UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Richland/Wilkin Joint Powers Authority, a Minnesota-North Dakota Joint Powers Authority,

Plaintiff,

vs.

United States Army Corps of Engineers; John McHugh, Secretary of the U.S. Army Corps of Engineers (in his official capacity); Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works (in her official capacity); and Col. Dan Koprowski, District Commander, St. Paul District, U.S. Army Corps of Engineers (in his official capacity),

Defendants,

and

Fargo-Moorhead Flood Diversion Board of Authority,

Defendant-Intervenor.

Civil File No. 0:13-CV-02262-JRT-LIB

AMICUS CURIAE MINNESOTA DEPARTMENT OF NATURAL RESOURCES' MEMORANDUM REGARDING MOTION TO DISMISS AND MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Pursuant to the Court's Order dated February 24, 2015, Amicus Curiae Minnesota Department of Natural Resources ("MDNR") files this Memorandum in support of the Richland/Wilkin Joint Powers Authority's ("JPA's") motion for a preliminary injunction

and in opposition to Fargo-Moorhead Flood Diversion Board of Authority's ("Diversion Authority's") motion to dismiss Counts III through V of the Third Amended Complaint.

BACKGROUND

A. The Project and Federal Environmental Review.

In 2008, the U.S. Army Corps of Engineers ("Corps"), along with the Cities of Fargo, North Dakota and Moorhead, Minnesota, began work on the *Fargo-Moorhead Metro Feasibility Report and Environmental Impact Statement* (FR/EIS). (Declaration of Nathan Hartshorn ("Hartshorn Decl."), Ex. 1 [No. 82].) The FR/EIS evaluated a number of alternatives to address recurrent flooding in the Fargo-Moorhead Metropolitan Area, including the "Locally Preferred Plan" (the "Project"). (Declaration of Gerald Von Korff dated July 15, 2014 ("July 2014 Von Korff Decl."), Ex. A at ES-4 [No. 71].)

The Project involves the construction of a diversion channel four miles south of the confluence of the Red and Wild Rice Rivers and south of Fargo-Moorhead.[1] (July 2014 Von Korff Decl., Ex. A at ES-12-13; Ex. D. at 2-9.) The Project requires a "staging area" sufficient to contain approximately 200,000 acre-feet of water immediately south of the Red River and Wild Rice River dams. (*Id.*) The proposed staging area is located in Clay and Wilkin Counties, Minnesota and in Richland and Cass Counties, North Dakota. (*Id.; see also* Declaration of Randall Doneen dated July 21, 2014 ("First Doneen Decl."), ¶¶ 27–30 [No. 81] (containing a detailed description of the Project and its operation).) Homes, businesses, and farms in the staging area would be flooded during

operation of the Project. (July 2014 Von Korff Decl., Ex. D at 7-8; First Doneen Decl., ¶ 26-27.)

The Project also requires the construction of a control structure anchored on the Minnesota side of the Red River, a structure that both the Corps and MDNR classify as a high-hazard dam. (First Doneen Decl., ¶ 11-14.) A high-hazard dam is a dam that would cause loss of life and property damage in the event of a failure. (*Id.*) Construction of a high hazard dam in public waters requires both a MDNR permit and the preparation of a state EIS. *See generally,* Minn. R. 6115.0300 to 6115.0520 (2013) (dam safety permitting rules); Minn. R. 4410.4400, subp. 18 (2013) and First Doneen Decl., ¶ 12. The Corps recognized the need for the State of Minnesota's environmental review and permits in its Final FR/EIS. (First Doneen Decl., Ex. 2 at 137.)

During the public comment periods on the federal environmental review documents, MDNR raised a number of concerns with the Project. (First Doneen Decl., ¶ 20-24; July 2014 Von Korff Decl., Ex. B.) While the Corps responded to some of these comments in the FR/EIS, the Corps verbally informed MDNR that there was no need to reply to all of MDNR's comments because the requested analysis would be included in the State of Minnesota's own environmental review process. (First Doneen Decl., ¶ 25.)

The Corps failed to adequately address MDNR's concerns regarding a number of issues, including geomorphology, indirect wetland impacts, fish passage, compatibility with land use regulations, cold weather impacts, and mitigation during the federal

[1] The Project is described in more detail in MDNR's Memorandum Regarding Motion for

environmental review process, deferring instead to the state environmental review process. (Second Declaration of Randall Doneen ("Second Doneen Decl."), ¶ 14.) For example, while MDNR explained that the Project would not allow any fish passage at certain river elevations and has the potential to strand fish, the Corps relied on after-the-fact mitigation to address impacts to fish populations. (July 2014 Von Korff Decl., Ex. B at 7-8; Declaration of Jill Schlick Nguyen ("Nguyen Decl."), Ex. A.) Further, the Corps dismissed MDNR's concerns that the Corps "drastically discount[ed] the potential for impacts caused by changes in geomorphic processes" and declined to research potential issues with river bank stability. (July 2014 Von Korff Decl., Ex. B at 6-7; Nguyen Decl., Ex. A.)

The Corps completed the FR/EIS in July 2011. (July 2014 Von Korff Decl., Ex. A.) On December 19, 2011, the Corps issued the Chief's Report for the Project. (Declaration of Bruce Spiller dated July 8, 2014 ("Spiller Decl."), Ex. A [No. 69].) The Chief's Report, which was transmitted to Congress, recommended construction of the Locally Preferred Plan as the preferred alternative. (Spiller Decl., Ex. A at 1-2.)

In September 2013, the Corps issued a Supplemental Environmental Assessment ("SEA") for the Project. The SEA addressed "several proposed modifications to the Project" including "a ring levee around the towns of Oxbow, Hickson, and Bakke, ND." (Ex. H filed by Corps in Opposition to Motion for Preliminary Injunction at 7 [No. 162].) The SEA explains that while the FR/EIS contemplated acquiring this entire area in fee, an

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Anti-Suit Injunction filed July 22, 2014.

alternative is to construct a ring levee around the area. (*Id.* at 22.) The SEA notes that approximately 40 residences would have to be removed to allow for construction of the levee. New residences and a new golf course would be constructed within the levee. (*Id.* at 23.)

Congress authorized, but did not appropriate funding for, the design and construction of the Project in the Water Resources Reform and Development Act of 2014 ("2014 WRRDA"). Water Resources Reform and Development Act of 2014, P.L. 113-121, § 7002(2)(4). Congress indicated that the Project should be carried out "substantially in accordance with the plan, and subject to the conditions, described in the [final feasibility study]." *Id.* One of the conditions included in the FR/EIS requires the Diversion Authority to obtain State and local permits and undertake State environmental review. Funding for the Project is not included in the President's 2015 budget. (Declaration of Kent Lokkesmoe, ¶ 17 [No. 80].)

B. The State Environmental Review Process.

MDNR commenced the state environmental review process in 2013. (First Doneen Decl., ¶ 33.) In February 2014, MDNR issued the Scoping Environmental Assessment Worksheet and Scoping Decision Document ("Scoping EAW") for the state EIS. (*Id.* at ¶ 40.) The purpose of the scoping process is to set out the scope of the issues to be evaluated in the state's EIS. (*Id.* at ¶35.) The Scoping EAW identifies twenty-eight state and local permits or approvals required for construction and operation of the Project including the Dam Safety permit for the dam on the Red River. (*Id.* at ¶ 38; July 2014

Von Korff Decl., Ex. D at 10-12.) MDNR anticipates issuing the state Draft EIS in August 2015. (Second Doneen Decl., ¶ 2.) MDNR will then provide the public with the opportunity to comment on the Draft EIS. (*Id.*) MDNR anticipates that it will complete the Final EIS and issue its record of decision by late fall 2015 or spring 2016. (*Id.* at ¶ 3.)

C. The Diversion Authority, the Oxbow-Hickson-Bakke Ring Levee, And Other Efforts to Start the Project Prior to Completion of the State EIS.

The Diversion Authority was formed in 2011 by the City of Fargo, North Dakota; the City of Moorhead, Minnesota; Cass County, North Dakota; Clay County, Minnesota; the Cass County Joint Water Resources District, a North Dakota water resources district; and the Buffalo-Red River Watershed District, a Minnesota watershed district. (First Doneen Decl. ¶ 34; Declaration of Gerald Von Korff dated November 1, 2013, Ex. A [No. 23].) The purpose of the Diversion Authority is to build and operate the Project. (*Id.*)

In 2013 the Diversion Authority entered into a Memorandum of Understanding ("MOU") with the City of Oxbow for design and construction of the Oxbow-Hickson-Bakke Ring Levee ("OHB Levee"). The MOU indicates that the Oxbow-Hickson-Bakke area would be affected by the Project's staging of water and that purpose of the OHB Levee is to mitigate the Project's impacts. (Second Doneen Decl., ¶ 9.) The Diversion Authority is seeking to apply the cost of construction of the OHB Levee towards the Diversion Authority's local match for the Project, that is, the share of the total Project costs that the Diversion Authority is required to pay in order to receive federal funding. (*Id.*)

When the Corps granted the Diversion Authority a Clean Water Act section 404 permit for the OHB Levee on June 20, 2014, the Corps specifically noted that the OHB Levee is an "element of the Fargo-Moorhead Flood Risk Management Project." (Second Doneen Decl., ¶ 9.) In fact, the Corps allowed the Diversion Authority to withdraw its separate application for an OHB Levee permit, noting that "[t]he application for a stand-alone project is no longer necessary, as the OHB Project is part of the overall Federal Project." (Declaration of Gerald Von Korff dated February 3, 2015, Ex. 11 [No. 170].)

The Diversion Authority originally proposed building the OHB Levee at an elevation approximately seven feet above the 100-year flood elevation. (Second Doneen Decl., ¶ 9.) The Diversion Authority did begin construction at this elevation, but after MDNR and Minnesota Governor Mark Dayton objected to its construction activities, it eventually agreed to limit its subsequent construction to a lower elevation. (Declaration of Perry Miller, et al. ¶ 16 [No. 169]; Declaration of Gerald Von Korff dated December 9, 2014, Ex. 1 [No. 125]; Declaration of Darrell Vanyo dated January 23, 2015, Ex. A [No. 159].)

In addition to beginning construction of the OHB Levee, the Diversion Authority has approved the purchase of land necessary for the construction of the diversion channel. (Second Doneen Decl., ¶ 10; *see also* Declaration of Jody and Karla Slusher, ¶ 3 [No. 139].) The Diversion Authority has also expressed an interest in starting

construction on the diversion channel in the summer of 2015. (Second Doneen Decl., ¶ 11.)

ARGUMENT

The Diversion Authority's arguments that Minnesota law does not extend across the border disregard one key fact—three members of the Diversion Authority are Minnesota local governments.[2] As Minnesota local governments, these entities—and the Diversion Authority of which they form a part – are subject to regulation by the State of Minnesota. The primary purpose of the Minnesota Environmental Policy Act ("MEPA") is to ensure that Minnesota's government entities consider the environmental impacts of actions they propose to take. In addition, the Minnesota Environmental Rights Act ("MERA") protects natural resources in the State of Minnesota from pollution, impairment, or destruction, even if some or all of the conduct causing such damage occurs in another State. The Diversion Authority offers no support for its novel assertion that the State of Minnesota's regulation of its own political subdivisions, pursuant to MEPA and MERA, violates the dormant Commerce Clause.

Further, the actions taken by the Diversion Authority to begin construction of portions of the Project prior to completion of environmental review undermine MEPA's purpose of ensuring that Minnesota government entities review the impacts of a proposed action prior to committing to that course. The Diversion Authority's efforts to begin the Project should be enjoined.

I. MEPA GOVERNS MINNESOTA GOVERNMENT ENTITIES EVEN WHEN THEIR CONDUCT OCCURS IN ANOTHER STATE.

MEPA governs actions by the State of Minnesota and its local governments, even when such conduct crosses State lines. MEPA's purpose is to ensure that "governmental agencies contemplating taking action … on a proposed project must first consider the project's environmental consequences." *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs,* 713 N.W.2d 817, 823 (Minn. 2006); *see also No Power Line, Inc. v. Minn. Envtl. Quality Council,* 262 N.W.2d 312, 327 (Minn. 1977) (the purpose of MEPA is to "force agencies to make their own impartial evaluation of environmental considerations before reaching their decisions"). No language in MEPA suggests that Minnesota government entities can avoid this responsibility simply by crossing the border, such as by building a controversial or environmentally-damaging project in another State.[3] Minn. Stat. ch. 116D.

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[2] MDNR also refers the Court to the arguments included in its Memorandum Regarding Motion for Anti-Suit Injunction filed July 22, 2014.

[3] A related question is whether MEPA requires consideration of environmental impacts in other States that result from Minnesota governmental action. Minnesota agencies at times have considered impacts to other States when drafting environmental impact statements. *See Minn. Ctr. for Envtl. Advocacy v. Holsten,* 2009 WL 2998037, at *3 (Minn. Ct. App.) (upholding adequacy of MDNR's discussion of project's greenhouse gas emissions but declining to decide whether MEPA requires such discussion in an EIS). Federal courts have ruled that the National Environmental Policy Act ("NEPA") requires analysis of regional, national, and international impacts. *Mayo Found. v. Surface Transp. Bd.,* 472 F.3d 545, 554-55 (8th Cir. 2006) (requiring board to examine project's impacts to regional and national air emissions); *Gov't of Province of Manitoba v. Salazar,* 691 F. Supp. 2d 37, 51 (D.D.C. 2010) (holding that NEPA required the Bureau of Reclamation to consider the impact to Canada resulting from a proposed North Dakota water project). These cases demonstrate that environmental review does not stop at borders as neatly as the Diversion Authority suggests.

MEPA prohibits Minnesota governments from taking action to begin or approve a project before environmental review has been completed:

> If an … environmental impact statement is required for a governmental action … a project may not be started and a final governmental decision may not be made to grant a permit, approve a project, or begin a project, until … the environmental impact statement has been determined adequate.

Minn. Stat. § 116D.04, subd. 2b (2014).[4] Regulations promulgated by the Minnesota Environmental Quality Board further provide that beginning a project includes "any action within the meaning of 'construction.'" *See* Minn. R. 4410.3100, subp. 1 (2013); *see also* Minn. R. 4410.0200, subp. 10 (defining construction as any activity that "directly alters the environment"). Regulations also provide that a governmental unit may not take actions such as acquisition of property that prejudice the ultimate decision on the project:

> If a project subject to review under [MEPA] is proposed to be carried out or sponsored by a governmental unit, the governmental unit shall not take any action with respect to the project, including the acquisition of property, if the action will prejudice the ultimate decision on the project, until … the final EIS has been determined adequate …. An action prejudices the ultimate decision on a project if it tends to determine subsequent development or to limit alternatives or mitigation measures.

Minn. R. 4410.3100, subp. 2 (2013).

The Diversion Authority is subject to this prohibition because it meets the MEPA definition of a "governmental unit" which includes Minnesota watershed districts, counties, and cities. *See* Minn. R. 4410.0200, subp. 34 (2013). The Project is also a

"project" or "governmental action" under MEPA because it would be carried out, approved, and permitted in whole or in part by Minnesota governmental units and it would cause physical manipulation of the environment. *See* Minn. R. 4410.0200, subps. 33, 65 (2013) (defining "governmental action" and "project").

Further, the OHB Levee is part of the Project. The Corps describes the OHB Levee as a Project component in the Supplemental Environmental Assessment. (Ex. H. at 7 [No. 162].) The Diversion Authority is seeking credit for its construction of the OHB Levee as part of its total contribution to the Project. (Second Doneen Decl., ¶ 9.) In addition, the Corps determined that no separate Clean Water Act section 404 permit application was required for the OHB Levee because it is part of the Project. (Declaration of Gerald Von Korff dated February 3, 2015, Ex. 11.)

Even if the OHB Levee were not a Project component, MEPA would prohibit its construction because it is a mitigation measure designed to minimize or rectify impacts of the Project. (Second Doneen Decl., ¶ 9.) MEPA does not allow actions "with respect to the project" that "limit alternatives or mitigative measures." Minn. R. 4410.3100, subp. 2 (2013); *see also* Minn. R. 4410.3100, subp. 51 (defining the term "mitigation"). By constructing a mitigation measure prior to the completion of environmental review, the Diversion Authority could preclude other alternatives – such as a "no build" alternative --

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[4] The Third Amended Complaint also cites another MEPA provision regulating Minnesota government entities. Minn. Stat. § 116D.04, subd. 6 prohibits the issuance of permits that are likely to cause pollution, impairment, or destruction of natural resources in the State unless there are no feasible alternatives. *See* Minn. Stat. § 116D.04, subd. 6 (2014).

or mitigation measures that are currently being considered in the State's environmental review or may be advanced during public comments on the review.

The Diversion Authority asserts that the prohibition on beginning a project does not apply to the OHB Levee because no Minnesota government unit is issuing a permit for the levee. (Diversion Authority's Mem. in Support of Mot. To Dismiss/Remit at 18 [No. 147].) MEPA's prohibition is in fact far broader than the Diversion Authority suggests and applies not just to permitting but also to construction, acquisition of property and any other action that would prejudice the ultimate decision on the Project.

The Diversion Authority also incorrectly asserts that the OHB Levee has "independent utility" and therefore is not subject to this prohibition. (*Id.* at 18 n. 7.) *See* 40 C.F.R. § 1506.1(c) (2014) (federal agencies must not take action while a program-wide environmental review is pending unless the action "is justified independently of the program").[5] The Diversion Authority's assertions of the OHB Levee's "independent utility" date only from MDNR's objections to its construction. (Second Doneen Decl., Ex. B.) The OHB Levee was planned as part of the Project, and until MDNR objected, the Diversion Authority intended to and indeed commenced constructing the OHB Levee at a far higher elevation than necessary to protect the area from natural flooding. (Ex. H. at 7 [No. 162]; Declaration of Perry Miller, et al. ¶ 16.)

[5] No MEPA case provides that a showing of "independent utility" is a defense to a violation of the prohibition on starting a project prior to completion of environmental review.

The facts do not support the Diversion Authority's assertion that the OHB Levee has independent utility.

II. MERA APPLIES TO CONDUCT OUTSIDE THE STATE'S BOUNDARIES THAT CAUSES POLLUTION, IMPAIRMENT, OR DESTRUCTION IN MINNESOTA.

MERA applies to construction of Project components in North Dakota if that construction causes pollution, impairment, or destruction in Minnesota. MERA provides a cause of action for "the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction." Minn. Stat. § 116B.03, subd. 1 (2014); *see also* Minn. Stat. § 116B.01, .07 (2014).

To protect Minnesota's natural resources, MERA specifically provides that an action can be brought against persons outside the State, relating to conduct that takes place outside the State but causes impacts within the State. First, MERA provides that an action may be brought against "any person," and "person" is defined to include out-of-state individuals and entities. *See* Minn. Stat. § 116B.03, subd. 1 (2014) (describing cause of action); Minn. Stat. § 116B.02, subd. 2 (2014) (defining "person" to include "any state, municipality or other governmental or political subdivision or other public agency or instrumentality"). Second, MERA's long-arm statute reaches out-of-state conduct. Minn. Stat. § 116B.11, subd. 1 (2014) (allowing action against a foreign corporation or nonresident individual who "commit[s] . . . any act outside the state which would impair, pollute or destroy … natural resources within the state"). The JPA's MERA claim should not be dismissed on the basis that most of the Project would be

constructed in North Dakota. If construction of Project segments in North Dakota would cause environmental damage in Minnesota, that construction may form the basis for a MERA claim.[6]

III. APPLYING MEPA AND MERA TO THE DIVERSION AUTHORITY'S CONDUCT IN NORTH DAKOTA DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

The Diversion Authority's construction of the OHB Levee is not conduct that takes place wholly in North Dakota and therefore subjecting the Diversion Authority to regulation under MEPA or MERA does not violate the dormant Commerce Clause. The Diversion Authority includes Minnesota local governments as members. In addition, the OHB Levee is part of a larger project that would be partly constructed in Minnesota and likely have environmental impacts in Minnesota. (Second Doneen Decl., ¶ 13.)

The dormant Commerce Clause is an implied limitation on state authority that prevents states from discriminating against or unduly burdening interstate commerce. *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 99 (1994). There are three tests to determine whether a statute is valid under the dormant Commerce Clause. First, a statute is per se invalid if it regulates "commerce that takes place wholly outside of the state's borders." *Cotto Waxo Co. v. Williams,* 46 F.3d 790, 793 (8th Cir. 1995); *N.D. v. Heydinger,* 15 F. Supp. 3d 891, 911 (D. Minn. 2014). Second, if a statute discriminates against interstate commerce on its face or in its purpose or effect, the statute

[6] MDNR will not address Count V of the Third Amended Complaint, which alleges that the Project would violate State law and permits cannot be granted for the Project. (Third Am. Compl. ¶ 134-39 [No. 112].) MDNR's environmental review is continuing, and

is subject to strict scrutiny. *Cotto Waxo Co.,* 46 F.3d at 793. Third, if a statute only burdens interstate commerce indirectly, it will be upheld unless "the burdens it imposes on interstate commerce are 'clearly excessive in relation to the putative local benefits.'" *Cotto Waxo Co.*, 46 F.3d at 793 (quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970)).

As to the first test, a state may not enact laws that regulate transactions having absolutely no connection to a state. *Am. Beverage Ass'n v. Snyder,* 735 F.3d 362, 373 (6th Cir. 2013). A state may not, for example, enforce price-affirmation laws that directly regulate the price an out-of-state business can charge out-of-state customers for out-of-state transactions. *See, e.g., Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.,* 476 U.S. 573, 582 (1986). But states have broad regulatory authority, and mere extraterritorial effects are not enough to invalidate a law. *Instructional Sys., Inc. v. Computer Curriculum Corp.,* 35 F.3d 813, 825 (3rd Cir. 1994); *Nat'l Elec. Mfrs. Ass'n v. Sorrell,* 272 F.3d 104, 110 (2nd Cir. 2001). Unless a law directly regulates out-of-state transactions, the extraterritoriality doctrine imposes no limit on state authority to legislate over matters of local concern. *See Kassel v. Consol. Freightways Corp. of Del.,* 450 U.S. 662, 669 (1981) (stating that "there is a residuum of power in the state to make laws governing matters of local concern which nevertheless … affect interstate commerce or even, to some extent, regulate it").

MDNR is precluded from making a dam safety permit decision until after the environmental review has been completed.

As discussed above, the Diversion Authority's construction of the OHB Levee cannot fairly be described as conduct occurring wholly in North Dakota. Because on the facts presented here there are Minnesota impacts and Minnesota governments involved, this Court need not decide whether in some hypothetical circumstance MEPA or MERA could be applied to wholly out-of-state conduct. Further, if MEPA or MERA have some extraterritorial effects, such as regulating the out-of-state conduct of Minnesota governments, these laws are still valid under the dormant Commerce Clause.

As to the second test, a statute is only discriminatory if it "accord[s] differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Grand River Enter. Six Nations, Ltd. v. Beebe,* 574 F.3d 929, 942 (8th Cir. 2009). The Diversion Authority has not argued that MEPA or MERA are discriminatory, and indeed, they are not. MERA, for example, does not subject out-of-state polluters causing damage in Minnesota to any greater burden than in-state polluters.

As to the third test, MEPA and MERA survive the *Pike* balancing test because the important goal of protecting Minnesota's natural resources outweighs any potential burden on interstate commerce. The Diversion Authority has not provided *any* evidence that MEPA or MERA excessively burden interstate commerce, and the local benefits of these environmental statutes are significant. MERA seeks to ensure the "protection, preservation, and enhancement of air, water, land, and other natural resources located within the state," while MEPA "encourage[s] productive and enjoyable harmony between

human beings and their environment." Minn. Stat. § 116B.01, 116D.01 (2014). Courts generally uphold State statutes under the *Pike* balancing test that are "reasonably targeted at important public health and environmental concerns." *Constr. Materials Recycling Ass'n. Issues and Educ. Fund, Inc. v. Burack,* 686 F. Supp.2d 162, 172-3 (D.N.H. 2010).

IV. THE JPA HAS STANDING TO BRING ITS CLAIMS AGAINST THE DIVERSION AUTHORITY.

The JPA has standing to bring its State law claims against the Diversion Authority. This Court should reject the Diversion Authority's argument that if the State law claims against the Corps are barred by sovereign immunity, none of the State law claims can be redressed and therefore these claims should be dismissed. (Diversion Authority's Mem. in Support of Mot. To Dismiss/Remit at 9-15.) The Diversion Authority again seeks to stand in the shoes of the Corps. It is the Diversion Authority, not the Corps, that is currently acquiring land for the Project and building the OHB Levee. The Corps has not received funding to begin constructing any part of the Project, and it is unknown whether the Corps will *ever* receive such funding. (Declaration of Kent Lokkesmoe, ¶ 17.) Clearly, an injunction against the Diversion Authority would provide effective relief.

In *Sierra Club v. Clinton,* 689 F. Supp. 2d 1147, 1155 (D. Minn. 2010), this Court rejected a similar argument to that made by the Diversion Authority. In that case, the State Department argued the Sierra Club lacked standing because even if a State Department permit was vacated, the President could re-authorize the permit. *Id.* This Court held that "the President's future actions or inactions are too speculative to preclude standing in this case." *Id.* Similarly, it is unknown whether Congress will ever provide

funding for the Project, but an injunction would effectively prevent the Diversion Authority from starting construction prior to completion of environmental review.

V. THE CORPS FAILED TO ADEQUATELY ADDRESS MDNR COMMENTS ON THE EIS.

Though MDNR is primarily focusing its comments on the State law claims[7], MDNR does note that the Corps failed to adequately address several MDNR comments in the FR/EIS. The Corps dismissed as insignificant or relied on after-the-fact mitigation to address MDNR's comments on issues such as geomorphology and fish passage. (July 2014 Von Korff Decl., Ex. B; Nguyen Decl., Ex. A.) The Corps also told MDNR that these issues could be addressed in the state environmental review process. (First Doneen Decl., ¶ 25.)

"While it is true that NEPA 'requires agencies preparing environmental impact statements to consider and respond to the comments of other agencies, not to agree with them,' it is also true that a reviewing court 'may properly be skeptical as to whether an EIS's conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise.'" *Davis v. Mineta,* 302 F.3d 1104, 1123 (10th Cir. 2002) (citations omitted); *see also N.C. Wildlife Fed'n v. N.C. Dep't of Transp.,* 677 F.3d 596, 600 (4th Cir. 2012) (overturning EIS that failed to address significant issue raised in comments). MDNR has significant expertise

[7] Because MDNR is focusing on the State law claims, MDNR is not taking a position on Corps' partial motion to dismiss for lack of jurisdiction.

on issues such as fisheries and hydrology that should have been given more weight by the Corps.

Further, the Corps' failure to adequately address these issues and reliance on MDNR's EIS is more troubling in light of the Diversion Authority's construction activities. As one court indicated, researching environmental effects after a project is constructed is like "locking the barn door after the horses are stolen." *Lathan v. Volpe,* 350 F. Supp. 262, 266 (W.D. Wash. 1972), *rev'd in part on other grounds, Lathan v. Brinegar,* 506 F.2d 677 (9th Cir. 1974); *see also Nat'l Wildlife Fed'n v. Andrus,* 440 F. Supp. 1245, 1252 (D.D.C. 1977) ("The many references to future studies which will determine later the environmental impact of the powerplant reflect the fact that defendants have yet to make the sort of probing examination that is required by NEPA."). The JPA's National Environmental Policy Act claims are supported by the Corps' failure to adequately address MDNR's comments throughout the federal environmental review.

CONCLUSION

Starting a project before environmental review is completed undercuts the very purpose of environmental review by foreclosing alternatives and mitigation measures. Though the Diversion Authority asserts that all alternatives under consideration by MDNR would require the OHB Levee and acquisition of property in the path of the diversion channel, the Diversion Authority forgets that MDNR has not yet made its determination on distributed storage and that the alternatives under consideration include a "no action" alternative. (Second Doneen Decl., ¶ 6-8.) The Diversion Authority's work

on the Project forecloses other alternatives under consideration in the State's environmental review process – rendering that process meaningless.

Dated: March 12, 2015.

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