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. 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.	)	Civil Action No. 0:13-cv-02262-JRT-LIB

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT GRANTING DECLARATORY AND PERMANENT INJUNCTIVE RELIEF BARRING ACTIONS TO CARRY OUT FARGO-MOORHEAD PROJECT IN DEFIANCE OF MINNESOTA'S PERMIT DENIAL

I. Introduction

On October 3, 2016, the Minnesota Department of Natural Resources (DNR) denied public waters and dam safety permits to defendants Fargo-Moorhead Flood

Diversion Board of Authority (Diversion Authority) and the United States Corps of Engineers (USACE, or the Corps). See Declaration Exhibit 3. Diversion Authority has requested a contested case hearing to challenge the DNR's decision, see Declaration Exhibit 9, but in the meantime both USACE and Diversion Authority have announced their intention to build and operate the project notwithstanding Minnesota's denial of their permit application.[1] In response to our pre-motion conference communication, the Corps asserts that it can build in defiance of Minnesota's permit denial because this Court has already ruled in its favor on this issue, and that the Court's ruling is "law of the case." The Corps has provided us no other legal authority that would allow it to violate the express terms of the 2014 project authorization requiring a Minnesota permit. **Plaintiff moves the Court for partial summary judgment granting declaratory and permanent injunctive relief (or, if necessary, preliminary injunctive relief) against Diversion Authority and USACE barring actions to carry out the project in defiance of Minnesota's permit denial.**

Section 204 of the Water Resources Reform and Development Act of 2014 (WRRDA-2014) (codified at 33 U.S.C. § 2232(b)(2)) prevents a water resource development project from being carried out until the local sponsor first completes environmental reviews and obtains any required state authorizations. The federal feasibility study, incorporated by Congressional authorization through section 7002(2) of

[1] See *FM Leaders, Corps: We are committed to building the Diversion*, published October 6, 2016, accessed November 16, 2016 at http://www.fmdiversion.com/fm-leaders-corps-we-are-committed-to-building-this-project/

WRRDA-2014, expressly states that a DNR permit is among those required authorizations for this project. See Declaration Exhibit 2. Defendants' plans to start work on this project directly defies these provisions.

Section 3.14.4 of the federal feasibility report and environmental impact statement submitted to Congress explicitly recognized Minnesota's permitting power and required Diversion Authority to obtain DNR permits as a condition of going forward with this project. See Declaration Exhibit 1. That section states:

> *As part of implementing this project, t**he non-federal sponsors will be required to obtain a Minnesota Department of Natural Resources protected waters permit,** a water quality permit from the North Dakota Department of Health, a Sovereign Lands Permit and construction permit from the North Dakota Office of the State Engineer. I**n order to obtain the necessary permits from the State of Minnesota**, the non-federal sponsors must complete the scoping and review process required by the Minnesota Environmental Policy Act.*

This permitting condition was then incorporated into the Congressional authorization of the Fargo-Moorhead flood control project by WRRDA-2014 § 7002(2), which authorizes the Fargo-Moorhead flood control project but only to be carried out "substantially in accordance with the plan, and **subject to the conditions, described in the respective *reports*** designated in this section…." (emphases added). See Declaration Exhibit 2. The *reports* incorporated by this language in section 7002(2) are the Chief's Report and the federal environmental review—both of which insist that the project must comply with

Minnesota law[2]: (1) the Chief's Report requires that construction and operation of this project generally comply with state law; and (2) the federal feasibility report and environmental impact study recognizes that this project is specifically subject to Minnesota DNR permitting, see Declaration Exhibit 1.

Under an even broader umbrella, section 204 of WRRDA-2014 sets out two prerequisites which must be satisfied ***before*** any water resources development project can be carried out by a non-federal interest (such as Diversion Authority): the first is "to obtain any permit or approval required in connection with the project" under federal and state law; the second is to undergo a complete environmental review. 33 U.S.C. § 2232(b)(2). And again, both of these requirements were explicitly incorporated as conditions of this project in the Congressional authorization because of section 7002(2)'s incorporation of the Chief's Report and feasibility report/environmental impact study (section 3.14.4, see Declaration Exhibit 1).[3]

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[2] See Complaint ¶ 12. This memorandum references the third amended complaint to show that plaintiff's allegations directly allege that commencing construction in the absence of state approval and permits would violate federal law, including the terms of authorization in WRRDA-2014, and state law. The complaint consists of introductory allegations (¶¶ 1-18); allegations of general applicability to all counts regarding the project development (¶¶ 31-82); and allegations that the defendants threatened to take actions prejudicial to Minnesota's environmental review and permit process (¶¶ 82-87), all of which are incorporated by reference into all of the counts.

[3] Plaintiff's third amended complaint raised a concern that the defendants might seek to evade their obligations under section 3.14.4 either by prejudicing the Minnesota environmental review or the permitting by starting construction before both processes were complete. Complaint ¶ 5 ("A critical step in the approval process for a locally sponsored flood control project is obtaining the approval of the State or States in which the project is located"), and ¶ 6 ("The EIS that was submitted to Congress directly represented that the Minnesota environmental

Last time this matter was before the Court on a motion for relief, plaintiff sought a preliminary injunction to protect the integrity of the Minnesota environmental and permitting review. We asserted the Diversion Authority's conduct at that time defied Minnesota law by attempting to circumvent the environmental review and permitting process. Plaintiff is now before this Court because the environmental review and permitting process were not merely exercises—they are real and enforceable mechanisms by which the state seeks to protect its lands, citizens, and property. Minnesota demanded that the project go through an environmental review because that review was necessary to supply data and analysis for the public waters permitting process. Plaintiff brought the motion in the first instance, to protect the permitting process. The public has spent over $1 million to complete the environmental review, in order to secure a meaningful and enforceable permitting process.

The purpose of the preliminary injunction was to prevent Diversion Authority from defying the Minnesota automatic moratorium during the environmental review, so that the ultimate permitting review would be meaningful. Construction of a ring levee prejudiced Minnesota's environmental review and permitting process. The automatic moratorium was designed to prevent the project proposers from building a dam to flood Minnesota, when the state might later determine that the dam did not meet a Minnesota's standards for a permit.

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and permitting process would be respected and that the local sponsor would cooperate with that process").

The Minnesota environmental review was initiated, not as an empty procedural gesture, but because Minnesota found that the federal environmental review was inadequate to provide the analysis necessary to support the Minnesota state permitting process. See Doneen Declaration ¶ 16 (The Corps verbally informed the DNR that the local project sponsors would be required to meet the requirements for, and secure, all local and state permits.); federal environmental impact statement appendix U, p. 67 (AR0040797) (MnDNR recommends that that permit-level analysis be compiled and provided concurrently with the state environmental review process); federal environmental impact statement appendix S, p.46 (AR0056154).[4] The culmination of these discussions was the recognition by the USACE in the feasibility report and environmental impact statement that this project was subject to Minnesota public waters permitting, because it proposed to dam the Red River and flood Minnesota.

On October 3, 2016, the Commissioner of Natural Resources denied defendants' application for public waters and dam safety permits seeking to alter the course, current and cross section of public waters, and to dam the Red River to flood Minnesota. Notwithstanding that denial, Diversion Authority and USACE have announced that they intend to proceed with the project. The defendants are committing the same prejudicial violation of the conditions that that gave rise to the preliminary injunction, and about which we complained throughout the amended complaint. According to the Diversion Authority's public relations website, USACE Project Manager Aaron Snyder stated at a

[4] See Complaint ¶ 6.

press conference on October 6, 2016 that the Corps is "going to continue moving forward with this project," despite the permit denial three days earlier.[5] Plaintiff's claim that defendants would defy Minnesota's permitting authority, a claim that this Court recognized as speculative in its prior order, is now ripe for adjudication.

There is simply no basis for asserting that this project can be conducted without Minnesota permits, which have now been denied for the design as proposed by defendants. In this motion and memorandum, we contend:

- That the federal feasibility report and environmental impact study, the Chief's Report, and the Minnesota environmental review all contain explicit recognition that this locally-sponsored project must comply with Minnesota permitting requirements.

- That the Congressional authorization was explicitly conditioned upon compliance with Minnesota permitting. Any attempt to carry out the project without a Minnesota permit exceeds the authority granted to the Diversion Authority and the USACE by WRRDA-2014.

- That a non-federal interest must obtain state authorization and permits before carrying out a water resources development project. 33 U.S.C. § 2232(b)(2).

- That, although defendants seek to evade the permitting requirement by allocating some of the construction to USACE through a "Project Partnership Agreement" (PPA) and then claiming that the work performed by USACE cannot be stopped, even though unlawful, because USACE is allegedly immune, a federal district court has jurisdiction to enter relief against actions to carry out a water resources development project in ways that exceed the conditions in the federal authorization. *State of Mo., ex rel. Ashcroft v. Dep't of Army, Corps of Engineers*, 526 F. Supp. 660, 667 (W.D. Mo. 1980), *aff'd sub nom. State of Mo. ex rel. Ashcroft v. Dep't of the Army*, 672 F.2d 1297 (8th Cir. 1982); see also 5 U.S.C.A. § 706; *Citizens Comm. for Hudson Val. v. Volpe*, 425 F.2d 97, 100 (2d Cir. 1970)

[5] See *FM Leaders, Corps: We are committed to building the Diversion*, published October 6, 2016, accessed November 16, 2016 at http://www.fmdiversion.com/fm-leaders-corps-we-are-committed-to-building-this-project/

(sovereign immunity does not protects an agency from conduct that exceeds statutory limitations); *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Sackett v. E.P.A.*, 132 S. Ct. 1367 (2012).

- That building the project without Minnesota authorization and permits removes a critical environmental protection contained in the federal feasibility report and environmental impact study. It is a material change in the project which would require a supplemental federal environmental impact statement and reauthorization by Congress.

II. Summary of Procedural History

After a lengthy feasibility study, including an environmental review, in early 2010, the USACE recommended a Minnesota $1.2 billion short diversion as the National Economic Development (NED) project.[6] The NED project was recommended because it best met national objectives, provided the maximum benefit-cost ratio, and minimized environmental harm without causing unacceptable downstream flooding. Local sponsors rejected the NED project and sought certification of the locally-preferred project (LPP), to drain an additional 50 square miles of floodplain and open that floodplain to urban development. The USACE initially accepted this request, based upon an erroneous certification by the St. Paul USACE district that elimination of that flood storage would not cause unacceptable downstream flooding. See AR0011763 ("Invalid assumptions concerning extent of downstream impacts").

However, at the very last minute, USACE St. Paul District conceded that its certification was incorrect. See AR0011763. The LPP could not drain 50 square miles of floodplain during major floods without causing significant downstream flooding. At

[6] See, for example, the executive summary of the federal environmental impact statement.

Diversion Authority's request, USACE, St. Paul District, advocated that Diversion Authority should be allowed to expand development into the floodplain anyway, and proposed to build a dam just upstream of the floodplain Fargo wanted to protect. This dam would back waters from the Red and its tributaries into two Minnesota and two North Dakota counties (southern Cass and Clay and northern Richland and Wilkin counties). This plan radically changed the impacts of the project which would now flood vast reaches of Minnesota (not to mention upstream North Dakota communities) in order to promote development in Fargo's floodplain. Doneen Declaration Doc D-81 ¶ 10.

Minnesota's DNR and a variety of impacted communities challenged this radical last-minute change in the project. AR 54804-07, 56327, 56342; Von Korff Declaration dated July 13, 2015, Exhibits N, O. Minnesota informed USACE that the revised project would need Minnesota permits, and to support a permit decision, either the USACE would have to supplement its environmental review further to provide a "permit level" review, or Minnesota would have to conduct its own environmental review. See Supp. Draft EIS Appendix Q Public Involvement and Coordination; AR0019967-68 (DNR Environmental Chief Doneen warns of difficulty of permitting projects that are not consistent with the goals of the 1998 Red River Basin Flood Damage Reduction Work Group mediation agreement).

Minnesota's concerns placed in jeopardy the prospects of obtaining a Chief's Report submission to Congress in time to be included in next Water Resources Development Act, because water resource development projects are conducted in

compliance with state land-use and water policy and thus require active support of the impacted states. To avoid further delay[7], USACE and local sponsors decided to defer Minnesota concerns to a Minnesota environmental and permitting review. Well before the federal final environmental impact statement was complete, USACE verbally assured Minnesota that a Minnesota environmental review would be enforced by the federal review. Doneen Declaration D-81 ¶ 16ff. The project would be required to satisfy Minnesota's environmental law. Then, as referenced above, this commitment was made explicit as an authorization condition through section 3.14.4 of the federal feasibility report and environmental impact study.[8] The project was sent to Congress with a feasibility report that contained explicit recognition of Minnesota's right to conduct an environmental review and its right to exercise its permitting powers.

At first, USACE and Diversion Authority acted in compliance with these project conditions. USACE and Diversion Authority commenced the Minnesota environmental review with an environmental assessment worksheet which reaffirmed the federal commitments and again recognized that Minnesota permits would be required. See Declaration Exhibit 5. When the Congress authorized the project in WRRDA-2014 § 7002(2), then, both project sponsor and USACE had initiated the Minnesota environmental review under a framework that explicitly identified Minnesota permits as a project requirement.

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[7] See Complaint ¶ 60

[8] See Complaint ¶ 24.

Then, WRRDA-2014 authorized the project "subject to conditions contained in the Reports," thus incorporating the condition that the project must comply with Minnesota's environmental and permitting laws. However, as soon as the act passed in Congress, the Diversion Authority began to renege on the conditions in the federal feasibility report and environmental impact study and state environmental assessment worksheet. Suddenly, Diversion Authority began to tell the public that the authorization contained in WRRDA-2014 expunged and overrode Minnesota's permitting authority. Despite the fact that WRRDA-2014 section 204 contains provisions barring efforts to carry out the project until completion of the environmental reviews and until state authorizations and permits were obtained, the Diversion Authority orchestrated a public campaign to delegitimize Minnesota's rights to exercise its permitting authority. This was the core of the complaint that led to the preliminary injunction.[9] That campaign continues to this day. Yet, the very same WRRDA-2014 section that requires compliance with the state environmental review also specifically demands that efforts to carry out the project may not commence until state authorizations and permits are obtained. 33 USC § 2232(b)(2), exactly as pled in the amended complaint. As discussed above, plaintiff sought preliminary injunctive relief to challenge Diversion Authority's contention that the conditions contained in section 3.14.4 were expunged from the project by the Congressional authorization.

[9] See for example Complaint ¶¶ 5, 6, 8-h, 9, 12, 24, 60, 68, 100-105.

Premature Signing of the Project Partnership Agreement

Congress authorized certain remaining funds to the USACE for up to five new construction starts. Public Law 114–113—DEC. 18, 2015. Water resource development projects operate through local sponsors. Lokkesmoe Declaration D-80. ¶ 10:

> *The local sponsor is required to pay a substantial share of the cost of the feasibility/environmental review studies (50/50 percent) and of the design and the construction of the project (65 federal/35 nonfederal percent). The local sponsors are also required to obtain all flowage easements and other property interests required for construction of the project and obtain all necessary State and local permits. The local sponsor must also agree to own and operate the project upon completion*

Surely Congress did not want the Secretary tying up limited new start money on a project that was not ready to go, so it insisted that only new starts that were fully ready to begin would receive that money. For this reason, any new project start would have to have a project partnership cost-sharing agreement signed "as soon as practicable, but no later than August 31, 2016." Public Law 114-113, supra, division D, Title I. The authorization did not designate a specific project, nor did it authorize the Secretary or purport to authorize the Secretary to start construction in ways inconsistent with the terms of the WRRDA-2014 conditions. There was no override of the permit requirement nor any qualification of the protections contained in the feasibility report and environmental impact statement or Chief's Report.

Executing a Project Partnership Agreement (PPA) is a major step forward in carrying out a water resources development project. WRRDA prevents commencing a project that is not ready to go, lest funds be allocated to projects that cannot be

completed, or worse, allocated to projects that have to be redesigned because proper authorizations had not been obtained.[10] See 33 USC § 2232. That is one of the reasons for the prohibition against starting a project when it lacks State permits and authorizations. See id.

The Assistant Secretary certainly must have recognized that signing a PPA would violate the carry-out prohibition. She knew also, that even at the most optimistic pace, no permit would issue, no state authorization obtained, until well after the August 31, 2016 deadline. So, she decided, it appears, to fudge her way around the no "carry out" problem by proposing to review the project status before August 31, 2016. If the project was likely to receive a permit, she would sign a PPA under the theory that soon, the project could actually be carried to construction. Possibly, she thought that she could declare the PPA signed before August 31, 2016 as legal under section 2232 on a nunc pro tunc basis, once a permit was granted.

However, since she only had $5 million of spare start-up money left to give, no major construction could take place without most of the funds supplied by the Diversion Authority. Diversion Authority transferred $45 million to the USACE account for this purpose to match the USACE's five million. On June 29, 2016 the Minnesota DNR issued detailed findings determining that the state environmental impact statement was

[10] Sec. 5014 grants the Secretary authority channel certain projects through a pilot program. Known as the Water Infrastructure Public-Private Public-Private Partnership Pilot Program. However, this program does not exempt these projects from Section 204 of WRRDA-2014, nor does it exempt them from NEPA, nor from the conditions incorporated in the authorization. Section 5014(i)(2).

adequate. However, the findings and accompanying documents made it crystal clear that the environmental impact statement and adequacy determination should not be taken as implying permit approval. The DNR's official release accompanying the findings stated as follows[11]:

> *The DNR's environmental review process has been thorough and objective. The EIS identifies several significant concerns about this project that will need to be addressed prior to permitting decisions," DNR Commissioner Tom Landwehr said. "A particular concern regards how the project would impact the area upstream of the dam."*
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> *Landwehr emphasized that the EIS is not a decision-making document, but instead identifies the potential impacts of the proposed project. Under Minnesota law, the appropriate place to address the issues identified in the Final EIS is the permitting process. Primary unresolved questions noted in the EIS include:*
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> - *Whether the proposed Fargo-Moorhead flood diversion project is a reasonable alternative to address flood risks in the area.*
> - *Whether the proposed project is compatible with land use and water management plans in the area.*
> - *Concerns that the proposed mitigation does not satisfactorily address all the impacts the project would have on the area.*

See also Declaration Exhibit 10.

As the time to implement her proposed fudge to the no-carry-out requirement, the Assistant Secretary evidently decided to certify that the permit was likely to be granted, without engaging any diligence at all. Both the Governor and Commissioner's office

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[11] http://news.dnr.state.mn.us/2016/05/16/final-environmental-impact-statement-for-fargo-moorhead-flood-diversion-highlights-dnr-questions-about-project//

have declared that the Assistant Secretary made no attempt to get an authoritative statement on whether permit grant was likely. See Declaration Exhibits 6, 7. On July 11, 2016, the USACE issued a completely baseless certification that Diversion Authority was likely to resolve Minnesota's permitting issues and USACE signed a Project Partnership Agreement with Diversion Authority, hoping that this would be rendered retroactively lawful under section 2232 by a later permit grant. In response, Governor Dayton and Commissioner Landwehr both strongly issued formal objections that the certification was issued without consulting with the DNR and explicitly warned the USACE that there was no basis for asserting that Minnesota permits would be granted. See Declaration Exhibits 6 and 7. The USACE and Diversion Authority began to propagate the view that by some device, they could circumvent the permitting requirements contained in the federal feasibility report and environmental impact study.

DNR Permit Denial

On October 3, 2016, Commissioner Landwehr issued a 50 page permit denial containing factual, policy and legal conclusions denying the application for permits. See Declaration Exhibit 3. In our third amended complaint, we pled that Minnesota law would compel this result. Among the findings are:

a. Between the years 2020 and 2040, Fargo's projected growth is expected to require just under 11 square miles. Over 60% of the City's growth by the year 2040 is expected to be within existing city limits and just over 30% (approximately 4 square miles) is estimated to require the unincorporated extra-territorial boundaries. Fargo Growth Plan, 2007. Protecting sparsely populated lands currently within the floodplain for the future development of the F-M metropolitan area is, therefore, inconsistent with Fargo's development plans

b. The project proposal to allow development in the floodplain immediately downstream of the dam is not consistent with either current Federal or State policy because dams can and do fail, and allowing development in vulnerable areas would increase the consequences of a dam failure or improper operation.

c. DNR concludes that the average projected annual damages from floods, assuming no emergency measures is about 25% of the amount advanced by USACE in support of the application. ($51 million versus $194 Million)

d. The USACE's inflated the projected damages by excluding emergency measures.

e. Existing flood risk reduction measures in combination with emergency measures currently already provide flood protection over the 100-year flood event in developed areas. This 100 year flood protection utilizes an already elevated 100 year flood that projects flooding at 30% greater than any flood which has occurred in the past 100 years. Therefore, the additional benefits that would be provided by the proposed Project are to: (1) eliminate the need for flood insurance; (2) protect sparsely developed rural property for future development, and (3) provide greater protection over the [already inflated] 100-year flood event.

f. Should a breach occur, as set forth in ¶¶ 92 - 94 and ¶¶ 123 - 128 the proposed Project as constructed is not protective of the public health and safety as required by Minn. Stat. § 103G.315, subd. 3 (2014) and Minn. R. 6115.0380, subp. 1 and 6115.0410, subp. 8 (2015).

g. The Federal Benefit Cost Ratio (BCR) utilized in justifying the LPP is misleading because a number of benefits that are claimed as Project benefits are currently provided by present flood control plus emergency measures and are not added benefits of the proposed Project.

h. The review of the economic analysis and flood control benefits performed for the proposed Project does not establish that the quantifiable benefits support the need for the Project as required by Minn. R. 6115.0410, subp. 8C (2014). Additionally, the permanent economic benefits attributed to the proposed Project do not contribute to the public welfare in a meaningful way. Minn. Stat. § 103G.315, subp. 3.

i. Constructing a Class I (high hazard) dam is neither reasonable nor practical in light of the incremental increase of flood protection afforded to existing development in the F-M Metropolitan area. Minn. Stat. § 103G.315, subd. 3 (2014). (Par 136.)

j. For the reason set forth in ¶¶ 144 and 145 the DNR concludes that the adverse effects of the proposed Project are not certain to be mitigated as required by Minn. R. 6115.0190, subp. 5G, 6115.0200, subp. 5F-G, and 6115.0210, subp. 5D (2015).

k. For purposes of its permitting decision and for the reasons set forth in ¶¶ 135 - 137, the DNR concludes that the primary benefits of the proposed Project over the No Action Alternative with Emergency Measures in the F-M metropolitan area are economic benefits. Economic considerations alone are not sufficient to meet the permitting criteria set forth in state law including Minn. Stat. § 116D.04, subd. 6, Minn. Stat. Ch. 116B (2014) and Minn. R. Minn. R. 6115.0200, subp. 5C 6115.0250, subp. 1a (2015).

l. The Permit Applicant has failed to establish that there is a "lack of other suitable feasible site[s]" as required by Minn. R. 6115.0410, subp. 8A.(2015). As outlined in ¶¶ 17, 20 – 21, 32, and 52 the DNR concludes that the No Action Alternative with Emergency Measures is a suitable, feasible, and prudent alternative to the proposed Project within the meaning set forth in Archabal v. County of Hennepin, 495 N.W. 2d 416, 422 (Minn. 1993) .

m. The proposed Project appears to be inconsistent with the underlying intent of E.O. 11988 and E.O. 13690. …..

Following issuance of the permit denial Diversion Authority and USACE announced their intent to defy the permit denial and proceed full speed ahead, as if the permit proceedings were a nullity. Plaintiff then provided USACE's counsel with notice of intent to bring this motion; in a meet and confer correspondence, the USACE contended that this Court had already decided that sovereign immunity protected USACE against a claim that its actions violate WRRDA-2014 or that they depart from the conditions of authorization.

ARGUMENT

III. Commencing this Project Under the Project Partnership Agreement is an Unauthorized Attempt to Carry Out this Project.

(A) Commencing this Project before Minnesota Permits and Authorizations Violates 33 USC § 2232(b)(2).

Title 33 Section 2232(b)(2) provides that "Before carrying out a water resources development project, or separable element thereof, under this section, a non–Federal interest shall….Obtain any permit or approval required in connection with the project or separable element under Federal or State law;" 33 USC § 2232(b)(2)(A). In our pre-motion communications with USACE and Diversion Authority we received no principled explanation as to why this project can lawfully be "carried out" in the absence of a Minnesota state permit and authorization. In oral argument at one point, USACE has suggested that the project doesn't need permits, because the only permits that are covered by this statute are permits "required….under State law," implicitly suggesting that since all WRDA projects are federal, no state permits can be "required." That argument would negate the word "State" in the statute, and amend it by fiat to say, that no State law permitting shall apply to WRDA projects. Moreover, USACE's argument on whether public waters permits are not among the permits required is obliterated by section 3.14.4 in which USACE itself which lists those permits as required State permits.

The requirement that state permits be obtained for this project is a condition of Congressional authorization. Neither Diversion Authority nor USACE have been authorized to carry out any part of this project in defiance of the conditions contained in

that authorization. Section 2232(b)(2) could not be clearer that permits and state authorizations must be obtained before carrying out the project, precisely because commencing work on a project before state permits and authorizations have been obtained wastes public resources and prejudices the possibility that the permits might require a change in project configuration.

The Secretary indirectly has acknowledged with her attempt to treat the project as if it were going to get a permit that signing a PPA is an act of carrying out the project. The phrase carry out is used throughout the Water Resource Development Act in the broadest possible sense. E.g., 33 USC §§ 2211(4), 2213(m)(3)(b), 2222 and many dozens of others. The Secretary is authorized an appropriation to "carry out this section." 33 U.S.C.A. § 2220(b). Funds may be accepted from other agencies to carry out a study or project. 33 USC §2222. Carry out thus is an all-encompassing term as used in the Act. Section 2340 refers to the total amount of funds authorized to be carried out by the Secretary.

The phrase "carry out" clearly encompasses construction. Section 2232(b)(2)(B) says that

> *"Before carrying out a water resources development project, or separable element thereof, under this section, a non–Federal interest shall… ensure that a final environmental impact statement or environmental assessment, as appropriate, for the project or separable element has been filed."*

If carrying out did not encompass construction, this section would be allowing commencement of the project before the final environmental impact statement had been

filed. The statute encompasses only one exception: if a portion of the project is a "separable element" that portion can be treated as a separate and distinct unity. Indeed, this single exception strongly suggests that no others are allowed.

A "Separable element" is defined as a portion of a project— (1) which is physically separable from other portions of the project; and (2) which—(A) achieves hydrologic effects, or (B) produces physical or economic benefits, which are separately identifiable from those produced by other portions of the project. 33 U.S.C. § 2213(f). The statute is seeking to prevent investment of funds into the project, if it is possible that the project will not be approved. Only if a portion of the project provides independent value such that this "separable element" can stand alone and justify the independent investment of taxpayer dollars, can that portion of the project be separately evaluated for state authorization, state permitting and completion of a separate environmental review.

"Before carrying out a water resources development project, or separable element thereof, under this section, a non–Federal interest shall….

> *Obtain any permit or approval required in connection with the project or separable element under Federal or State law;" 33 USC § 2232(b)(2)(A)*

The statute is again preventing prejudicial investment of public funds into a project that cannot be built because permits required under State law cannot be obtained. The inclusion of permits required under State law belies any suggestion that state permits are not required: the statute explicitly recognizes the application of State laws and state approvals. USCAE's inclusion of the permitting requirement in section 3.14.4

represents an interpretation by the agency that these permits are required permits under section 2232. The agency's change in position on this is situational, circumstantial, arbitrary and capriciously designed simply to bull over a law that now is deemed inconvenient.

(B) Commencing Construction Violates the Authorization Conditions and Exceeds USACE Jurisdiction.

The federal authorization of this project leaves no room for doubt that Minnesota public waters permits are the kind of permits required under State law. Section 3.14.4 of the federal feasibility report and environmental impact study could not be clearer. It is the local sponsor's responsibility to obtain those permits and section 2232(b)(2) makes it equally clear that the project may not be carried out until those permits are obtained.

The structure of these locally sponsored projects imposes certain duties on the local sponsor, and these duties are conditions of moving forward with the project. The local sponsor acquires the real estate upon which the construction will take place. The local sponsor provides financial guarantees and pays a portion of those funds in advance of construction. If USACE intends to carry out a portion of the project, it does so by prearrangement and agreement with the local sponsor. The PPA is a partnership agreement: the acts of one partner are acts of the other. Allowing USACE to carry out portions of the project in violation of the authorization would eviscerate the terms of that authorization. Allowing the local sponsor simply to delegate to the USACE any part of the project that carries with it an inconvenient constraint, would mean that there are no longer any constraints.

(C) Commencing Construction without Minnesota Permits Violates the National Environmental Policy Act.

Under regulations promulgated by the Council on Environmental Quality, interpreting the National Environmental Policy Act (NEPA), a supplemental environmental Impact Statement is required when "the agency makes substantial changes in the proposed action that are relevant to environmental concern." 40 C.F.R. § 1502.9. During oral argument, counsel for Diversion Authority has argued that the authorization locks the project configuration in stone: material changes in the project cannot occur, he has argued, without a supplemental authorization. Now, this argument was advanced to negate the possibility that any other alternative to reduce or eliminate flooding of the upstream communities could be considered after the authorization. Yet, here, Diversion Authority and USACE are about to completely eliminate the most significant environmental protection available to Minnesota citizens and communities—the most important aspect of the project protecting them from the possibility that this project will be used in an unbridled way to pour water onto Minnesota communities whenever it suits the economic advantages of North Dakota interests. Diversion Authority evidently believes that all of the features that Diversion Authority's communities like are sacrosanct, but any of the features that protect upstream and downstream communities can be expunged from the project authorization at will.

The Minnesota permitting requirement is a fundamental protection to Minnesota citizens. The project is run by local sponsors dominated by North Dakota governments who are seeking to flood Minnesota to develop North Dakota. The federal feasibility

report and environmental impact study diverted these issues to the Minnesota permitting process. The federal feasibility report and environmental impact study essentially said, there are major Minnesota concerns to address, but we won't address them here in the federal environmental review; instead, we will reassure Minnesota by acknowledging that Minnesota permitting authority is retained.

Parenthetically, this was not Minnesota's preferred method of handling this issue. Federal law prefers that the federal environmental review work in conjunction with the state process. 40 CFR § 1500.5 (n); 1500.6 (h); § 1501.7 (a). Together, the State and Federal Government are supposed to assess "Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. 40 CFR § 1502.16. When Minnesota raised the concerns about conflicts between Minnesota law and policy, the proposers could have attempted to resolve those concerns within the framework of the feasibility and environmental review. Instead, they intentionally created serial review of these issues, but explicitly assured Minnesota that its permitting laws would apply.

Defendants have turned the environmental review and the authorization into a giant bait and switch. Protection of Minnesota's regional, state and local land use policies and controls, and protection of its water policy was expressly delegated to the Minnesota permitting and environmental review. That commitment was incorporated into the federal authorization as a material protection of Minnesota's environment.

Removing those protections is an unauthorized material change implicating important environmental consequences. This shouldn't ever occur when the protections are a part of the authorizing legislation itself. Material changes implicating the requirement for a supplemental environmental review typically occur in the context of an agency's exercise of its discretion to carry out its delegated mission. *See Nat'l Parks Conservation Ass'n v. Jewell*, 965 F. Supp. 2d 67, 71 (D.D.C. 2013) (power line permit); *Employees for Environmental Responsibility Pub. Employees for Envtl. Responsibility v. U.S. Dep't of the Interior*, 832 F. Supp. 2d 5, 10 (D.D.C. 2011) (EIS prepared in connection with proposed regulation). Here, the defendants are blatantly ignoring the conditions incorporated into the federal authorization. USACE is changing a feature of the project it is not authorized to change and then claiming the right to exceed its authority with impunity. This Court has NEPA jurisdiction to declare the attempt to remove key protections for Minnesota communities without a supplemental environmental review and new authorization.

IV. Administrative Procedure Act provides jurisdiction over the Corps in this action.

(A) This Court's prior decision did not Determine that USACE Could Violate the Water Resource Development Act by Conducting Construction Work on Diversion Authority's Behalf to Violate the Permit Requirements.

In written pre-motion conference, USACE asserted that we could not seek relief against federal defendants because this court allegedly already barred that relief it its dismissal of federal defendants. On the contrary, this Court dismissed our state law claim against the federal defendants as parties who might be interested in the outcome of the

s***tate law dispute***. At that time, the only dispute (other than the federal NEPA dispute) that was ripe for adjudication was our claim that Diversion Authority was violating the Minnesota automatic moratorium. Federal Defendants stated that they had taken no final action which is a prerequisite to Administrative Procedure Act jurisdiction. All parties agreed that the claim that defendants might actually build the project in defiance of the Minnesota permitting requirement was not ripe for adjudication. For its part, Diversion Authority asserted that the permits were surely going to be granted: We asserted that the permits could not lawfully be granted, but both parties acknowledged that litigating what might happen if defendants defied the permit requirement was premature.

Federal defendants' dismissal on this point was both interlocutory and without prejudice, and thus subject to revision at any time. FRCP 54(b) ("Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities"). *See U.S. v. State of Ark.*, 791 F.2d 1573 (1986) (state defendant dismissed seven years before could be reinstated because dismissal involved fewer than all parties or claims). This Court retains jurisdiction to address its equitable relief to "other persons who are in active concert or participation" with the primary party. Rule 65(d)(2)(C). If federal defendants were not already parties, addressing an injunction to a non-party acting in concert would be accomplished by an amendment to the complaint or motion to add them as addressees of

an injunction. But here, federal defendants are already parties, they have repeatedly announced their intention to defy Minnesota's permit denial. For that reason, we gave Federal Defendants reasonable notice of our intent to reactivate their participation by motion. Although this case is not yet concluded, even under Rule 60(b)(5),(6) the court can modify its final judgment on the grounds that applying the judgment prospectively is no longer equitable, or for any other reason that justifies relief. The equitable powers of this Court are broad enough to prevent parties from conspiring to circumvent equitable relief.

(B) APA Provides this Court with Jurisdiction to Prevent the USACE from Taking Final Action Prejudicial to Plaintiff Communities that Exceeds the Authority Granted by WRRDA-2014.

That brings us to the possible contention that USACE can use sovereign immunity claims to eviscerate the permitting requirements contained in section 3.14.4 of the federal feasibility report and environmental impact study and 33 U.S.C. § 2232. If this were possible, it would effectively eliminate compliance with any of the conditions imposed on a project and incorporated into the project authorization by law. For example, the current feasibility report and environmental impact statement proposes to mitigate the damage to Oxbow by building a ring levee around Oxbow, Hickson and Bakke. That mitigation is a condition of the plan to build a dam that would otherwise flood those communities. However, if Diversion Authority delegated the construction of the Ring Levee to the USACE, then evidently, USACE contends that the Ring Levee could be constructed only around Oxbow, leaving Hickson and Bakke to be flooded. Against a

claim that the larger Ring Dike was part of the environmental mitigation, USACE's immunity argument leads to the conclusion that nobody can make the USACE keep the commitments made in the federal environmental review, and basically any representations in the federal review about the project are entirely illusory and unenforceable.

There is neither federal funding nor federal authorization for the Corps to proceed with the project at this time without the Minnesota permit. The LPP is a locally-sponsored project, and is subject to the statutory conditions for water resources development projects by non-federal interests. The Water Resources Reform and Development Act of 2014 (WRRDA-2014) authorized the parties to carry out the Fargo-Moorhead diversion project according to the completed final feasibility study (*i.e.*, environmental impact statement) and "subject to the conditions" of the Chief Engineer's Report dated December 19, 2011.[12] The Chief's Report recommended authorization of the project, with partial federal funding, "subject to cost sharing, financing, and other applicable requirements of Federal and State laws and policies."[13] The Chief's Report also required the local sponsor to "operate, maintain, repair, rehabilitate, and replace the project…in accordance with applicable Federal and State laws and regulations."[14]

The Corps can no longer disregard this litigation by arguing that it is not ripe for review. It has executed a project partnership agreement, participated in construction

[12] WRRDA-2014, § 7002(2)(4)
[13] Chief's Report, p.4 para.11
[14] Chief's Report pp.6-7, para.11(k)

activities, spent public dollars, and disseminated marketing materials concerning its intent to construct the LPP. Since Minnesota's denial of the public waters and dam safety permits on October 3rd, USACE has communicated its intent to persist in these activities. The USACE has taken final action that is plainly arbitrary, capricious and unlawful, in direct defiance of the authorizing conditions.

Amendments to the Administrative Procedure Act (APA) in 1976 clarified Congress's intent to ensure that the doctrine of sovereign immunity would not cause technicalities to prevail over justice, and that the doctrine would no longer "interfere[] with consideration of practical matters" or "transform[] everything into a play on words." *Bowen v. Massachusetts*, 487 U.S. 879, 892, 108S. Ct. 2722, 2731 (1988) (quotations omitted). Today, section 702 of the APA provides:

> *An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.*

5 U.S.C. § 702. This development in the law bears precisely on this situation where relator seeks equitable injunctive relief against an agency of the United States.

Section 706 of the APA also fortifies the Court's jurisdiction over the Corps in this litigation. It states:

> *To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning*

> *or applicability of the terms of an agency action. The reviewing court shall--*
> *(1) compel agency action unlawfully withheld or unreasonably delayed; and*
> *(2) hold unlawful and set aside agency action, findings, and conclusions found to be--*
> *(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;*
> *(B) contrary to constitutional right, power, privilege, or immunity;*
> *(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right*

5 U.S.C. § 706. The Court should decide the relevant legal questions and compel USACE to comply with federal and state laws, which have clearly proscribed carrying out this project as currently proposed. USACE's final decision to proceed in defiance of its jurisdiction meets all of the requirements for exercise of modern APA jurisdiction. *See Hawkes Co. v. U.S. Army Corps of Engineers*, 782 F.3d 994, 997 (8th Cir.), cert. granted sub nom. *U.S. Army Corp of Engineers v. Hawkes Co.*, 136 S. Ct. 615, 193 L. Ed. 2d 495 (2015), and aff'd, 136 S. Ct. 1807, 195 L. Ed. 2d 77 (2016); *Califano v. Sanders*, 430 U.S. 99 (1977); *Sackett v. E.P.A.*, 132 S. Ct. 1367 (2012). It is final, because it is taking lands, spending money irrevocably, and staking out a firm position that the Minnesota permitting power can be defied. Its actions in defying the permit denial are actions under which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' " *Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)

As the Corps continues with the current project—and it has plainly advertised its intention to do so—it is in excess of its statutory authority and limitations and otherwise

not in accordance with law. The APA clearly provides that this Court has jurisdiction over the Corps in this matter, and the Corps should be enjoined from any further activities to carry out the current project without a Minnesota permit.

V. A MERA Injunction Should Issue.

The Minnesota Environmental Rights Act (MERA) affords plaintiff a cause of action to protect natural resources against any person, including a governmental subdivision. Indeed, political subdivisions have a greater duty that a private individual to see that the legislative policy of this state. *Freeborn v. Bryson*, 243 N.W.2d 316(1976) (As a creature of the state deriving its sovereignty from the state, the county should play a leadership role in carrying out legislative policy).

> *"Pollution, impairment or destruction" is **any conduct** by any person which **violates, or is likely to violate, any environmental quality standard,** limitation, rule, order, license, stipulation agreement, or permit of the state or any instrumentality, agency, or political subdivision thereof which was issued prior to the date the alleged violation occurred or is likely to occur or any conduct which **materially adversely affects or is likely to materially adversely affect the environment**; Minn. Stat. §116B.02. (emphasis added). Minn. Stat. § 116D.02 subdiv 5.*

MERA affords redress for two classes of pollution. *State v. Schaller v. County of Blue Earth*, 563 N.W.2d 260 (Minn. 1997). Conduct which violates, or is likely to violate, and environmental quality standard, limitation… or permit of the state….[which] is likely to occur or any conduct which materially adversely affects or is likely to materially adversely affect the environment falls in the per se violation category. Diversion Authority's announced intention to carry out this project without a Minnesota permit

establishes that they are engaging in conduct which is likely to violate an environmental quality standard, that is, the public waters permitting requirement. *Gillette v. Peterson*, No. A03-997, 2004 WL 1191764 (Minn. Ct. App. June 1, 2004).

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