

# **Corps Declines to Implement**

## **Court-Ordered Flow-Regime**

### **For Missouri River**

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By Damon Franz

Greenwire reporter

The U.S. Army Corps of Engineers will not implement a federal judge's recent order to reduce flows on the lower Missouri River for the protection of three endangered species this summer, and the agency has no plans to execute long-term management changes government biologists said are necessary to ensure the survival of the species, the Corps announced last night.

Shortly before the midnight deadline by which the Corps was required to reduce river flows in a legal order by U.S. District Judge Gladys Kessler, the agency announced it would not obey Kessler's order and will continue to maintain the river at a level high enough to float barges this summer. Kessler had ruled on July 12 that the Corps would be in violation of the Endangered Species Act if it does obey a Fish and Wildlife Service opinion calling for low flows to create habitat for the piping plover, interior least tern and pallid sturgeon.

According to Corps spokesman Paul Johnston, the agency dropped the water levels slightly after the decision came down but did not fully comply with Kessler's order because an earlier Nebraska district court decision requires the agency to follow the 60-year-old master manual for operating its six Missouri River dams, a document that requires the Corps to provide river levels high enough to float barges during the summer.

Yesterday, the Justice Department filed papers to appeal Kessler's decision before the D.C. Circuit Court.

"After July 15, it is impossible to simultaneously comply with the conflicting flow requirements contained in the two orders," the Corps said in a statement. "Until a ruling is obtained from the D.C. Circuit, the Corps plans to continue operating ... in compliance with the order of the District Court in Nebraska."

But Latham and Watkins attorney David Hayes, the former deputy secretary of Interior under the Clinton administration who argued the case for the environmental groups, said the issue of conflicting court decisions is simply a red herring used by the Corps to justify maintaining the status quo. American Rivers and other environmental groups that brought the suit are considering filing a motion for contempt of court before Judge Kessler, he said.

“The amazing thing about the government’s position is that the likelihood of a contempt order coming out of the Nebraska court is about zero, because that decision never addressed the endangered species issue,” he said. “The government is attempting to hide behind a conflict that doesn’t exist.”

According to Johnston and the Corps official who manages the agency’s six Missouri River dams, problems other than legal ones could arise from obeying Kessler’s order and dropping the river elevation. Ten barges currently floating down the river would have to be quickly moored, and without tow boats to move them as the river drops, they could break free and damage docks or other infrastructure.

Larry Cieslik, Chief of the Missouri River Basin Water Management for the Corps, said environmental damage could occur if barges become stranded, break and spill their contents. “Some barges could have hazardous material that if spilled would have environmental consequences,” he said in court papers.

Corps says it will not obey Endangered Species Act recommendation  
In addition to announcing that it will not comply with Kessler’s order, the Corps also announced for the first time last night that it will not adapt the long-term management changes the FWS said in a 2000 biological opinion are necessary to ensure the survival of the three species. In that document, FWS said natural conditions, including a spring rise and low summer flows, are needed to create habitat for the species, including sandbars for the birds to nest in the summer and forage habitat for young sturgeon.

In its 2000 biological opinion, FWS said the Corps must implement those changes by 2003 or risk being found in violation of the ESA. But while the Corps took steps to rewrite the master manual that controls the river’s operation, it repeatedly delayed making a final decision, saying it would instead enter consultations with FWS biologists over possible alternatives to the opinion.

Yesterday, the Corps said it is again entering into discussions with FWS,

but this time, the discussions will be in the form of a “formal consultation” beginning July 21 with a legally binding end date 135 days later. By the end of discussions this fall the agencies will have a new biological opinion on how to best protect the species, the Corps says. But while the documents have not yet been drafted, the Corps has ruled out the possibility that the recommendations will include a spring rise and low summer flows. “The Corps biological assessment does not contemplate the need to employ a spring rise or lower summer release from the Gavins Point Dam to provide for the recovery of the federally protected Missouri River species,” Johnston said.

While the agency characterized the decision as a cooperative effort between the agencies, FWS biologists and field staff working with endangered species in the Missouri River region said the decision came out of Washington D.C., and some were not aware of it until this morning. Nor did any cite new evidence indicating that the earlier evidence calling for revised management is no longer valid.

Johnston of the Corps, however, said there have been new studies since the 2000 biological opinion indicating that there might be other ways to save the species and still provide for navigation and flood control on the river.

“Since the last biological opinion, there have been more studies as to what good might come out of a spring rise and low summer flows,” he said. “We’re working our way through a plan that meets human needs and protects the species.”

One option, he said, is to have a fall rise, which could build up high sandbars that could then provide nesting habitat for the birds in the summer without requiring flows too low to accommodate barge traffic. For the pallid sturgeon, he said, the Corps could build habitat by creating low-flow areas where the fish can feed. “There has been a natural spring rise every year on the lower river, and you have little recruitment for the pallid sturgeon,” he said. “The missing element is lack of habitat, so we need to do more shallow water habitat development.”

To help with these efforts, the Bush administration announced yesterday it is adding \$42 million to the budget for the Missouri River for next year for the creation of habitat, assessing species population and improving hatcheries. But Hayes says the administration is just “trying to buy support for its untenable position.

“Without changing the flows, all you can do is cosmetic stuff,” he said. “It doesn’t address the root problem. The 500 studies cited in the biological

opinion all pointed to the need to change the flow regime. There is no mystery about what needs to be done to restore the river and these are not dramatic changes that are required. The Corps and the administration are defiantly resistant to making these change.

“Despite Kessler’s rebuke and the strong science backed by the National Academy of Sciences, they’re thumbing their noses at it. It’s a remarkably arrogant position. It’s ‘science be damned.’ It’s ‘science and species be dammed,’” Hayes said.

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Ms. Worth Hager  
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