UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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

Plaintiff,

Minnesota Department of Natural Resources,

Plaintiff-Intervenor,

vs.

United States Army Corps of Engineers; Robert M. Speer, Acting Secretary of the U.S. Army Corps of Engineers (in his official capacity); Assistant Secretary of the Army for Civil Works (in her official capacity); and Col. Sam Calkins, 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,

and

City of Oxbow,

Defendant-Intervenor.

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

DNR'S MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Plaintiff-Intervenor, the Minnesota Department of Natural Resources ("DNR"), requests the Court grant its motion for preliminary injunction and enjoin construction by Defendant-Intervenor, Fargo-Moorhead Flood Diversion Board of Authority ("Diversion Authority"), and the United States Army Corps of Engineers ("Corps"), on the Fargo-Moorhead Flood Risk Management Project ("Project") until the DNR grants the Diversion Authority a public waters work and dam safety permit for the Project.

BACKGROUND

I. WRRDA 2014 REQUIRES THE DIVERSION AUTHORITY TO OBTAIN ALL PERMITS BEFORE CONSTRUCTION AND REQUIRES THE CORPS TO ENSURE THOSE PERMITS ARE OBTAINED.

Congress reaffirmed its long-standing position that state-federal partnerships and fiscal responsibility are central to the construction and management of flood control projects by mandating in the Water Resources Reform and Development Act of 2014 ("WRRDA 2014") that local non-Federal interests obtain all necessary permits before construction begins. WRRDA 2014 requires that "[*b*]*efore* carrying out a water resources development project … a non-Federal interest *shall … obtain any permit* or approval required *in connection with* the project … under Federal or State law." 33 U.S.C. § 2232(b)(2) (emphasis added). WRRDA 2014 also requires the Diversion Authority "ensure that an environmental impact statement ("EIS") . . . has been filed" for the project. *Id.* In short, Congress requires non-Federal interests such as the Diversion Authority to take two steps before carrying out a taxpayer-backed water resource project: (1) ensure that environmental review has been filed prior to project construction; and (2)

obtain any required federal or state permits. 33 U.S.C. §§ 2232(b), (d)(4).[1] All EIS documents relating to the Project have been completed but the Diversion Authority failed to obtain the necessary permits prior to Project construction.

WRRDA 2014 also imposes an affirmative duty on the Corps to "regularly monitor and audit" the non-Federal interest to ensure "construction is carried out in compliance with the requirements of this section . . . ." 33 U.S.C. § 2232(d)(4). Congress could not have been clearer that the Diversion Authority, as the non-Federal interest, was required to obtain all state permits prior to the commencement of Project construction and the Corps was required to ensure that the Diversion Authority complied with the provisions in WRRDA 2014. The Corps failed to do so.

These statutory obligations in WRRDA 2014 are consistent with Congress' understanding and the Corps' acknowledgement that, historically, flood control was a state responsibility and, therefore, the States have a coextensive right, if not obligation, to regulate flood control projects. Flood control projects have always been considered "a form of land use, a local affair." Oliver Houck, *Can We Save New Orleans?*, 19 Tul. Env. L. J. 1, 8 (2006); *see also* N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform* 4-11 (University of Iowa Legal Studies, Research Paper No. 12-12, 2012). In fact, when Congress enacted the 1936 Flood Control Act, it stated the federal government would need to cooperate with State and local authorities to best

[1] 33 U.S.C. § 701b-13, referred to as WRDA 2007, is the predecessor to WRRDA 2014 and contains substantively similar requirements.

manage flood control projects. *See* 33 U.S.C. § 701a (2006) ("[It] is the sense of Congress that flood control on navigable waters or their tributaries is a proper activity of the Federal Government *in cooperation with States*, their political subdivisions, and localities thereof . . . ."") (emphasis added). The Corps similarly acknowledged Minnesota's right to permit dam safety projects when testifying at the 1979 public hearing during the adoption process of Minnesota's dam safety rules. The Corps testified Minnesota's dam safety rules were "consistent with and complimentary of the Corp guidelines." (*See* Declaration of Colin O'Donovan dated April 20, 2017, at ¶ 2 and Ex. A (O'Donovan Decl.").)

II. THE CORPS CONCEDED DNR PERMITS ARE REQUIRED FOR CONSTRUCTION AND OPERATION OF THE PROJECT.

Minnesota law expressly provides, no person may "construct, reconstruct, remove, abandon, transfer ownership of, or make any change in a . . . dam . . . on public waters" without first obtaining a DNR public waters work permit. Minn. Stat. § 103G.245, subd. 1(1). In recognition of this requirement, the Corps determined during its own environmental review that: "[a]s part of implementing this project, the non-federal sponsors will be required to obtain a [DNR] protected waters permit . . . ." (*See* Dkt. No. 162-7 at p. 109.) The Corps' Final Feasibility Report and Environmental Statement ("FFREIS") also acknowledged that a state environmental review would be required and mandated that construction contractors acquire all local permits needed to comply with state laws. (*Id.*) A fundamental "local permit" required by Minnesota law for both

construction and operation of this Project is the Minnesota dam safety/work in public water permit.

The Corps' Chief's Report also conceded the Project would be subject to Minnesota regulatory oversight. (*See* Dkt. No. 162-10 at pp. 6-7 (¶¶ 11.o, 11.k require the Project comply with all state and local regulatory requirements).) When authorizing the Project, Congress specified that the Project be "carried out by the Secretary substantially in accordance with the [FFREIS], and subject to the conditions described in the [Chief's Report] . . . ." WRRDA 2014, Pub. L. No. 113-121, 128 Stat. 1193, § 7002(2). In short, not only did the Corps admit Minnesota permits were necessary, but Congress mandated those permits be obtained *prior* to Project construction.

III. MINNESOTA DEVELOPED A ROBUST ENVIRONMENTAL REVIEW AND PERMITTING PROCESS TO PROTECT ITS CITIZENS FROM POTENTIAL HARMS ASSOCIATED WITH THE PROJECT.

The State of Minnesota, through its DNR, regulates navigable waters and holds an "absolute right to all [its] navigable waters and the soils under them for their common use, subject only to the rights since surrendered by the constitution to the general government." *St. Anthony Falls Water-Power Co. v. Bd. of Water Comm'rs*, 168 U.S. 349, 359 (1897). Minnesota has a substantial interest in the Red River and with that interest comes a concomitant duty to manage and regulate its waters for the benefit of its citizens. *See Herschman v. State Dept. of Natural Res.*, 225 N.W.2d 841, 844 (Minn. 1975); *Lamprey v. Metcalf*, 53 N.W. 1139, 1143 (Minn. 1893).

The Project includes the construction of a Class I high hazard dam on the Red River, a navigable water over which the State of Minnesota has jurisdiction. By

definition, the failure of this dam could result in significant harm and the loss of life to the citizens of Minnesota. Minn. Stat. §§ 103G.501-.561; Minn. R. 6115.0300-.0520. The ¶ has developed an extensive environmental review and permitting system to regulate the State's interests in its public waters for the benefit of its citizens and has directed DNR to implement that permitting system. *See* Minn. Stat. ch. 103G.

The environmental review process is set up to describe the potential environmental effects of the proposed Project based on the need articulated by the Corps and the Diversion Authority. It examined potential alternatives to the Project as proposed, and identified how the Project's effects could be avoided or mitigated. (O'Donovan Decl. at ¶ 3, Ex. B.) Before, during, and after the EIS process, the DNR made clear that "the adequacy determination [of the EIS] is not an approval of the proposed Project." (*Id.*) The EIS disclosed Project impacts that were controversial and unresolved, including the articulated scope of the project need which included protection of undeveloped land within the floodplain and elimination of the need to purchase flood insurance within the project area, construction of a high hazard dam upstream of a large population center, increased flooding to areas upstream and downstream, newly inundated lands, the potential for induced development in the floodplain, and problems with proposed mitigation strategies. (*Id.*) The DNR informed the Diversion Authority and the public that "the appropriate place to evaluate these issues is in the permit decision making." (*Id.* at ¶ 4, Ex. C.) The DNR noted that as part of its permitting process, the DNR would conduct additional policy and technical analysis. (*Id.*) The DNR then followed its permitting process in reviewing the Diversion Authority's permit application.

IV. THE DNR DENIED THE DIVERSION AUTHORITY'S PERMIT APPLICATION, BUT THE DEFENDANTS PROCEEDED WITH PROJECT CONSTRUCTION ANYWAY.

The Diversion Authority submitted its application for a Minnesota Dam Safety and Public Waters Work permit, Permit Application 2016-0386 ("Permit Application") for the Project on February 18, 2016. (*See* Dkt. No. 347-5.) On October 3, 2016, the DNR denied the Diversion Authority's Permit Application. (*See* Dkt. No. 411-1.) The DNR found that the Project "does not adequately protect the public health, safety and welfare of [Minnesota's] citizens, does not represent the minimal impact solution, and is neither reasonable nor practical." (*Id*. at p. 48.) The DNR found the Project would have "significant environmental impacts that are not compliant with prudent environmental requirements" and that the Project did not adequately mitigate for those adverse impacts. (*Id.*) Despite the DNR's permit denial, the Diversion Authority and the Corps commenced construction of the Project.

ARGUMENT

I. THE COURT SHOULD ENJOIN THE DEFENDANTS FROM CONTINUED PROJECT CONSTRUCTION BECAUSE SUCH CONDUCT VIOLATES FEDERAL AND STATE LAW.

Preliminary injunctions are meant to prevent irreparable harm and preserve the status quo. *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994); Fed. R. Civ. P. 65. Courts weigh four flexible factors when issuing an injunction: (1) the probability that the moving party will succeed on the merits; (2) the threat of irreparable harm to the moving party; (3) balancing this harm with any injury an injunction would inflict on other interested parties; and (4) the public interest. *Planned Parenthood Minn., N.D., S.D. v.*

Rounds, 530 F.3d 724, 729 n.3 (8th Cir. 2007); *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 776 (8th Cir. 2012) (citing *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)). The Court may enjoin any party to the litigation as well as anyone acting in active concert with an enjoined party. F.R.C.P. 65(d)(2); *S.E.C. v. O'Hagan*, 901 F. Supp. 1476, 1478 (D. Minn. 1995).

II. THE DNR IS LIKELY TO SUCCEED ON ALL FOUR OF ITS COUNTS.

A. The DNR Must Only Show A Fair Chance Of Prevailing On The Merits of One Count.

While no single *Dataphase* factor is determinative in deciding whether to grant a preliminary injunction, likelihood of success on the merits is the most significant. *Wilson*, 696 F.3d at 776. The moving party must only establish it has a "*fair chance of prevailing*" on the merits of its claims. *Rounds*, 530 F.3d at 732 (emphasis added). The Court is not tasked with determining whether the movant will ultimately win, only whether the movant has established a likelihood of succeeding on the merits of any one of the claims asserted. (Dkt. No. 193 at p. 38); *Am. Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 250 (D.D.C. 2003).

When a movant seeks an injunction to enjoin implementation of a statute that was the product of lengthy public debate involving Congress, a heightened standard may be applicable. *See, e.g.*, *Richenberg v. Perry*, 73 F.3d 172, 172-73 (8th Cir. 1995). Here, the DNR does not seek to enjoin the enforcement of WRRDA 2014, but instead seeks to ensure WRRDA 2014 is properly enforced and implemented. This Court, moreover, has previously ruled the heightened standard is not appropriate for injunctive relief seeking to

enforce statutory obligations, and that conclusion constitutes the law of the case. (Dkt. No. 193 at pp. 38-39); *In re Stephens*, No. 11-cv-3459, 2012 WL 1889716 at *6 (D. Minn. May 24, 2012) (J. Tunheim) ("The law-of-the-case doctrine is a means to prevent the relitigation of a settled issue in a case.").

B. The DNR Is Likely To Prevail On Count I (33 U.S.C. § 2232(D)(4)) And Count II (WRRDA 2014 § 7002) Against The Corps.

1. The Court May Review The Corps' Actions Under The APA.

The Administrative Procedures Act ("APA"), Pub. L. 79-404, 60 Stat. 237. (codified at 5 U.S.C. § 500 *et seq*.), permits a court to review final agency action or inaction. 5 U.S.C. § 702. A reviewing court "shall interpret constitutional and statutory provisions" and shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ." 5 U.S.C. § 706(2).

To be reviewable, the actions by the agency must constitute "final agency action" which is "the consummation of the agency's decision making process . . . . from which legal consequences will flow." *Am. Farm Bureau Fed'n v. U.S. Envtl. Prot. Agency*, 836 F.3d 963, 969 (8th Cir. 2016). The APA also defines "agency action" to include the failure to act. 5 U.S.C. § 551(13). Courts presume Congress intended agency action to be subject to judicial review. *S. Dakota v. Ubbelohde*, 330 F.3d 1014, 1027 (8th Cir. 2003) (affirming in part and reversing in part an injunction against the Corps). Conduct is considered "final agency action" when rights or obligations have been determined or

legal consequences otherwise flow from the decision. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Stony v. Marsh*, 563 F. Supp. 679, 683 (E.D. Mo. 1983) (granting injunction against the Corps from constructing in a floodplain). A decision by the Corps regarding the scope of its statutory authority constitutes final agency action. *See Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 999 (8th Cir.), *aff'd*, 136 S. Ct. 1807 (2016).

2. The Corps Is Violating Statutory Obligations Imposed By Congress.

The Corps has taken final agency action that is subject to review under the APA by entering into a binding contract—the project partnership agreement ("PPA")—to construct the Project with the Diversion Authority. (*See* Dkt. No. 354-7.) Entering into legal agreements, by their very nature, amount to conduct from which legal consequences will flow. *See Am. Farm Bureau Fed'n*, 836 F.3d at 969. The PPA makes the Diversion Authority the sole operator of the Project's dam and requires the Diversion Authority to operate the dam "at no cost to the Government." (*See* Dkt. No. 354-7 at p. 7.) Thus, even if the Diversion Authority claims it will not construct in Minnesota itself, the Diversion Authority is the operator of the Project's dam and requires a permit under Minnesota law.

Furthermore, the Project dam cannot be separated from other features of the Project currently under construction. The Project control structures and diversion inlet constructions are fundamental component parts of the Project's dam structure in that their design, construction and operation weigh heavily on the analysis of dam safety. Indeed, these features are integral component parts of the dam. To argue that these features are

beyond the reach of Minnesota because they are constructed in Minnesota is tantamount to arguing that Minnesota should only review one half of the dam. This is prohibited by the statutory definition and rule. *See* Minn. Stat. 103G.005, subd. 14 ("'Project' means a specific plan, contiguous activity, proposal, or design necessary to accomplish a goal….[A] project may not be split into components or phases for the sole purpose of gaining additional exemptions."); *see also* Minn. R. 6115.0170, *subp.* 30a (same).

Nor do the mandates on Minnesota local units of government terminate when those actions are taken to build on Minnesota's border. Such an interpretation would allow parties to a joint powers agreement to cherry pick which portions of a project they would build in order to evade full review and compliance with both states' environmental review and permitting processes. This would lead to a bureaucratic steam roller that would eviscerate Minnesota's environmental review and permitting authority. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995 (8th Cir. 2011).

The PPA also requires the Diversion Authority to fund the majority of the Project's expenses and obligates the Diversion Authority to pay the Corps "to initiate construction of the Federal Work, currently estimated at $51,000,000." (Dkt. No. 354-7. at p. 7.) In other words, the PPA is drafted in an attempt to cloak the Diversion Authority and its construction obligations with immunity by allowing the Diversion Authority to pay the Corps to construct these elements of the Project as "Federal Work" or to have the Corps hire subcontractors to do work the Diversion Authority would otherwise be prohibited from doing without the required Minnesota permit. Notably, the Corps does

not even appear to currently be doing the work; the Corps' contractor, Ames Construction, Inc., is the entity that has begun Project construction. (*Id*. at ¶ 5, Ex. D.)

The Corps issued its Chief's Report and affirmed to Congress that the Project would be subject to Minnesota regulatory oversight. (*See* Dkt. No. 162-10 at pp. 6-7.) Congress authorized the Project based on the Chief's Report and required the Project be carried out subject to the conditions in the Chief's Report. WRRDA 2014 § 7002(2). Obtaining DNR permits, therefore, is a condition that must be fulfilled in order to comply with Congress' authorization. This condition has not been fulfilled. The Diversion Authority lacks the necessary DNR permits and construction therefore cannot begin.

Since the DNR denied the Diversion Authority's Permit Application in October 2016, however, both the Diversion Authority and the Corps have flouted DNR's order and publically announced their intent to move forward with Project construction. The Corps' contractor has already begun operations at the site and during the parties' meet and confer call on March 24, 2017, counsel for the Corps and Diversion Authority stated work will be continuing with excavation commencing likely in May 2017. (O'Donovan Decl. at ¶ 6, Ex. E.)

The Corps refuses to comply with statutory obligations imposed on it by Congress in 33 U.S.C. § 2232 and WRRDA 2014 § 7002. The Corps is aware that the DNR denied the Diversion Authority's Permit Application, and, despite this knowledge, the Corps made a deliberate decision to allow the Project to proceed to construction without the necessary DNR permits. The Corps' actions are statutorily prohibited, and DNR has a strong likelihood of prevailing on Counts I and II.

C. The DNR Is Likely To Prevail On Count III That The Diversion Authority Has Violated MERA.

The DNR is likely to succeed on the merits of its Minnesota Environmental Rights Act, Minn. Stat. ch. 116B ("MERA") claim against the Diversion Authority. MERA provides a cause of action against any person for "the protection of air, water, land, or other natural resources located within the state . . . from pollution, impairment, or destruction . . . ." Minn. Stat. § 116B.03, subd. 1. MERA empowers courts to issue injunctions to protect the environment. *See State ex rel Wacouta Twp. v. Brunkow Hardwood Corp.*, 510 N.W. 2d 27, 32 (Minn. Ct. App. 1993).

There are two distinct ways to prove a MERA violation. First, a party may show "that conduct of the defendant violates or is likely to violate said *environmental quality standard*, limitation, *rule*, order, license, stipulation agreement, or *permit*." Minn. Stat. § 116B.04 (emphasis added); *see also State by Schaller v. Cnty. of Blue Earth*, 563 N.W.2d 260, 264 (Minn. 1997). Second, a party may show "any conduct which materially adversely affects or is likely to materially adversely affect the environment." *See generally id.* There is no affirmative defense available for a MERA cause of action predicated upon a violation of an environmental quality standard, rule, or permit. *Id.* In other words, if the Court finds the DNR has a fair chance of proving that the Diversion Authority violated or is likely to violate any environmental quality standard, rule, or permit, then the Court should enter an injunction because no defense is available under MERA. Construction of a dam or its pertinent parts without a work in public waters/dam

safety permit is a per se violation of Minn. Stat. § 103G.245, one of the statutes adopted to protect Minnesota's public waters.

1. The Diversion Authority Has Or Is Likely To Violate Multiple Environmental Quality Standards, Rules, and Permits.

For a statute to be actionable as an "environmental quality standard" under MERA, it must embody environmental quality and protection as its primary function. *See State ex rel. Afremov v. Remes*, No. A14-2037, 2015 WL 4715316, at *5 (Minn. Ct. App. Aug. 10. 2015) (defining the scope of rules that are actionable as "environmental quality standards" under MERA); *see also Schaller*, 563 N.W.2d at 262 (identifying Minnesota agency's noise standards as an environmental quality standard).

Minnesota Statutes chapters 103A-G constitute "the water law of this state" and govern water use and conservation. Minn. Stat. § 103G.001. These laws were drafted to conserve and use the water resources of the state "in the best interests of its people, and to promote the public health, safety, and welfare" of the citizens of Minnesota. Minn. Stat. § 103A.201, subd. 1. The Statement of Need and Reasonableness ("SONAR") promulgated during the initial rulemaking process shows that the primary policy behind Minn. Stat. ch. 103G was to reduce environmental impact. (O'Donovan Decl. at ¶ 7, Ex. F) ("In exercising the permit Authority of Minnesota Statutes … the primary policy of the Commissioner has been that the proposed action *must be* the action with the least environmental impact.") (emphasis added).)) Similarly, one of the purposes behind Minn. R. ch. 6115 is to regulate dams "in such a manner as to best provide for public health, safety, and welfare.... consistent with the goals and objectives of applicable

federal and state environmental quality programs." *See* Minn. R. 6115.0300. Violations of statutes and rules like Minn. Stat. ch. 103G and Minn. R. ch. 6115 is exactly what MERA was intended to prohibit. The Diversion Authority should be enjoined from proceeding with construction because construction of the Project without the required permit is a per se violation of the environmental quality standards, rules, and permits listed below.

a. *Minn. Stat. § 103G.245: Work In Public Waters.*

The Minnesota legislature has directed that to conserve the state's water resources and insure their use to promote public health safety, and welfare the state shall control and supervise activity that changes the course, current or cross section of public waters, including the construction, reconstruction, transfer of ownership of dams in public waters. Minnesota law requires a DNR public waters work permit ("PWWP") in order to "construct, reconstruct, remove, abandon, transfer ownership or, or make any change in a . . . dam." Minn. Stat. § 103G.245, subd. 1. A PWWP is also required for any project affecting floodwaters. *Id.* at subd. 9. Any work on a project for which a PWWP is required without a PWWP is a violation of Minnesota law.

The DNR will only grant a PWWP for a project involving the control of floodwaters by a dam after considering all other flood damage reduction alternatives. *Id.* at subd. 9(b). In denying the Diversion Authority's Permit Application, the DNR found that the Project "does not adequately protect the public health, safety and welfare of [Minnesota's] citizens, does not represent the minimal impact solution, and is neither reasonable nor practical." (*See* Dkt. No. 411-1 at p. 48.) The DNR also found that the

Project would have "significant environmental impacts that are not compliant with prudent environmental requirements" and that the Project did not adequately mitigate for those adverse impacts. (*Id.*) Construction of the Project without the required PWWP therefore violates Minn. Stat. § 103G.245.

b. *Minn. R. 6115.0300 et seq.: Regulating The Construction And Operation Of Dams*.

The DNR is vested with the authority to regulate the construction, operation, repair, and maintenance of a dam in such a manner as to best provide for public health, safety and welfare. Minn. R. 6115.0380, subd. 1. Minnesota dams must be operated and maintained in conformance with DNR standards to ensure the public health, safety, and welfare is maintained. *Id.* A PWWP is required for both the *construction* and *operation* of a Class I dam. *Id.* The DNR denied the Diversion Authority's Permit Application because it would not adequately protect the citizens of Minnesota. The Diversion Authority has not obtained a permit to operate the dam, and any construction prior to obtaining the permit is therefore not only economically indefensible, but unlawful.

c. *Minn. R. 6115.0190, Subp. 5: Fill Of Public Waters*.

The discharge of fill into public waters of Minnesota without a permit is a violation of Minnesota rules.[2] Minn. R. 6115.0190, subp. 5. Filling involves the placement of unconfined or loosely confined materials in public waters. *Id.* at subp. 2. In order to issue a permit to discharge fill to the public waters, the project must represent the

[2] No permit is required to discharge fill to install certain beach sand blankets or in certain public watercourses having a total drainage area of five square miles or less. These exceptions are not applicable in the present case. *See, e.g.*, Minn. R. 6115.0190, subp. 4.

minimal impact solution to a specific need with respect to all other reasonable alternatives. *Id.* at subp. 5. The proposed filling must be consistent with applicable floodplain management standards and a permit applicant must submit information to show that there is no feasible and practical means to attain the intended purpose without filling and the proposal will adequately protect public safety and promote the public welfare. *Id.* During Project construction and operation, fill material will be discharged within public waters, which requires a permit from the DNR pursuant to Minn. R. 6115.0190, subp. 5. The Diversion Authority has begun carrying out Project construction but has yet to obtain the requisite permit in violation of Minnesota law.

d. *Minn. R. 6115.0200, Subp. 5: Excavation Of Public Waters.*

Excavation of materials from public waters of Minnesota without a PWWP is a violation of Minnesota Rules. *See, e.g.*, Minn. Stat. § 103G.245, subd. 8; Minn. R. 6115.0200, subp. 5. Excavation includes any activity that results in the displacement or removal of bottom materials or the widening, deepening, straightening, realigning, or extending of public waters. *Id.* at subp. 2. In order to issue a PWWP to excavate in public waters, a project must meet certain specific requirements. *Id.* A PWWP will only be issued by the DNR if the permit application includes provisions for the deposition of excavated materials and the project represents the minimal impact solution to a specific need with respect to all other reasonable alternatives. *Id.* In addition, the proposed excavation must represent a minimum encroachment, change, or damage to the environment. *Id.* The Project proposes excavating portions of the Red River in order to construct the Class I dam, which requires a permit from DNR under Minn. R. 6115.0200,

subp. 5. Excavation is expected to begin soon or has already commenced without the required permit and is in violation of Minnesota law.

e. *Minn. Stat. § 103F.105: Floodplain Management.*

Under Minnesota law, land and floodplains are considered a limited, irreplaceable, and valued resource. Minn. Stat. § 103F.105(a)(1). Minnesota law holds that "land is a limited and irreplaceable resource." Minn. Stat. § 103F.105(a)(2). It is Minnesota law that the reduction of flood and associated damages should be through floodplain management, with a focus on nonstructural measures such as floodplain zoning and flood-proofing. *Id.* at § 103F.105(b). The Project will cause the inundation of the staging area, with a net negative impact of 2,100 acres of land in Minnesota. As scoped in the EIS, the Project is inconsistent with Minnesota floodplain management and cannot be constructed without violating Minn. Stat. § 103F.105.

It is undisputed that the Diversion Authority lacks a PWWP and therefore proceeding with the Project is a per se violation of MERA. The Court should issue a preliminary injunction against the Diversion Authority on this basis alone. In addition, the Diversion Authority has or is likely to violate the other environmental quality standards by proceeding with the Project and Project construction should be enjoined.

2. <u>The Diversion Authority Has Or Is Likely To Create A Material Adverse Impact On Minnesota Natural Resources</u>.

In determining whether conduct is likely to materially adversely affect the environment, the Minnesota Supreme Court has provided that courts analyze five factors: (1) the quality and severity of the adverse effects; (2) whether the natural resources

affected are rare, unique, or endangered; (3) whether the proposed action will have long-term adverse effects; (4) whether the proposed action will have significant consequential effects (e.g. whether wildlife will be lost if its habitat is impaired or destroyed); and (5) whether the affected natural resources are significantly increasing or decreasing. *State by Shaller v. Cnty. of Blue Earth*, 563 N.W.2d 260, 267 (Minn. 1997). Only in a case alleging a material adverse impact is a defendant permitted to put forward evidence that there is no feasible or prudent alternative. *Id.*

The DNR identified significant adverse impacts of proceeding with the Project as proposed by the Diversion Authority. The DNR noted that the Project "would alter the natural flow of water through the floodway" which would change and could reduce the stability of streams and rivers." (*See* Dkt. No. 411-1 at ¶ 48a.) The Diversion Authority failed to provide a monitoring plan or details regarding specific monitoring techniques, location, frequencies, or triggers for monitoring or proposed response actions. (*Id.*) The DNR also noted that the Project will impact 1,750 acres of non-forested wetland, but that the Diversion Authority's mitigation plan had not considered the Minnesota Wetland Conservation Act ("WCA") and no WCA hearings or approvals had been received. (*Id.*) The DNR found that the Project "would result in the loss of fish connectivity … impact aquatic biota and habitat … and strand fish in the diversion channel and staging area." (*Id.*) The Project also encourages the "establishment of invasive species populations" including zebras mussels. (*Id.*) The Diversion Authority refused to provide a formal invasive species management plan. (*Id.*)

In sum, the Project will have severe adverse impacts to Minnesota's environment. Since Congress' authorization requires that the Corps construct the Project in compliance with the FFEIS and the Chief's Report, the Corps cannot substantially change how the Project is constructed and therefore these adverse impacts will occur. The Court, therefore, should enjoin construction of the Project to abate these material adverse impacts that will undoubtedly affect Minnesota's natural resources as defined by MERA.

D. The DNR Is Likely To Prevail On Count IV That The Diversion Authority Violated Minn. Stat. § 103G.135 By Initiating Project Construction After The DNR Order Denied The Permit.

The legislature vested the DNR with the authority to seek injunctive relief to enforce compliance with Minnesota's water laws codified in Minn. Stat. chs. 103G and 103F. *See* Minn. Stat. § 103G.135 ("[T]he district court of a county where a project is entirely or partially located may by injunction enforce compliance with, or restrain the violation of, an order of the commissioner made under this chapter [103G] or chapter 103F."). Pursuant to § 103G.245, subd. 1, the Diversion Authority submitted its Permit Application and the DNR denied that application in an order dated October 3, 2016. (*See* Dkt. No. 411-1.) The Diversion Authority has requested a contested case hearing challenging the DNR's determination and the DNR has granted the contested case hearing. Despite the fact that the Diversion Authority lacks the required permit it and its agent, the Corps, are proceeding with construction in open defiance of the DNR's order denying the Permit Application. Minnesota law prohibits a person from "undertak[ing] or procur[ing] another to undertake an alteration in the course, current, or cross section of public waters

… after a permit to undertake the project has been denied." Minn. Stat. § 103G.141. The Court should enjoin the Diversion Authority to require compliance with Minnesota law.

III. MINNESOTA WILL SUFFER IRREPARABLE HARM AND THE BALANCE OF HARM WEIGHS IN FAVOR OF AN INJUNCTION.

To demonstrate a threat of irreparable harm, "a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Roudachevski v. All-Am. Care Ctrs., Inc.*, 648 F.3d 701, 706 (8th Cir. 2011). The Court must weigh the threat of irreparable harm to the moving party against the injury of imposing an injunction. *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 316 (8th Cir. 2009). But the Eighth Circuit has warned that "real environmental harm will occur through inadequate foresight and deliberation" and noted "the difficulty of stopping a bureaucratic steam roller, once started." *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995 (8th Cir. 2011).

Minnesota is threatened with both procedural and substantive harms. The DNR analyzed the Diversion Authority's Permit Application, found it inadequate, and denied it. The Diversion Authority, some of whose members are Minnesota local units of government, refuses to comply with the DNR's order. Moreover, the Diversion Authority now contends its application was simply "advisory." If DNR orders are to have any effect, they must be enforced.

In its order denying the Permit Application, the DNR identified that the Project would cause significant harm and unmitigated environmental impacts. Notably, the Project benefits North Dakota at Minnesota's expense. In the Project's proposed staging

area, operation of the dam would increase water surface elevations and in many locations the flood depth would increase by six feet or more during a 100-year flood event. Moreover, many of the locations in the proposed staging area are not currently in a designated floodplain. Outside the staging area, thousands of acres of land that does not currently receive flood water would now be inundated. While North Dakota would receive a net benefit of protected acreage after the Project is complete, Minnesota would actually suffer a net negative, with approximately 2,100 more acres impacted by flood water than without the Project.

While the cost for the Project may increase with delay, the balance of harms strongly weighs in Minnesota's favor. Moreover, following the DNR's denial of the Permit Application, the Diversion Authority requested that the DNR delay setting a contested case hearing. DNR, in response to the Diversion Authority request delayed noticing the contested case hearing for months. Any harm caused by delay is of its own making and it the Diversion Authority cannot credibly argue that the balance of harm due to delay weighs in its favor.

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST.

The long-term public interest of having a project that adequately protects both citizens and the environment in Minnesota and North Dakota far outweighs any delay to constructing the Project. This is especially true here where the Diversion Authority itself sought to delay contesting the permit denial. Moreover, the public has a strong interest in seeing environmental laws enforced and that actions which affect the environment be compliant with federal, state, and local law.

V. BOND.

The Court previously addressed the bond issue and waived it in the prior injunctive relief proceeding. (Dkt. No. 238 at p. 21.) Although discussed in the context of a NEPA exception, the Court noted the importance of environmental statutory regimes aimed at determining the impact of actions on the environment and serving the public interest in informed, environmentally aware decision-making. (*Id.* at p. 8.) The same analysis applies in the MERA context, and MERA itself holds a bond is discretionary. Minn. Stat. § 116B.06. If the Court decides to set a bond, however, the Court has broad discretion and should set a nominal bond as is common in other cases seeking to vindicate protection of the environment and natural resources. *See, e.g., Stockslager v. Carroll Elec. Co-op Corp.*, 528 F.2d 949, 951 (8th Cir. 1976); *Natural Res. Def. Council v. Morton*, 337 F. Supp. 167, 168-69 (D.D.C. 1971) (setting bond at $100).

CONCLUSION

This Project poses significant risk to the citizens of Minnesota and the environment. The Corps and Diversion Authority have violated federal and state law by proceeding with construction that will cause material adverse impacts despite the DNR's denial of a necessary permit to construct and operate the dam. The Court therefore should issue a preliminary injunction enjoining construction by the parties and anyone in active concert with them until the DNR issues a work in public waters and dam safety permit to the Diversion Authority.

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