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August 23, 2004

Correspondence Control Unit
Attention: Information Quality Complaint Processing
United States Fish and Wildlife Service
1849 C Street, N.W.
Mail Stop 3238-MIB
Washington, D.C. 20240

Re: **FWS/AEA/17916**
Appeal of Denial of Request for Correction of Information Pursuant to the Data Quality Act of Unsupported Information Disseminated by United States Fish and Wildlife Service in Connection with Relicensing of the Osage HydroElectric Project, Number 459-128

To Correspondence Control Unit:

This firm represents Union Electric Company d/b/a AmerenUE (“AmerenUE”) in the relicensing of a hydroelectric project known as the Osage Project, Federal Energy Regulatory Commission (“FERC”) License Number 459-128, located at the Lake of the Ozarks, Missouri and within Benton, Camden, Miller and Morgan Counties (the “Project”). This letter is an appeal of the August 3, 2004 decision of the Fish and Wildlife Service (“FWS”) to reject the Request for Correction of Information pursuant to the Data Quality Act (“DQA”) (a/k/a the Information Quality Act) and the Department of Interior’s (“DOI”) and United States Fish and Wildlife Service’s (“FWS”) Information Quality Guidelines (“Request”). The Request was submitted to the FWS on June 22, 2004.¹

On April 22, 2004, the FWS submitted statements to FERC (“FWS Letter”) in connection with the relicensing of AmerenUE’s Project. Certain statements relied on non-existent information and harms AmerenUE by suggesting that FERC consider imposing onerous licensing provisions for the Project which are not warranted by the true facts and circumstances at the Project. Accordingly, AmerenUE is an “affected person” under the provisions of the FWS Guidelines.²

¹ A copy of the Request is attached.

² United States Fish & Wildlife Service Guidelines available at <http://irm.fws.gov/infoguidelines/FWS%20Information%20Quality%20Guidelines.pdf>.

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The FWS should reverse its decision for three reasons. First, the adjudicative process exception contained in the FWS guidelines violates the plain language of the DQA and the OMB guidelines. Second, FERC's hydroelectric licensing is not an adjudicative process in this case. Third, new evidence shows that the statements made by FWS relied on studies that did not exist.

I. The Supposed Adjudicative Process Exception Violates the Plain Language of the Data Quality Act and the OMB Guidelines

The Information Quality Act (“DQA”)³ requires the FWS to issue guidelines “ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the [FWS].” The FWS’s rejection of AmerenUE’s Request for correction of statements that the FWS made to FERC in the way of a retraction, blatantly fails this requirement.

The FWS rejected AmerenUE’s Request, claiming that the unsupported information that FWS provided to FERC allegedly fell within an exception in its Guidelines. Section II-6 of the FWS Guidelines states in pertinent part:

II-6 What information does not fall under these guidelines?

These guidelines apply only to information that FWS sponsors and disseminates to the public. Examples of information that would generally not meet these criteria are:

.
. .
.

Dissemination intended to be limited to subpoenas or information for adjudicative processes, including ongoing criminal or civil action or administrative enforcement action, investigation, or audit.

The FWS relies on that section of its guidelines to bar any and all challengers alleging that the FWS failed to adequately support its statements with necessary studies and evidence when such statements are made within an adjudicative process.

The express and unambiguous language of the DQA does not provide for the supposed adjudicative process exception enunciated in the FWS Guidelines. The DQA ordered the

³ Public Law 106-554, § 515 (codified at 44 U.S.C. § 3501 *et seq.*).

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Director of the Office of Management and Budget (“OMB”) to provide policy and procedural guidance to the FWS for ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by the FWS. The DQA also required FWS itself to issue guidelines to promote the same mandates.⁴ Nowhere did the DQA authorize the FWS, OMB or any other agency to establish exceptions to the requirement to comply with the DQA. Thus, the plain language of the DQA imposes an affirmative duty on the FWS to act in this case by retracting the unsupported information that it made to FERC. The FWS “exception” does not comport with that duty.

Moreover, the OMB neither intended nor provided authority for the FWS to make such broad exclusions from the definition of “dissemination.” In its final guideline, OMB noted that it modified an exception to its draft definition of “dissemination” by replacing the term “judicial process” with the term “adjudicative process.” The stated purpose for this action was to “make it clear that [its] guidelines do not apply to the *issuance* of agency adjudicative decisions.”⁵ Accordingly, the OMB qualified “adjudicative process” as limited to the issuance of adjudicative decisions, as opposed to the broad panoply of proceedings espoused by the FWS guidelines.

Finally, given the OMB’s clear limitation on the term “administrative process” the exclusion only applies, if at all, to an agency’s own adjudicative decisions. The exclusion therefore does not include disseminations made when an agency participates in an adjudication conducted by another agency. For all these reasons, FWS must reverse its decision, and retract the unsupported information that it made to FERC.

II. Even if an Adjudicative Exemption Existed, the FERC Hydroelectric Licensing in This Case is Not an Adjudicative Process

The FWS is incorrect in asserting that the April 22, 2004 correspondence was submitted as part of a FERC administrative adjudication. The correspondence was filed in response to the March 4, 2004 announcement that AmerenUE’s application was filed and that FERC was going to conduct an Environmental Assessment, as required by statute.⁶ There, FERC asked for general comments and asked agencies to “cooperate with us in the preparation of the

⁴ See 44 U.S.C. § 3516(b)(2).

⁵ 66 Fed. Reg. 49,723 (September 28, 2001)(Emphasis added).

⁶ *Notice of Application and Applicant Prepared Environmental Assessment Tendered For Filing With the Commission, Establishing Procedural Schedule for Relicensing and Deadline For Submission of Final Amendments*, Project No. 459-128.

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environmental document.”⁷ FERC also stated that AmerenUE’s application had not been accepted for filing and that FERC was “not soliciting motions to intervene, protests, or final terms and conditions at this time.”⁸

In lieu of preparing its own environmental assessment for the Osage Project, the FWS submitted correspondence to FERC to help FERC conduct an environmental assessment. The environmental assessment is a process for agency compliance with a statutory obligation. Given the context and nature of the FERC request for information concerning AmerenUE’s application, FERC’s activity is not adjudication. Therefore, the April 22, 2004 correspondence was not submitted as part of an administrative adjudication.

The Administrative Procedure Act (APA)⁹ governs decisionmaking by federal agencies. The APA provides the statutory structure on which federal administrative law is built. As previously explained, OMB replaced the term “judicial process” with the term “adjudicative process.” This replacement clearly indicates that OMB decided to include judicial-type proceedings before federal agencies within the exclusion to the term “dissemination.” However, only formal adjudication proceedings resemble judicial processes. As described in Sections 554-557 of the APA, only formal adjudication includes elements of a judicial process. In formal adjudication, an agency is required to conduct a trial-type proceeding on the record, and only after opportunity for an agency hearing. In the instant case, and at time the FWS submitted its correspondence to FERC, FERC was not engaged in a formal adjudication. And FERC was not engaged in a hearing. AmerenUE’s license had not even been accepted for filing at that time. Accordingly, the April 22, 2004 correspondence was not submitted as part of an administrative adjudication. Likewise, the July 18, 2002 letter from Charles Scott to Dave Wambold,¹⁰ which was not even addressed by the FWS response to AmerenUE’s Request for Correction, pre-dates AmerenUE’s relicensing application by nearly two years, and cannot be considered to be part of any regulatory, administrative or adjudicatory process.

III. New Evidence Shows FWS’s Statements Relied on Information That Did Not Exist

In the FWS Letter, FWS alleged that the Missouri Department of Conversation (“MDC”) was unable to achieve its management goals, and FWS requested additional studies. FWS stated that

⁷ *Id.* at p. 1.

⁸ *Id.* at p. 2.

⁹ 5 U.S.C. §§ 551-583.

¹⁰ This letter was not directed to FERC. Instead, the letter was directed to AmerenUE, and a copy was provided to FERC.

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AmerenUE's proposal to address paddlefish issues is "inadequate to meet the MDC's management plans for paddlefish." FWS also commented that "there is ample evidence that protective measures at the project are greatly needed for fish and are recognized as necessary by FERC, natural resource agencies, and AmerenUE."

On June 22, 2004, AmerenUE asked the FWS to either provide data supporting its assertions, or to correct and retract the unsupported information. Subsequently, on July 27, 2004, AmerenUE submitted a letter to FERC and the FWS demonstrating, via an attached Affidavit, that the alleged studies of the MDC that were purportedly relied upon by the FWS in making its April 22, 2004 statements to FERC did not exist. Nevertheless, on August 3, 2004, and without mentioning the evidence submitted to it in AmerenUE's July 27, 2004 letter,¹¹ FWS rejected AmerenUE's complaint.

When an agency makes a misstatement because it relied on faulty, nonsupportive data, the DQA demands that the agency take action to maintain the quality, objectivity, and utility of such data. Reliance on bad data spoils any policy statements stemming from the data. In cases where the data cannot be fixed, or did not exist in the first place, the only method to comply with the goals of the DQA is to retract any statements stemming from such data. The DQA imposes an affirmative duty to act to restore integrity, especially where a licensee is placed in jeopardy when a Federal agency makes misstatements to another Federal agency. Therefore, in light of the new evidence that the data relied on by the FWS did not exist, FWS must reverse its decision, and retract the unsupported information that it made to FERC.

V. Conclusion


The DQA codifies an important governmental goal and public policy of ensuring the accuracy, quality and integrity of information disseminated by the federal government. FWS must adhere to the DQA and retract statements made based on non-existent data in connection with the Project. The decision of the FWS to deny AmerenUE's request must be reversed.

¹¹ A copy is attached.

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Please feel free to contact me, as indicated above, should you have any questions regarding this Appeal of Denial of Request for Correction of Information, or wish to discuss the matters addressed herein.

Sincerely,


for Charles A. Zdebski

CAZ/mec

cc: Thomas O. Melius, Assistant Director-External Affairs
Allen E. Creamer, Osage Project Manager, FERC
Magalie R. Salas, Secretary, FERC
Chris Iselin
Jerry Hogg

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June 22, 2004

Correspondence Control Unit
Attention: Information Quality Complaint Processing
United States Fish and Wildlife Service
1849 C Street, N.W.
Mail Stop 3238-MIB
Washington, D.C. 20240

Re: Request for Correction of Information Pursuant to the Data Quality Act of Unsupported Information Disseminated by United States Fish and Wildlife Service in Connection with Relicensing of the Osage HydroElectric Project, Number 459-128

To Correspondence Control Unit:

This firm represents Union Electric Company d/b/a AmerenUE in the relicensing of a hydroelectric project known as the Osage Project, Federal Energy Regulatory Commission ("FERC") License Number 459-128, located at the Lake of the Ozarks, Missouri and within Benton, Camden, Miller and Morgan Counties (the "Project"). This letter is a Request for Correction of Information pursuant to the Data Quality Act ("DQA") (a/k/a the Information Quality Act) and the Department of Interior's ("DOI") and United States Fish and Wildlife Service's ("FWS") Information Quality Guidelines, and requests that FWS either: (1) provide data supporting the quality, objectivity, utility and integrity of certain information disseminated by FWS in connection with the relicensing of the Project by FERC; or (2) correct and retract the unsupported information.

Specifically, it has recently come to the attention of AmerenUE that FWS's failure to perform due diligence and ensure that its information be based on certain fundamental research may have resulted in FWS making misrepresentations to FERC. Ultimately, AmerenUE believes that FWS has failed to adequately support its statements with necessary studies and has presented certain policy positions that are unsupported by existing evidence. Disseminating such unsupported information violates the DQA and harms AmerenUE by suggesting that FERC consider imposing onerous licensing provisions for the Project which are not warranted by the true facts and circumstances at the Project.

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I. Background

AmerenUE is seeking to relicense its Osage Hydroelectric Project. In 2000, AmerenUE requested and received approval from FERC to employ alternative licensing procedures (“ALP”) in the relicensing of the Project. Accordingly, AmerenUE instituted a stakeholder process to address the concerns of parties affected by the Osage Project, which has resulted in ongoing monthly meetings.

On February 24, 2004, AmerenUE filed its application for a renewed license to operate the Project. Thereafter, on March 4, 2004, FERC issued a Notice of Application and Applicant Prepared Environmental Assessment Tendered for Filing with the Commission, Establishing Procedural Schedule for Relicensing and Deadline for Submission of Final Amendments (“Notice”). In its Notice, the Commission set the deadline of April 26, 2004, for stakeholders to submit comments. Comments were properly submitted by many stakeholders, including a letter dated April 23, 2004 submitted by the Missouri Department of Conservation (“MDC”) and a letter dated April 22, 2004 submitted by FWS. *See* letter from Charles M. Scott, Field Supervisor, FWS, to Secretary, FERC, dated April 22, 2004, attached as Exhibit A. Interestingly, both the MDC and the FWS letters included similar parallel requests for additional studies and comments on fish protection.

II. The Data Quality Act

The DQA directs the Office of Management and Budget (“OMB”) to develop and issue government-wide standards to provide policy and procedural guidance to ensure the “quality, objectivity, utility, and integrity of information (including statistical information)” used and disseminated by federal agencies.¹ Moreover, each federal agency is required to issue tailored guidelines to ensure information integrity and quality and to establish administrative procedures to allow affected persons or organizations to challenge such information.²

On September 28, 2001, OMB published in the *Federal Register* guidelines for ensuring the quality, objectivity, utility, and integrity of information disseminated by federal agencies.³ OMB

¹ *See* Treasury and General Government Appropriations Act for Fiscal Year 2001, Public Law 106-554, § 515.

² “Affected persons or organizations” are defined as those who may use, be benefited by, or be harmed by the disseminated information.

³ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed Reg 49718 (Feb. 22, 2002), 67 Fed Reg

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proposed that the guidelines apply to a wide range of government information and directed federal agencies to develop information resources management procedures for ensuring the quality of released information and to establish administrative mechanisms to allow affected persons the opportunity to challenge certain data inconsistent with OMB or agency guidelines.

Consistent with OMB and DOI guidelines, FWS published separate guidelines governing how the FWS would apply the DQA. FWS notes that the guidelines apply to “all information disseminated by the agency to the public, including information initiated or sponsored by the agency, and information from outside parties that is disseminated by the agency in a manner that reasonably suggests that the agency endorses or agrees with the information.”⁴ To ensure the quality of the information, FWS states that information will undergo substantial oversight from senior management, peer review, product review and other controls. For information that is deemed to be influential, a higher standard must be met in the sense that there will be greater transparency and scrutiny of supporting data.⁵

III. FWS’s Unsupported Statements

During the relicensing of the Project, the FWS has disseminated several pieces of information in violation of the DQA, thus harming AmerenUE in the relicensing of the Project.

First, FWS has stated that the proper environmental management goal for protection of spoonbill catfish, a/k/a paddlefish, at the Project must be one hundred percent survivability, either through fish passage or fish protection. See letter from Charles Scott, FWS, to Dave Wambold, AmerenUE, dated July 18, 2002, copied to FERC, attached as Exhibit B. FWS’s goal has no scientific or technical basis, and no rational basis. Paddlefish do not reproduce naturally at the Project because their spawning grounds were flooded by an Army Corps of Engineers Project known as the Harry S. Truman Dam (“HST Dam”), which is upstream from AmerenUE’s Project. In fact, paddlefish exist at the Project only as the result of a put, take and grow fishery supported by a hatchery financed by AmerenUE under its FERC License.

8452 (February 22, 2002) (republished).

⁴ United States Fish & Wildlife Service Guidelines at 2 (emphasis added). Available at <http://irm.fws.gov/infoguidelines/FWS%20Information%20Quality%20Guidelines.pdf>. The FWS guidelines further state that information includes any communication or representation of knowledge, such as facts or data, in any medium or form.

⁵ “Influential” is defined by the FWS as scientific, financial or statistical information with a clear and substantial impact on important public policies or important private sector decisions.

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Indeed, FWS's position is curious considering comments filed in 1983 with FERC. At that time, FWS's acknowledged the impact of the HST Dam and stated:

Although migratory fish species such as paddlefish and striped bass occur within Lake of the Ozarks and the Osage River below the dam, the FWS does not believe that fish passage facilities are currently needed for this project. Passage of paddlefish above Bagnell Dam would not be beneficial to the species since the known paddlefish spawning grounds have been inundated by the Harry S. Truman Dam reservoir. Artificial propagation of paddlefish as mitigation for HST Dam is currently being pursued. In addition, the applicant operates a hatchery primarily for striped bass, and this species is annually stocked in Lake of the Ozarks.

See letter from Bruce Blanchard, DOI to Secretary, FERC, dated December 16, 1983, attached as Exhibit C. FWS's position and statements as to the need for one hundred percent survivability of paddlefish at the Project violate the DQA.

Second, in its April 22 letter to FERC requesting additional studies, FWS states that AmerenUE's proposal to address paddlefish issues is "inadequate to meet the MDC's management plans for paddlefish."⁶ Again, FWS's statement violates the DQA.

First, FERC denied FWS's request to reopen the Osage Project license prior to the relicensing process because FWS presented no evidence of any adverse impact on fisheries due to Project operations. See FERC letter decision, dated June 27, 2003. In addition, the curious coincidence of FWS's and MDC's contemporaneous and parallel requests for additional information belies FWS' purported factual reliance on MDC's studies. In other words, FWS's statements violate the DQA because they purport to rely upon the MDC's evidence that its fish management goals are not being met. No such evidence exists. MDC has admitted that for the years 2002 and 2003 it did not conduct any surveys or studies to determine whether actual harvest levels of paddlefish met the MDC's annual fisheries goals, and that for those years the MDC prepared only Paddlefish Aerial Counts, a 2003 Paddlefish Plan Addendum and a fish kill report for purposes of litigation. In addition, the MDC has admitted that the only surveys of paddlefish harvests performed on an annual basis are aerial surveys, and thus it does not regularly conduct fish creel studies or other research to determine whether its fisheries goals are being met.

⁶ Exhibit A at p. 7.

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IV. Conclusion

The DQA codifies an important governmental goal and public policy of ensuring the accuracy, quality and integrity of information disseminated by the federal government. FWS must adhere to DQA, and either correct or retract statements made in connection with the relicensing of the Project which have repeatedly violated the DQA. These statements harm AmerenUE by falsely suggesting to FERC that it must consider onerous licensing provisions which are, in fact, unnecessary.

Please feel free to contact me, as indicated above, should you have any questions regarding this Request for Correction of Information, or wish to discuss the matters addressed herein.

Sincerely,

Charles A. Zdebski

CAZ/mec

cc: Allen E. Creamer, Osage Project Manager, FERC
Magalie R. Salas, Secretary, FERC
Chris Iselin
Jerry Hogg
Susan Knowles, Esq.
John Molm, Esq.

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July 27, 2004

Ms. Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

RE: Docket No. P-459
Osage Project FERC No. 459-128, Benton, Camden, Miller, and Morgan Counties,
Missouri

Dear Ms. Salas:

Union Electric Company d/b/a AmerenUE ("AmerenUE"), through its counsel, hereby respectfully requests that certain statements in the April 22, 2004 letter submitted by the United States Fish and Wildlife Service ("FWS") in the above-captioned proceeding be stricken and removed from the record.¹ As demonstrated by the attached Affidavit, the alleged studies of the Missouri Department of Conservation ("MDC") that were relied upon by the FWS do not exist.

In the FWS Letter, FWS alleged that the MDC was unable to achieve its management goals, and requested additional studies. Specifically, FWS stated that AmerenUE's proposal to address paddlefish issues is "inadequate to meet the MDC's management plans for paddlefish".² Moreover, in referencing the possibility of future fish kills, FWS commented that "there is ample evidence that protective measures at the project are greatly needed for fish and are recognized as necessary by FERC, natural resource agencies, and AmerenUE."³

The Affidavit, however, confirms that for the years 2002 and 2003, the MDC did not conduct any surveys or studies to determine whether actual harvest levels of paddlefish met the MDC's annual fisheries goals, and that for those years the MDC prepared only Paddlefish Aerial Counts, a 2003 Paddlefish Plan Addendum and a fish kill report for purposes of litigation. The only surveys of paddlefish harvests performed on an annual basis are aerial surveys, and thus the MDC does not regularly conduct fish creel studies or other research to determine whether its

¹ Letter of Fish and Wildlife Services to FERC, Docket No. P-459 (Apr. 22, 2004) ("FWS Letter").

² FWS Letter, page 7.

³ FWS Letter, page 6.

TROUTMAN SANDERS LLP
ATTORNEYS AT LAW
A LIMITED LIABILITY PARTNERSHIP

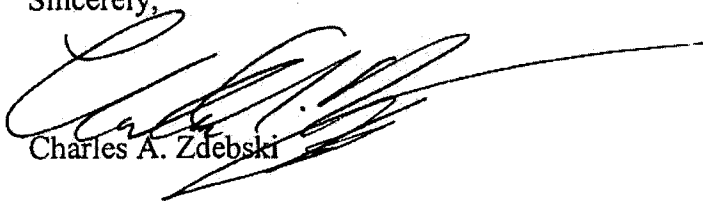
Magalie R. Salas, Secretary
July 27, 2004
Page 2

fisheries goals are being met. Indeed, other than the preceding documents, one of which is a prospective paddlefish plan and the other of which is a mortality count prepared in anticipation of litigation, "the MDC does not have any documents which reflect or depict harvest figures or levels of paddlefish in the Lake of the Ozarks or the lower Osage River for the years 2002 and 2003."

FWS's reliance on non-existent MDC data and studies sets an unhealthy and reckless precedent. Given the significance of its role in this proceeding, the FWS is charged with a basic duty to perform due diligence and ensure that its record statements are supported by sufficient evidence. In this instance, FWS has failed to fulfill that basic duty. The result of this unsupported reliance on non-existent MDC studies by FWS has resulted in particularized and prejudicial inaccuracies in the record before the Commission.

Accordingly, AmerenUE respectfully requests that these statements be stricken.

Sincerely,



Charles A. Zdebski

CAZ/mec

cc: Service List for Docket No. P-459
Allen E. Creamer, Osage Project Manager, FERC
Chris Iselin
Jerry Hogg
John Molm, Esq.

IN THE CIRCUIT COURT OF MILLER COUNTY, MISSOURI

MISSOURI DEPARTMENT OF CONSERVATION,)	
)	
)	
Plaintiff,)	
)	
v.)	Case No. CV502-462CC
)	
UNION ELECTRIC COMPANY, d/b/a AMEREN UE,)	
)	
)	
Defendant.)	

AFFIDAVIT

STATE OF MISSOURI)
)
COUNTY OF COLE)

COMES NOW, Denise L. Garnier, and, after being first duly sworn, deposes and says:

1. My name is Denise L. Garnier. The facts contained in this Affidavit are from my personal knowledge.

2. I am the custodian of records for the Missouri Department of Conservation ("MDC"). In that capacity and after diligent search and inquiry, I state and affirm as follows:

a. On or about April 28, 2004, MDC received from counsel for Union Electric Company d/b/a Ameren UE a request pursuant to Section 610.023.2 of the Revised Statutes of Missouri. That request seeks documents relating to compilations, studies analysis, or creel surveys reflecting harvest levels for paddlefish in the Lake of the Ozarks and lower Osage River for the years 2002 and 2003.

b. On or about June 4, 2004, Ameren UE served upon counsel for MDC a notice of deposition of company representative regarding the documents (or lack

thereof) that reflect or depict non-kill harvest figures or levels of paddlefish in the Lake of the Ozarks or the lower Osage River for the years 2002 and 2003.

c. For the years 2002 and 2003, the MDC did not tabulate, compile or otherwise conduct any surveys that reflect or depict harvest figures or levels of paddlefish in the Lake of the Ozarks or the lower Osage River for the years 2002 and 2003 other than the Paddlefish Aerial Counts and the 2003 Paddlefish Plan Addendum previously produced to counsel for AMERENUE, and a fish kill report prepared in anticipation of litigation which was previously identified in Craig Evans' letter to J. Kent Lowry dated May 19, 2004.

d. Further that, other than as set forth in the proceeding paragraph, the MDC does not have any documents which reflect or depict harvest figures or levels of paddlefish in the Lake of the Ozarks or the lower Osage River for the years 2002 and 2003.

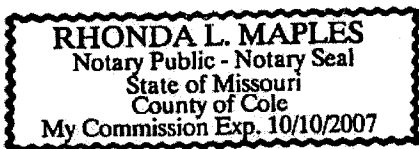
e. Further, MDC confirms only aerial surveys are conducted on an annual basis.

FURTHER affiant sayeth naught.

Missouri Department of Conservation

By: *Denise L. Garnier*
Denise L. Garnier

Subscribed and sworn to before me on this 23rd day of June, 2004.



Rhonda L. Maples
Rhonda L. Maples, Notary Public
Cole County, Missouri