, 2005 order, would not impact the choice of treatment alternatives. Any actions that the Bureau may have taken that were inconsistent with the Court's order should not now be credited in justifying the choice among different WTP methodologies.

[16] The Federal Defendants claim that determinations of "cost effectiveness" were justified, among other reasons, based upon a North Dakota technical report determining that a cost differential of $50 million would achieve just a "2-4% increase in UV treatment efficacy." Fed. Def. Mem., p. 31, citing 2009 AR 2008_157 at 3. This is misleading and incorrect for several reasons. First, the $50 million cost differential, as explained below, is not correct and is based upon the Bureau's questionable cost estimate. Second, the pilot study referenced (2009 AR 2008_175) was done under average water quality conditions, whereas it is well known that disinfection failures occur under conditions that are common, albeit less frequent than the average. In this regard, the actual water quality of the Missouri River is highly variable, with extremely high turbidity values being commonly observed. In such circumstances, the increased efficiency due to pre-treatment involving DAF-filtration would be much greater than 2-4%, albeit unquantified since the Bureau failed to pilot test a more realistic range of actual water quality conditions, and could well make the difference between allowing the inter-basin transfer of a harmful invasive species such as whirling disease and preventing such a catastrophe.

See ROD at 10 (2009 AR 2009_26 at 10). What they neglect to mention is that, in the context of the RRVWSP, the Bureau extensively reviewed different treatment options. It then rejected "basic treatment" (chemical disinfection, plus UV treatment) -- the WTP choice made by the Bureau for NAWS -- for all options, including those involving an enclosed conveyance directly to municipal water systems, and instead concluded, "Each of the Missouri River import alternatives would use an In-filter DAF or a comparable, cost effective treatment process to reduce the risk of transfer of invasive species from the Missouri River Basin to the Hudson Bay Basin." RRVWSP FEIS, Executive Summary, at 32. The Bureau has nowhere adequately explained how DAF-filtration can be cost-effective for each and every one of the RRVWSP alternatives, including alternatives essentially identical to NAWS in terms of water conveyance to municipal water systems, but not cost-effective for NAWS.[17]

The Federal Defendants and North Dakota both expound at length on the various measures of treatment effectiveness mentioned in the FEIS. *See* Fed. Def. Mem., p. 29; ND Mem., pp. 5-6. Yet, the Bureau nowhere establishes any overarching standard, such as proposed by Manitoba (*see* 2009 AR 2007_190 at 29-31), to be used to make a choice among alternatives. As Manitoba stated in its comments on the FEIS, "The stated goal is to 'adequately treat' Missouri River water. However, the Final EIS does not establish any treatment goals against which to measure acceptable or non-acceptable performance. Thus, there is no way to assess whether treatment is in fact adequate" (2009 AR 2009_7 at 5). In short, while Manitoba appreciates that the Bureau may have "considered" Manitoba's proposed treatment goals, as well as recent proposals for ballast water

[17] While the Federal Defendants assert that "the FEIS does not find that any of the alternatives are not 'cost effective,'" Fed. Def. Mem., p. 30, this is just semantic quibbling. As they themselves acknowledge in next breath, the FEIS finds that the preferred alternative is the "most cost effective" option. FEIS at 2-22 (2009 AR 2008_172 at 44). Necessarily, then, the FEIS found other alternatives to be less cost effective.

treatment and EPA guidance regarding the treatment of *Giardia* and *Cryptosporidium*, ND Mem., p. 6, consideration alone is insufficient: some effort must be undertaken to set a standard to measure the adequacy of the treatment alternatives.

At the same time, while avoiding standard-setting, the FEIS relies upon cost estimates that frankly tilt the decision-making process in favor of the cheapest alternative. In its comments, Manitoba presented concrete and specific cost data for DAF-filtration facilities that are already under construction in settings directly comparable to NAWS. The data Manitoba presented is based upon actual, tendered treatment plant designs. FEIS, Appendix C (2009 AR 2008_172 at 389); (*see also* 2009 AR 2006_111 at 3). Based on these data, Manitoba presented strong and convincing evidence that a DAF-filtration plant for NAWS could be built for less than $44 million. Notwithstanding these data, the Bureau -- without offering a rationale -- flatly rejected the Manitoba cost data and arbitrarily substituted its own cost figures which showed that a DAF-filtration plant would be $76 million, or more than 70% above Manitoba's estimate and more than four times the cost of the Bureau's preferred alternative ($17.5 million). FEIS, Executive Summary, at 15 (2009 AR 2008_170 at 15).

Manitoba's estimates were prepared by an internationally-recognized engineering consulting firm (EarthTech) with more than fifty offices located around the world, including in Canada and the United States, which has experience in designing and constructing DAF-filtration treatment plants. As Manitoba explained in its comments, EarthTech's estimates are based upon "[p]roven detailed designs," "[d]etailed pricing of equipment based upon either budget or tendered prices," "[r]ecently tendered construction rates adjusted to reflect 2007 price levels" and "[t]wo similar DAF plants of comparable capacity and either recently completed or now nearing tender." FEIS, Appendix C (2009 AR 2008_172 at 479). Consequently, "[t]here is a high degree of confidence that the basis of

these estimates closely reflect current market conditions" (*id*. at 477), and cost estimates such as the Bureau's, derived in another way, must be considered suspect and inherently less reliable.

E. The FEIS Fails to Consider Adequately the Environmental Consequences of Agency Action.

Consideration of the Project's environmental impacts is not only central to NEPA but was a signal failure of the Bureau, as found by this Court, in its earlier NEPA review. Unfortunately, the FEIS perpetuates many of the same errors by minimizing the environmental consequences of agency action, excluding any consideration of impacts in Canada and asserting that the Project entails no cumulative impacts.

i. The FEIS Inappropriately Minimizes Project Impacts.

Under the CEQ's regulations, an EIS must fully explore the "environmental consequences" of the proposed action and its alternatives. 40 C.F.R. § 1502.16. In its February 3, 2005 opinion, this Court stressed that a signal failure of the Bureau was that there had been "no study of the *consequences* of leakage from the pipeline." *Government of the Province of Manitoba v. Norton, supra*, 398 F. Supp. 2d at 63. The Court stated, "Without some reasonable attempt to measure these consequences instead of bypassing the issue out of indifference, fatigue, or through administrative legerdemain, the Court cannot conclude that BOR took a hard look at the problem." *Id.* at 65. The Court added, "Absent some measurement of the quantum and intensity of any ecological effects . . . , it cannot be said that risk of environmental impacts is reduced to a minimum." *Id*. at n. 24. The Court thus remanded the matter to the Bureau for "an integrated analysis of the possibility of leakage and the potential consequences," *id*. at 65, emphasizing, "Manitoba has raised the specter of significant environmental consequences that deserve serious consideration." *Id*. at 66.

Notwithstanding the Court's admonitions, the FEIS dismisses Project risks and ignores Project consequences. Its basic theme is that the level of treatment makes little difference, because

biological invasions will inevitably occur. Further, because risks are assertedly so low with any treatment process that might be chosen, there is little attempt to distinguish among alternatives in terms of their environmental effects. The FEIS thus ignores the "black letter law that NEPA requires a comparative analysis of the environmental consequences of the alternatives before the agency." *Center for Biological Diversity v. U.S. Dep't of the Interior*, __ F.3d __, __, 2009 WL 2914504, at *10 (9th Cir. Sept. 14, 2009). Any choice, the Bureau effectively says, is essentially the same. Far from being an "integrated" analysis of risks and consequences, the FEIS is all about how risks are assertedly low and hardly at all about consequences.

Much of the discussion in the FEIS seems designed to downplay the significance of the Project, *e.g.*, the emphasis on the "higher risks" associated with "non-Project pathways," FEIS at 4-16 -- 4-18 (2009 AR 2008_172 at 88-90), or ballast water discharges, FEIS at 3-4 (2009 AR 2008_172 at 48), and the identification of other inter-basin water transfers in the United States and Canada, FEIS at 3-13 (2009 AR 2008_172 at 57), all leading to the conclusion that the Project's risks really do not matter very much. As the Bureau puts it, the strategy of not constructing inter-basin transfer projects "would probably fail within the larger picture, since competing pathways are likely to yield successful species invasions." FEIS at 4-23 (2009 AR 2008_172 at 95). However, if invasions are inevitable, one must necessarily ask why have they not already occurred, how is it that the Missouri River Basin and the Hudson Bay Basin are still distinct and vastly different ecological environments and why is control of invasive species a major national environmental priority? *See* http://www.invasivespecies.gov/ (National Invasive Species Council homepage).

The FEIS essentially deals with environmental consequences by discounting their likelihood and emphasizing the assertedly greater likelihood of biological invasions through "non-Project pathways." *E.g.*, FEIS at 4-20 -- 4-21 (2009 AR 2008_172 at 92-93). The FEIS contains what it

labels a "Risk Analysis," FEIS at 4-1 -- 4-21 (2009 AR 2008_172 at 73-93), the entire thrust of which appears to be to try to show that Project pathway risks are "low" in comparison to non-Project pathways and that the problem of invasive species in general can never be "eliminated." FEIS at 4-10 (2009 AR 2008_172 at 82). To the contrary, as Manitoba explained in its detailed comments on the DEIS, the approach taken by the Bureau substantially overstates the risks from non-Project pathways and understates the risks from Project pathways. *See* FEIS, Appendix C (2009 AR 2008_172 at 441-468). In particular, the FEIS exaggerates the non-Project pathways, for example, by including in the list of twenty potential non-Project pathways many that are simply implausible and unrealistic. To take just one, included in the list is ballast water transfer, but there has never been shipping in vessels requiring ballast between the two basins, and there never will be. Much is made, moreover, of invasive species transfer by water birds. However, as Manitoba pointed out in its comments on the DEIS, a simple analysis can place this in proper perspective. Assuming there are ten million water birds migrating northward across the continental divide each year and each transports 10% of its body weight in Missouri River water, it would take *10,000 years* of migrating birds to equal the same risk as operation of NAWS in any one year. Similarly, one would need to have 1.85 *billion* bait buckets per year to transport the same amount of water as the Project.

At the same time, the FEIS underestimates the risks associated with the Project by incorrectly and incompletely analyzing the risks of failure. As North Dakota points out, the Bureau posits a so-called "bathtub curve" to predict failure over time. *See* ND Mem., p. 17, citing FEIS at 4-7, Figure 4.2 (2009 AR 2008_172 at 79). However, the bathtub curve

> misrepresents these risks when expressed over the expected life-time of the Project. Manitoba's scientific experts have determined that, when correctly expressed as a cumulative distribution function integrating ongoing risk from one

> day to the next over the lifetime of the Project, the risk of failure is greater than 10% at the end of the first year and rises to 60% at the end of the Project's expected 30 year lifetime.

FEIS, Appendix C (2009 AR 2008_172 at 391) (comments of Manitoba). As Manitoba explained in detail, a cumulative distribution function is a much more accurate depiction of risk than a simple consideration of the risk of failure on any single day, and the Bureau's approach is "inconsistent with the current state of risk assessment science and risk-based engineering for public water-management systems." *Id*. at 463.

EPA recommended that more attention be given to the consequences of the agency action. It stated, "We recommend that this DEIS provide more specific information on the potential ecological consequences of a successful invasion of the Hudson Bay basin, e.g., how a decrease in native species populations due to transmission of diseases or parasites could affect the ecological structure and functioning of the affected aquatic habitats" (2009 AR 2007_144 at 5). The Bureau largely ignored this recommendation, and, contrary to this Court's ruling, it made little or no attempt whatsoever to analyze the *consequences* of treatment failure or pipeline leakage. Indeed, the FEIS resolutely states, "[N]o Project-related impacts are anticipated under any of the alternatives evaluated." FEIS at 4-22 (2009 AR 2008_172 at 94).[18] However, as we have learned from the introduction and proliferation of a species such as the zebra mussel in new freshwater habitats, the phenomena of invasive species can be enormously destructive, both ecologically and economically (*e.g.*, 2002 AR 7601).

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[18] The FEIS thus contrasts markedly with the RRVWSP FEIS which contains an extensive discussion of the consequences of treatment failure or pipeline leakage. *See* RRVWSP FEIS at 4-125 -- 4-149 (including both a "Habitat Equivalency Analysis" and a "Regional Economic Impact Analysis"). This shows not only that at least part of the requisite analysis could be done but also that it was readily available.

Perhaps recognizing the limited nature of the consequences analysis in the FEIS, both North Dakota and the Federal Defendants rely heavily in defense of the Bureau on several reports by the U.S. Geological Survey ("USGS"), especially a 2007 report, dealing with the "risks and consequences" of NAWS (2009 AR 2007_141). *See* ND Mem., pp. 7-10; Fed. Def. Mem., pp. 18-20. There are several problems with this reliance. First, the 2007 USGS report itself acknowledges that it is only "preliminary" in nature (2009 AR 2007_141 at 5). Second, the 2007 USGS report, while it does deal extensively with the risk of failure,[19] touches on consequences in much less detail. In a 136-page report, only one section (Section 4.3) and nine pages (pages 105-114) are devoted to a discussion of these, and, even there, much of the discussion relates to risk management (*see* 2009 AR 2007_141 at 118-127). Third, in important respects, the FEIS' conclusions, particularly with respect to the risks of competing pathways, are not supported by the USGS report. *See* FEIS, Appendix C (2009 AR 2008_172 at 441-468) (comments of Manitoba). For example, the USGS report only concludes that non-Project pathways may "qualitatively" decrease the chance of the risks of the Project dominating, and it says nothing about quantitative risks, while the FEIS completely misinterprets this finding by stating that "the risk of biological invasion occurring through non-Project pathways would be much greater than the risk due to Project pathways for most potentially invasive species." FEIS at 4-20 -- 4-21 (2009 AR 2008_172 at 92-93). Fourth, the 2007 USGS report has important gaps. For example, the report refers to a number of organisms, such as the

[19] Even those risk assessments, as noted above, are subject to question. The report indicates that the risk of failure is 1 out of 10,000 in the initial year of operation and 1 out of 100,000 during the remainder of the Project's life (*see* 2009 AR 2008_15 at 1). Manitoba, as explained in its detailed comments to the Bureau on the DEIS, concluded, "[T]he probability of failure . . . on any day may have been under-estimated by two orders of magnitude. That is, the probability of failure on any day is likely 1/100 rather than 1/10,000." *See* FEIS, Appendix C (2009 AR 2008_172 at 391). One need not look beyond local events, however, *viz*., last year's catastrophic failure of the Montgomery County water main along River Road in Bethesda, Maryland, to understand that the risks of pipeline failure, despite the best efforts of engineers, are all too real. *See* Morse, "Cause of Pipeline's Failure May Take Weeks to Find; Officials Hope to Reopen River Road by Monday," *The Washington Post*, December 25, 2008, at B.1, available at http://www.washingtonpost.com.

Missouri River Sturgeon Iridovirus and a "parasitic hydrozoan of acipenserid fishes" and indicates that little information exists, so the report does not include such organisms in its analysis and indicates that "*a qualitative approach may be employed out of necessity*" (2009 AR 2007_141 at 120) (emphasis added). Moreover, the report does not define, describe or justify by supporting references what was included and what was not in the analysis of non-Project pathways, justifying this approach by stating that "*there are few fully characterized quantitative data needed to develop an empirically-based probabilistic analysis of invasion events . . . "* (*id*. at 100) (emphasis added). Ultimately, as Minnesota pointed out in its comments on the DEIS, "*The DEIS methodology is flawed because it relies on numerical risk assessment and conclusions that existing pathways will result in more or equivalent invasive biota transfer, that regulation of invasive micro-organisms is largely non-existent, and that a water treatment plant technology is completely transferable to mitigate impacts from these organisms*." FEIS, Appendix C (2009 AR 2008_172 at 377) (emphasis in original).

Last of all, North Dakota and the Federal Defendants claim that the FEIS thoroughly assessed the effectiveness of alternative treatment systems. *See* ND Mem., pp. 10-13; Fed. Def. Mem., pp. 19-20. They rely heavily on a 2008 study by Hedrick, *et al.* on UV effectiveness in addressing Whirling Disease (*Myxobolus cerebralis*) (*see* 2009 AR 2006_223) (pre-publication copy), in an effort to demonstrate that adding UV to the WTP more than adequately addresses concerns about treatment effectiveness. Manitoba has nonetheless pointed out that the FEIS "significantly overstates the findings of Hedrick et al." (2009 AR 2009_7 at 5). In particular, Manitoba noted that Hedrick, *et al*. observed viable *Myxobolus cerebralis* spores at UV doses "an order of magnitude higher than that proposed in the Final EIS," the inactivation observed by Hedrick, *et al*. was "erratic," there was no dose-response relationship with respect to the degree of UV that is

"effective," the authors used a very high quality of water with a transmissivity of 96% and "[t]his degree of transmissivity will not be experienced in the raw water from Lake Sakakawea" (*id*. at 5-6). Notably, the research of Hedrick, *et al*. has not yet been corroborated or supported by other independent researchers, a fundamental foundation of scientific discovery.

In sum, the Bureau's approach to analysis of environmental risks and consequences reflects exactly the problem-avoidance mindset which led the Court to find that the EA was inadequate.

ii. The FEIS Improperly Excludes the Canadian Environment.

As the FEIS acknowledges, "The construction cost of a biota WTP is a federal expense . . . . This is based on the premise that compliance with the Boundary Waters Treaty of 1909 is a federal responsibility." FEIS at 2-14 (2009 AR 2008_172 at 36). The Federal responsibility is further reflected in Section 1(h)(1) of the DWRA, which requires that the Department, prior to constructing any system to deliver Missouri River water to the Hudson Bay Basin, "determine that adequate treatment can be provided to meet the requirements of the [Boundary Waters Treaty]." 114 Stat. 2763A-282. These Federal obligations, which indicate that the very purpose of the WTP is to protect the Canadian environment, should necessarily inform the scope of the Bureau's NEPA review and dictate that impacts to the Canadian environment should be included within the review. *See generally Oregon Natural Desert Ass'n v. Bureau of Land Management*, 531 F.3d 1114, 1130 (9th Cir. 2008). However, the FEIS states that an "evaluation of potential consequences to Canada" is outside the scope of the FEIS. FEIS, Executive Summary, at 1-9 -- 1-10 (2009 AR 2008_172 at 19-20).[20] The document thereafter includes scarcely any information on Canadian resources that

[20] The record also elsewhere reflects that this was the Bureau's intent. Thus, at a cooperating agency meeting in September, 2008, the Bureau's Dakotas Area Manager stated that it was the Department's "policy not to address trans-border impacts" (2009 AR 2008_142 at 3).

might be affected by the Project or on the nature of the impacts that might occur. The Bureau's decision is insupportable.

The Federal Defendants counter that in fact the Bureau did "assess transboundary impacts of the Project in Canada." Fed. Def. Mem., p. 34. This of course not only contradicts the Bureau's own explicit statements in the FEIS, but it is also apparent that the bits and pieces of references to "Canada" here and "Lake Winnipeg" there in the FEIS, which the Federal Defendants would cobble together to demonstrate some level of consideration, scarcely constitute the kind of "hard look" at environmental consequences which the Court, in its February 3, 2005 opinion, determined was required.

If there were any doubt about the inadequacy of the Bureau's review of transboundary impacts, all one has to compare are the miscellaneous, unconnected references in the FEIS to the Canadian environment with the kind of more thorough analysis of which the Bureau is capable, as found in the RRVWSP FEIS. As Manitoba pointed out in its comments on the DEIS, the Bureau did consider the environment of Canada to fall within the scope of the RRVWSP FEIS and at least attempted to provide some analysis of the consequences of system failure to the Canadian environment. *See, e.g.*, RRVWSP FEIS at 4-19, 4-21, 4-29, 4-80, 4-81, 4-125, 4-149, and 4-181. *See* FEIS, Appendix C (2009 AR 2008_172 at 411).[21] Such analysis undoubtedly influenced the Bureau's choice of DAF-filtration for all out-of-basin alternatives. Indeed, EPA, noting what the Bureau had done for the RRVWSP, recommended that the Bureau undertake precisely this kind of analysis, stating, "In light of the value of this [RRVWSP] assessment in disclosing impacts in Canada's Hudson Basin for Red River, and in the interest of providing a determination of adequate

[21] The importance of considering the Canadian environment is also underscored in the RRVWSP FEIS, which notes that "the consequences of a biological invasion are much greater for Lake Winnipeg than for the other water bodies considered." RRVWSP FEIS at 4-142. *See also id*. at 4-139.

treatment to meet the requirement of the Boundary Waters Treaty, EPA recommends that a similar assessment of the potential impacts of successful invasion of the Hudson Bay basin be provided in this DEIS for NAWS" (*see* 2009 AR 2007_120 at 3; *see also* 2009 AR 2007_144 at 5). The recommendation fell on deaf ears.

Plaintiff's views regarding the scope of NEPA were set out in detail in its memorandum, dated June 9, 2003, in opposition to the Federal Defendants' motion for judgment on the pleadings at pages 35-42 (Dkt. No. 24). The law has not changed appreciably since that briefing. Suffice it to say that, contrary to the approach taken by the Bureau, the best statement of NEPA's obligations is still found in the CEQ's 1997 guidance on this issue. In the July 1, 1997 CEQ "Memorandum to Heads of Agencies on the Application of the National Environmental Policy Act to Proposed Federal Actions in the United States with Transboundary Impacts," the CEQ unequivocally stated, "NEPA requires agencies to include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States." *See* http://www.usda.gov/rus/water/ees/pdf/coeqg.pdf. The CEQ guidance represents a definitive policy statement concerning agency obligations under NEPA to consider "transboundary impacts" of actions undertaken in the United States. The CEQ guidance offers precisely the sort of "persuasive authority offering interpretive guidance" that courts have relied on from other non-regulatory CEQ issuances. *E.g.*, *Davis v. Mineta*, 302 F.3d 1104, 1125 n. 17 (10th Cir. 2002); *Associations Working for Aurora's Residential Env't v. Colorado Dep't of Transp.*, 153 F.3d 1122 (10th Cir. 1998). *See also League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service*, 549 F.3d 1211, 1217 (9th Cir. 2008). Moreover, the Department's own NEPA regulations expressly require the Department to follow the dictates of Executive Order 12114, 44 *Fed. Reg.* 1957 (January 9, 1979), which obligates Federal agencies to undertake an environmental review of agency actions

having environmental effects beyond America's borders. *See* 43 C.F.R. § 46.170.[22]

The CEQ Memorandum is all the more persuasive because it is consistent with several earlier cases which suggested, though they did not expressly hold, that transboundary effects were necessarily part of any adequate NEPA analysis. Thus, in one of the very first NEPA cases, involving a challenge to the Trans-Alaska Pipeline, the D.C. Circuit Court of Appeals ruled that a nonresident Canadian citizen and a Canadian environmental organization had a right to intervene in domestic NEPA litigation, implicitly finding consideration of Canadian impacts properly fell within NEPA's purview. *Wilderness Society v. Morton*, 463 F.2d 1261, 1261-1263 (D.C. Cir. 1972). Similarly, in *Swinomish Tribal Community v. FERC*, 627 F.2d 499 (D.C. Cir. 1980), Canadian intervenors were allowed to challenge the adequacy of an EIS relating to FERC action approving the City of Seattle's application for a license amendment that allowed the City to raise the height of Ross Dam on the Skagit River in Washington State, and the court evaluated on the merits the agency's consideration of cross-border impacts. *See also Association of Public Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158 (9th Cir. 1997) (review of consideration in EIS of effects of gas exploration in Canada).

Lastly, since the issuance of the CEQ Memorandum, a number of agencies have proceeded to include an assessment of impacts outside the United States in EISs on projects undertaken within the United States. Thus, for example, as noted above, even while asserting that such assessment was not "require[d]," the Bureau considered impacts on the Canadian environment in its RRVWSP NEPA

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[22] The FEIS, ignoring the CEQ's guidance and Department regulations, relies upon a 2006 ruling of the District Court of Nevada, *Consejo de Desarrollo Economico de Mexicali v. United States*, 438 F. Supp. 2d 1207 (D. Nev. 2006), in support of its misguided approach. FEIS at 1-10 (2009 AR 2008_172 at 20). This reliance is misplaced. The lower court decision was subsequently vacated by the Ninth Circuit Court of Appeals. *See* 482 F.3d 1157 (9th Cir. 2007). Earlier, moreover, in August 2006, the Ninth Circuit had issued an injunction pending appeal, signaling a possible favorable disposition toward the plaintiffs. The lower court decision thus has no precedential value.

review. The U.S. Fish and Wildlife Service *NEPA Manual*, Ch. 21, at 23, states, "[w]hen applicable, other impacts to consider may include . . . transboundary environmental impacts." *See* http://www.fws.gov/r9esnepa/550FW/550-final.fwm.pdf.

iii. The FEIS Fails to Analyze Adequately Cumulative Impacts.

An EIS must consider "cumulative impacts." 40 C.F.R. § 1508.25(c); 43 C.F.R. § 46.115. As defined in the CEQ's regulations, "'Cumulative impact' is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period time." 40 C.F.R. § 1508.7. The FEIS avoids any meaningful discussion of cumulative impacts, stating that, because "the additional risk posed by the Project is negligible," in the Department's view, "[N]o cumulative effects are anticipated." FEIS at 4-21 (2009 AR 2008_172 at 93). This is just another example of the Bureau's failure to acknowledge that system failure is a possibility and, therefore, that significant environmental effects may occur. Yet, if one posits that system failures might occur, it seems clear that there may in fact be cumulative effects, both as a result of the Devils Lake outlet and the RRVWSP.

The Federal Defendants claim that the Bureau complied with its NEPA obligations because it "expressly identified these projects" and determined that, in the case of Devils Lake, no potential invasive parasites or pathogens have yet been identified, while in the case of the RRVWSP, invasive species risks have been determined to be "very low." Fed. Def. Mem., p. 38. But, a determination that potential threats have not yet been fully identified or that risks are likely low is not a license to ignore them altogether. In the Bureau's view, every inter-basin water transfer project appears only to present "low" risks. Still, this scarcely means that conducting at least some analysis would not have yielded useful conclusions. As the Government of Canada stated in its comments on the DEIS,

"[T]he question of transboundary risk to Canada is best understood and addressed in terms of the cumulative risks posed by a number of water projects currently in progress in North Dakota." FEIS, Appendix C (2009 AR 2008_172 at 579) (*see also* 2009 AR 2009_14 at 3) (noting "minimal" and "insufficient" evaluation of cumulative impacts in the FEIS).

In fact, both projects pose real, identifiable threats which are cumulative to the Project. The North Dakota State-financed Devils Lake outlet was completed in the late summer of 2005 and is currently capable of operating at 100 cubic feet per second, or 72,397 acre feet per year.[23] The RRVWSP, should the Department eventually be authorized to build its preferred Missouri River delivery option, could involve the transfer of even greater volumes of water (122 cubic feet per second, or 88,324 acre feet per year) into the Hudson Bay Basin. *See* RRVWSP FEIS, Executive Summary, at 26. The Corps, in its 2003 EIS on a Federal proposal for a Devils Lake outlet, explained that there is "an extremely high risk that biota of concern could already be present . . . [in] Devils Lake" and that, if they are, "the *risk is also extremely high that these biota would be transferred via pumping operation from Devils Lake into the Sheyenne River* if a preventative filtering system were not in place." *See* U.S. Army Corps of Engineers, *Final Integrated Planning Report and Environmental Impact Statement, Devils Lake, North Dakota* at 6-69 (April 2003), available at http://www.mvp.usace.army.mil/fl_damage_reduct/default.asp?pageid=14&subpageid=83 (the "Devils Lake FEIS") (emphasis added).[24] In fact, the State-financed outlet does not have

[23] The North Dakota State Water Commission has in fact recently approved expansion of the Devils Lake outlet's capacity to 250 cubic feet per second. *See* MacPherson, "N.D. water panel approves Devils Lake projects," *Bismarck Tribune*, August 19, 2009, available at http://www.bismarcktribune.com/articles/2009/08/19/news/state/192511.txt.

[24] In comments to the Corps, EPA identified two fish parasites occurring in Devils Lake but not found in the Sheyenne and Red Rivers, Devils Lake FEIS at App. 4-17, while Manitoba identified a number of species in the Hudson Bay drainage basin that were at risk, Devils Lake FEIS, App. 4 at 57, and underscored the value of both the recreational and commercial catch that could be affected by the introduction of destructive alien and invasive species into the drainage basin. Devils Lake FEIS, App. 4 at 57-58.

such a filtering system, so that the risks of biota transfer are very real indeed. Further, subsequent studies nearing completion and conducted under the auspices of the International Joint Commission (the "IJC") have shown that of twelve species of pathogenic bacteria detected in Devils Lake, seven of these have not been found so far in sampling conducted in the Red River or Lake Winnipeg. These include the following: *Brevundimonas diminuta*, *Corynebacterium renale*, *Pseudomonas sp.*, *Pseudomonas mendocina*, *Shewanella putrifaciens*, *Streptococcus sobrins*, and *Yokenella regensburgii*. In addition, two new species of fish parasites, *Diplostomum spathaceum* and *Spiroxys* sp., have been found in Devils Lake fish but have not been found in fish from the Red River or Lake Winnipeg.

For its part, the RRVWSP is, like NAWS, part of the of the larger Garrison Diversion Unit project, which the IJC found over thirty years ago could introduce non-indigenous species into the Hudson Bay Basin, causing a reduction of approximately 30% to 75% of the commercial species in Lake Winnipeg, which is home to Manitoba's largest fishery. *See* IJC, *Report on the Transboundary Implications of the Garrison Diversion Unit* at 56 (2002 AR 907).[25] Manitoba, in its comments submitted to the Bureau on June 30, 2006, during the RRVWSP NEPA process, identified a long list of invasive species of concern, whose introduction into the Hudson Bay Basin could cause long-term, irreparable harm to native fish populations. *See* RRVWSP FEIS at App. M.2 (Comment 186).

Certainly the potential adverse consequences of the operations of the Devils Lake outlet and the RRVWSP are "reasonably foreseeable" in that they are "sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision." *City of Shoreacres v.*

[25] The FEIS states that the IJC's findings are no longer "applicable," because of new control technologies and differences between the project envisioned in the 1970s and those under consideration today. FEIS at 4-22 (2009 AR 2008_172 at 94). However, the IJC's concerns were not related to the control technologies available at the time, but rather to the potential for failure of control technologies, which continues to remain a major concern today.

Waterworth, 420 F.3d 440, 453 (5th Cir. 2005), quoting *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). The extensive environmental review by the Corps in the Devils Lake FEIS and the Bureau's own NEPA review of the RRVWSP are tribute to the seriousness of concern about these projects.[26] In the circumstances, because cumulative impacts from these projects could have serious and permanent effects on the downstream aquatic environment, the Bureau was obligated to assess them under NEPA.

F. The ROD Fails to Identify Properly the Environmentally Preferable Alternative or Alternatives.

The CEQ regulations and the Department's implementing regulations require the ROD to "specify[] the alternative or alternatives which were considered to be environmentally preferable." 40 C.F.R. § 1505.2 and 43 C.F.R. § 46.450. The ROD in this case asserts that there is no single, environmentally preferable alternative and that *all* alternatives, including the "no action" alternative, are equally "preferable" because "they all present a low to very low risk of biological invasions." ROD at 4 (2009 AR 2009_26 at 4). It does so, even though it concedes that "there are differences in risk reduction depending upon the level of treatment," *id.*, and even though EPA, in its comments on the DEIS, indicated that the "optimal way" to reduce risk would be to adopt an alternative other than the no action alternative. FEIS, Appendix C (2009 AR 2008_172 at 359-361). Indeed, as noted earlier, the preferred alternative was modified at EPA's request to include UV treatment precisely because EPA took the position that the WTP as proposed in 2001 was insufficient to protect against the transfer of invasive species, and the Bureau "agree[d] with EPA's suggestion that adding UV

[26] The Federal Defendants cite *Wilderness Society v. Salazar*, 603 F. Supp. 2d 52, 68 (D.D.C. 2009), for the proposition that agencies need not consider "synergistic effects" in situations "where no such impact[s] will result." Fed. Def. Mem., p 38. Synergistic effects, as the *Salazar* court explained, involve the interaction of cumulative effects "to create environmental impacts that are greater than the sum of the individual effects." 603 F. Supp. 2d at 68. In this case, effects from Devils Lake or the RRVWSP can be regarded as simply additive. In any event, a conclusion that risks are very low is not the same as a conclusion that they are non-existent.

disinfection to the No Action Alternative would further reduce the risk of transferring biota." *See, e.g.,* FEIS, Appendix C (2009 AR 2008_172 at 353-365); *id.*, Response to Comments 34-4 (2009 AR 2008_172 at 362). EPA's comments on the FEIS also note, "The preferred alternative takes into account recommendations EPA made in the DEIS for the No Action Alternative to apply UV treatment technology at Max instead of Minot. This change will provide additional safeguards and risk reduction for the pipeline between Max and Minot" (2009 AR 2009_30 at 2). Plainly, then, there are acknowledged environmental differences among the alternatives.

The CEQ defines the "environmentally preferable alternative" as

> the alternative that will promote the national environmental policy as expressed in NEPA's Section 101. Ordinarily, this means *the alternative that causes the least damage* to the biological and physical environment; it also means *the alternative which best protects, preserves, and enhances historic, cultural, and natural resources.*

CEQ, *NEPA's Forty Most Asked Questions*, 46 *Fed. Reg*. 18026, 18028 (March 23, 1981), available at http://www.nepa.gov/nepa/regs/40/40p3.htm (*see* Question 6a) (emphasis added). The CEQ notes that identification of the environmentally preferable action can be difficult and often requires the balancing of environmental values, but results in a clear "choice between that alternative and others." *Id.* This language strongly suggests that the agency must ultimately make a decision, and cannot simply state that the alternatives are essentially indistinguishable from one another. Indeed, the Bureau's approach is a tautological impossibility; an alternative can only be preferable if it is preferable to *something*.

That a serious analysis is required is indicated in a case like *Davis Mtns. Trans-Pecos Heritage Ass'n v. U.S. Air Force*, 249 F. Supp. 2d 763, 793 (N.D. Texas 2003), *vacated on other grounds*, Nos. 02-60288, 03-10506, 03-10528 (5th Cir. Feb. 5, 2009). In *Davis*, the agency evaluated three options in the EIS. Coarse screening revealed that two options had equal potential for being the environmentally preferable action because they both had potentially fewer and less significant

adverse environmental consequences than the third option. Upon fine screening, however, the agency determined that the first of those options presented slightly less potential for adverse environmental impacts because it would decrease the potentially affected acreage. As such, the agency ultimately selected that option because it was "minimally preferable" to the second. In short, the *Davis* case demonstrates that, when substantively similar alternatives exist, agencies can and should take the steps necessary to lead to the selection of an environmentally preferable alternative.[27]

The lesson is that agencies must engage in a thorough and exacting analysis to flesh out the differences among each alternative, especially when there is a potential for more than one alternative to be the environmentally preferable action. Such an analysis is particularly important here, because, as the Court noted, "'even small percentage differences in effectiveness in reducing biota transfer [may involve] large differences in terms of the total number of organisms that might be transferred.'" *Government of the Province of Manitoba v. Norton, supra*, 398 F. Supp. 2d at 65, n. 25 (quoting Manitoba's reply brief). However, there is no evidence that the Bureau engaged in this type of rigorous examination. To the contrary, the Bureau has attempted to brush the alternatives with broad strokes by conclusorily announcing that they are all environmentally preferable, despite admitting to the existence of identifiable distinctions among them.

The effect of the Bureau's approach to the "environmentally preferable alternative" is ultimately to ignore the regulatory requirement that agencies differentiate among alternatives in terms of their potential, adverse consequences. If the requisite analysis of differences among alternatives is not made, and no effort at differentiation undertaken, the requirement loses any

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[27] Even *Friends of Yosemite Valley v. Norton*, 194 F. Supp. 2d 1066 (E.D. Calif. 2002), *rev'd in part on other grounds*, 348 F.3d 789 (9th Cir. 2003), upon which the Federal Defendants rely, Fed. Def. Mem., pp. 39-40, underscores the appropriateness of undertaking a "rigorous" evaluation to make a choice of the environmentally preferable alternative in light of the "*full range*" of NEPA's national environmental policy goals (emphasis in original).

meaning. The ROD thus fails to specify the environmentally preferable alternative or alternatives for the Project, as required by Section 102(2)(C) of NEPA and 40 C.F.R. § 1505.2 and 43 C.F.R. § 46.450.[28]

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully submits that this Court should deny the Federal Defendants' and Intervenor-Defendant's motions for summary judgment and motions to lift the injunction, grant Plaintiff's cross-motion for summary judgment and maintain the existing injunction in effect, pending full compliance by the Federal Defendants with their NEPA obligations.

Plaintiff believes that oral argument is necessary.

Respectfully submitted,

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Dated: September 28, 2009
Washington, D.C.

[28] The Federal Defendants cite *Nevada v. Dep't of Energy*, 457 F.3d 78 (D.C. Cir. 2006), to claim that, even if the Bureau is in violation of its regulations, this is only "harmless error." Fed. Def. Mem., p. 40, n. 10. However, in *Nevada* (which involved identification of the "preferred alternative"), what was "especially" important (457 F.3d at 91) was that the agency, after release of a final EIS in which it failed to identify its preferred rail corridor, did make the requisite identification in a *Federal Register* notice. That has not occurred here with respect to identification of the environmentally preferable alternative or alternatives.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE GOVERNMENT OF PROVINCE OF MANITOBA, Plaintiff, v. KEN SALAZAR, *et al*., Defendants.	)	Case No. 1:02CV02057-RMC (Consolidated with 09-373)

ORDER

This matter having come before the Court for hearing upon the Federal Defendants' and Defendant-Intervenor's motions for summary judgment and to lift the injunction entered by the Court on April 15, 2005, and upon Plaintiff's cross-motion for summary judgment; the Court having considered the papers submitted in support of and in opposition to such motions, together with the entire record, and otherwise being duly advised in the premises; and the Court having found that that judgment should be entered in favor of Plaintiff on its claims; it is now, therefore, upon consideration,

ORDERED, that the Federal Defendants' and Defendant-Intervenor's motions for summary judgment and to lift the injunction be, and they hereby are, denied; and it is further

ORDERED, that Plaintiff's cross-motion for summary judgment be, and it hereby is granted; and it is further

ADJUDGED, DECREED AND DECLARED that the Federal Defendants' Final Environmental Impact Statement, dated December 5, 2008, for the Northwest Area Water Supply Project fails to comply with the requirements of the National Environmental Policy Act

of 1969, 42 U.S.C. § 4321, *et seq*. ("NEPA"), and the Federal Defendants' Record of Decision, dated January 15, 2009, and their actions based thereon, are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law within the meaning of Section 10 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A); and it is further

ORDERED, that this matter is remanded to the Federal Defendants to prepare, make available for public comment and consider in their decision-making process an environmental impact statement on the Project which satisfies the requirements of Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), and its implementing regulations; and it is further

ORDERED, that, pending such compliance with the requirements of NEPA, this Court's injunction of April 15, 2005, shall remain in full force and effect.

_____
UNITED STATES DISTRICT JUDGE

Dated: _____, 2009
Washington, D.C.