

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

Richland/Wilkin Joint Powers Authority, a)	
Minnesota-North Dakota Joint Powers)	
Authority,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 0:13-cv-02262-
)	JRT-LIB
United States Army Corps of Engineers; John)	
McHugh, Secretary of the US 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, US Army Corps of)	
Engineers (in his official capacity),)	
)	
Defendants.)	
)	
and)	
)	
Fargo-Moorhead Flood Diversion Board of)	
Authority, a Minnesota-North Dakota Joint)	
Powers Authority,)	
)	
Defendant-Intervenor.)	

PLAINTIFF’S STATUS REPORT

In its Preliminary Injunction Order and Memorandum this Court wrote:

“When considering a project of this size, scope, and potential environmental impact, the review process must be completed first. When Minnesota has completed a State FEIS and an adequacy determination, the Court will further consider this case.” p. 52-53

The Order concluded:

“The JPA’s motion for a preliminary injunction [Docket No. 122] is GRANTED against the Authority until further order of this Court.” P 53

It is appropriate, therefore, that the parties begin a dialog on how the Court should “further consider this case” once there is an adequacy determination. However, we think it is entirely inappropriate and imprudent that the parties attempt to address this unilaterally.

On Friday, May 13, 2016, Defendant-Intervenor’s counsel arranged a phone conference with the undersigned to advise us that on the following Monday, the Department of Natural Resources would be holding a press conference in connection with the issuance of the Minnesota Final Environmental Impact Statement. Neither Plaintiff nor Intervenor had received an advance copy of the FEIS. Under Minnesota law, the FEIS, when issued, is published for public comment on whether the FEIS is adequate. Public comment is due ten days from issuance. If determined adequate, the FEIS does not authorize a project, nor select among alternatives: in fact, in this case the FEIS identifies at least one alternative project configuration which is less environmentally damaging and develops significantly less floodplain than the Locally Preferred Project. Moreover, the FEIS defers to the permitting phase the issue whether MEPA requires selection of the NED project on section 116D.04 subdivision 6 grounds¹. Once the FEIS is determined adequate, the project proponent is free to seek permits, but a final EIS by no means determines the project proponent’s right to a permit.

¹ This arises because the DNR interprets MEPA to consider in the EIS only alternatives which meet the project purpose narrowly defined by the project proponent but DNR recognizes that section 116D.04 subdivision requires a broader consideration of project alternatives in the permitting phase.

Intervenor advised that the Diversion Authority would be proceeding, unilaterally, to conduct eminent domain proceedings to acquire property for the diversion inlet, at a location specified by the Locally Preferred Project. That location will not be needed in the event that other alternatives under serious consideration are chosen. Intervenor also advised that it would be proceeding, again unilaterally, with construction of that inlet, with construction to occur later in the summer and that it intended to file a status report to that effect with this Court. Intervenor invited Plaintiff to file its own status report or otherwise respond, and we file this, our status report as a response.

1. The Minnesota FEIS Reinforces the Foundation for the Preliminary Injunction.

On May 16, 2016, the Minnesota Department of Natural Resources posted a 528 page Final Environmental Impact Statement (FEIS) accompanied by about 190 Megabytes of appendices. The Minnesota FEIS is intended to be used a source of information in connection with required Minnesota permitting sought by the flood control project. At a press conference held by the Department of Natural Resources, the Commissioner is reported by the Minneapolis Star and Tribune to have stated that the FEIS reflects “*serious concerns*” by the Department regarding aspects of the proposed project.² It is clear both from the public comments of the Commissioner, and from the FEIS itself, that multiple project configurations will be under consideration in the Minnesota permitting.

2. FEIS not a Decision Document. The Minnesota FEIS is not a decision document. It supplies data to the Minnesota permitting process. In oral argument, Diversion Authority asserted that when the FEIS was prepared the Court could be assured that only the Locally

² *DNR has concerns over flood diversion Proposed project would keep Fargo dry by sending water into Minnesota. Minneapolis Tribune, May 16, 2016,*

Preferred Plan would be a suitable and feasible project alternative. That prediction has not been vindicated by the FEIS that was actually prepared.

3. Alternatives Under Consideration will Reduce Environmental Impact. The FEIS clearly advances two other alternatives for serious consideration in the permitting phase. One of those alternatives would reduce the area of flood plain developed and protected, thereby reducing the volume of water diverted by the proposed project. It would fundamentally change the hydrology of the project for the better, and it would materially change the location of the inlet structure which the Diversion Authority now proposes to acquire property for. If that alternative were adopted the takings and construction contemplated by Diversion Authority in its Status Report would be rendered unnecessary. In the permitting process, plaintiff will be advancing the position that Minnesota's Environmental Policy Act prohibits Intervenor from obtaining a permit for the Locally Preferred Project because there are superior feasible options which flood protect Fargo-Moorhead. While the FEIS really deserves more study than the filing of immediate Status Reports allow, it does seem evident at this point that the FEIS supports our position in this regard.

4. Possible Rejection of Locally Preferred Project in Preference to a Minnesota Statutes Section 116D.04 subdivision 6 feasible alternative. A second alternative, the "no-action alternative" has been retained in the FEIS as a viable option. The "no-action alternative" would be triggered if Minnesota finds in the permitting process that this project violates the requirement of Minn. Stat. Section 116D.04 subdivision 6, because the proposed project inflicts unnecessary and avoidable damage on large portions of Southern Cass and Clay Counties and Northern Richland and Wilkin Counties, or that the project proponent improperly narrowed the project purpose. The "no-action alternative" does not imply that there would be no flood

control protection for Fargo-Moorhead, but rather would find that MEPA's feasible alternative requirement requires the project proponent to propose a project that avoids flooding other communities and developing the floodplain. The "no-action alternative" could also be selected if Minnesota finds that the flooding of other communities to develop the floodplain violates the permitting conditions of Minnesota law. As we explained, Minnesota Statutes, Chapter 103G and its public waters permitting process do not authorize the construction of a dam when it inflicts damage on other communities under these circumstances. There exist alternatives that protect Fargo and Moorhead, without intentionally flooding communities south of Fargo.

5. Next Steps. The DNR's "Next Steps" Document clearly shows that the issuance of the FEIS does not negate the need for the preliminary injunction as predicted by Diversion Authority. On the contrary, the FEIS strengthens the legal and factual foundation for that injunction.

6. Water Resources Development Act (WRRDA-2014) and Minnesota Environmental Policy Act (MEPA-Chapter 116D) prohibit takings and construction. As we explained in conjunction with our motions, the Federal EIS authored by the USACE expressly found that a Minnesota Environmental and Permitting review was required to fill gaps intentionally left in the Federal EIS. Because WRRDA 42 USCA § 2232 requires a local sponsor to obtain state required permits, USACE had to choose between conducting the Minnesota environmental review jointly, or it had to defer to Minnesota. Also, NEPA regulations require the FEIS to examine and report potential conflicts with State law. USACE chose to defer this discussion to the Minnesota EIS and permitting process.

Minnesota's automatic moratorium remains in place until the FEIS is determined to be adequate, and until permits are issued. Minn. Stat. §116D.04. The FEIS just issued does not

sustain Diversion Authority's assertion, made at the time of preliminary injunction argument that the FEIS would rule out all other alternatives. In fact, the FEIS very clearly includes a viable alternative which avoids flooding of Richland and Wilkin County, and locates the inlet which Diversion Authority proposes to construct in an entirely different location. And, as the State has explained, MEPA requires the permitting process to consider feasible and prudent alternatives which the project proponent refused to consider.

7. Parties should confer with Minnesota to Determine Whether Further Judicial Action is Required. The Status Report suggests that Diversion Authority can now proceed with eminent domain and possibly inlet construction based upon the issuance of an FEIS which has not even yet been determined adequate. We register our strong objection to that suggestion. The proposed inlet structure for which condemnation might proceed will be unnecessary under two of the alternatives which will be considered by Minnesota DNR during the permitting review and under the NED project preferred by USACE. Under Minnesota Law, permits cannot issue for the LPP if:

- (a) The DNR determines that the Norther dam location is a feasible alternative that avoids or reduces environmental impact;
- (b) the DNR finds that by excluding the NED project originally recommended by USACE, the Diversion Authority improperly narrowed project purpose, thus violating MEPA mandate to choose the least impactful feasible project;
- (c) The project fails to meet the criteria for permitting under state or local permitting requirements, which permitting is condition under the Chief's Report and WRRDA.

8. Finally, it is our position that MEPA prohibits the Diversion Authority and its Minnesota Members from selecting a final project alternative to advance to the permitting stage until after

considering the FEIS. An environmental review is an *action forcing document* which is designed to assist Minnesota governmental decision makers and their constituents to determine which project alternatives to select. Minnesota law did not allow Diversion Authority to make a final selection of the Locally Preferred Project until it considered the FEIS. In our view, before the Diversion Authority can select the LPP, it must engage in a process of considering the information contained in the Minnesota environmental review.

Dated: May 18, 2016

RINKE NOONAN

/s/ Gerald W. Von Korff

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