UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Richland/Wilkin Joint Powers Authority,

Plaintiff,

v.

United States Army Corps of Engineers, et al.,

Defendants.

Court File No. 13-cv-2262 (JRT/LIB)

ORDER

This matter comes before the undersigned United States Magistrate Judge pursuant to a general assignment made in accordance with the provisions of 28 U.S.C. § 636(b)(1)(A), upon Defendant Fargo-Moorhead Flood Diversion Board of Authority's Motion to Strike, [Docket No. 437], brought pursuant to Federal Rule of Civil Procedure 12(f). The Court held a Motions Hearing on June 19, 2017, and thereafter the Court took the Motion under advisement.

For the reasons discussed below, the Court **DENIES** Defendant Fargo-Moorhead Flood Diversion Board of Authority's Motion to Strike, [Docket No. 437].

I. BACKGROUND AND STATEMENT OF FACTS

> This case involves a large-scale flood diversion project being planned in the Fargo-Moorhead region of Minnesota and North Dakota (["Project"]). Plaintiff Joint Powers Authority of Richland County, North Dakota, and Wilkin County, Minnesota (["JPA"]), which was formed to represent the interests of political subdivisions and citizens affected by the [P]roject, brought this action against the United States Army Corps of Engineers ("the Corps") and various individuals (collectively, "federal defendants" or simply, "the Corps"), alleging violations of the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA"). The Corps is the federal entity involved in developing the [P]roject on the Red River, in response to flooding in Fargo, North Dakota, and Moorhead, Minnesota, and surrounding areas, most recently in 2009.
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> The JPA initially filed this action on August 19, 2013. The Court later granted a motion to intervene filed by the Corps' local sponsor in developing the

> [P]roject: the Fargo-Moorhead Diversion Board of Authority ("Diversion Authority"[]).

(May 13, 2015, Memorandum Opinion and Order, [Docket No. 193], 2-3).

Similarly, on January 13, 2017, Chief Judge John R. Tunheim granted a Motion to Intervene brought by the Minnesota Department of Natural Resources ("MDNR"). (See, [Docket No. 398]). On March 24, 2017, Plaintiff-Intervenor the MDNR filed its Complaint in Intervention, [Docket No. 411], in which it brought the following claims against the Diversion Authority: Count III: a claim under the Minnesota Environmental Rights Act ("MERA"), Minn. Stat. § 116B.03, against the Diversion Authority seeking to protect Minnesota's natural resources from pollution, impairment, or destruction; and Count IV: a claim under Minn. Stat. § 103G.135 against the Diversion Authority seeking enforcement of the MDNR's order denying the Diversion Authority's permit application and enjoining the Diversion Authority from proceeding with initiation of construction on the project.[1] (Compl. in Interv., [Docket No. 411], 31-35).

Relevant to the present Motion to Strike now before this Court, the section of the MDNR's Complaint in Intervention entitled "The DNR's Public Waters Work Permit Regulatory Framework" set forth the Minnesota statutes which (1) prohibit people, corporations, or state governmental units from constructing or otherwise changing any waterway obstruction on public waters over which Minnesota has jurisdiction without first obtaining a public waters work permit from the MDNR; (2) establish the requirements for receiving such a permit; and (3) mandate certain considerations by the MDNR when considering whether to issue a permit. (Id. at 11-13).

Paragraph 44, which the Diversion Authority now seeks to strike, then states:

> 44. Pursuant to Minn. Stat. § 103G.141, subd. 1(1), (3), a person is guilty of a misdemeanor who "undertakes or procures another to undertake an alteration in the course, current, or cross section of public waters or appropriates

[1] Counts I and II of the Complaint in Intervention are directed at actions by the Corps and therefore are not relevant to the Diversion Authority's Motion to Strike presently before this Court.

> waters of the state without previously obtaining a permit from the commissioner, regardless of whether the commissioner would have granted a permit had an application been filed" or "after a permit to undertake the project has been denied by the commissioner . . . ."

(Id. at 14).

Paragraph 44 is referred to later in the MDNR's Complaint in Intervention; paragraph 131 states:

> 131. The Diversion Authority's actions set forth above, including but not limited to paragraphs 28-44 and 71-100[—which contained the factual allegations upon which the claims are based—] meet the definition of "pollution, impairment, or destruction" because such actions constitute a violation or a likely violation of Minnesota's environmental quality standards, rules, and/or DNR Order dated October 3, 2016[,] denying the Diversion Authority's Permit application, which were all issued prior to the Diversion Authority's conduct.

(Citation omitted.) (Id. at 32).

In Count IV, paragraphs 139-40 and paragraph 143 state:

> 139. Pursuant to state and federal law, including Minn. Stat. chs. 103G and 103F, the Diversion Authority is required to obtain the DNR Permit prior to the construction or operation of the Project or its component parts. *See supra* ¶¶ 13-44.
>
> 140. Despite the DNR's denial of the Diversion Authority's Permit application, and in violation of the DNR's Order dated October 3, 2016, the Diversion Authority has taken actions to initiate Project construction and has publically expressed its intent to continue Project construction without obtaining the DNR Permit as set forth above, including but not limited to paragraphs 28-44 and 82-100.
>
> . . . .
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> 144. This Court should declare the Diversion Authority's conduct to be a violation of the DNR's Order dated October 3, 2016[,] and/or a violation of Minn. Stat. chs. 103G and 103F, and order permanent equitable relief to enjoin construction and operation of the Project by the Diversion Authority until such time as the DNR has issued public waters work and dam safety permits for the Project.

(Citation omitted.) (Id. at 34-35).

Finally, paragraph 5 of the MDNR's prayer for relief in its Complaint in Intervention requests "[a] declaratory judgment that, the Diversion Authority's actions described in this Complaint are in violation of Minn. Stat. chs. 103G and 103F." (Id. at 36).

On April 21, 2017, the MDNR filed a Motion for Preliminary Injunction, [Docket No. 425], and a Memorandum in Support of that Motion, [Docket No. 426].[2] The MDNR seeks a temporary preliminary injunction enjoining construction by the Diversion Authority and the Corps on the Project until the MDNR grants a public waters work and dam safety permit for the Project. (Mem. in Supp., [Docket No. 426], 2).

On or about May 5, 2017, the Moorhead City Attorney and all of the Minnesota elected officials on the Diversion Authority Board received a letter from Shelley Lewis, a Moorhead city resident. (Mem. in Supp., [Docket No. 440], 5; Div. Auth. Exh. 1, [Docket No. 441-1], 2-4). The letter expressed Lewis' belief that "apparent unlawful activity" by the Diversion Authority had prompted the MDNR to join this federal lawsuit "to halt this unlawful project and/or the commencement of the construction." (Div. Auth. Exh. 1, [Docket No. 441-1], 2). Lewis further asserted a "clear violation of MN law" by the Diversion Authority and cited Minn. Stat. § 103G.141(1), which provides criminal penalties (jail time and a $1000 fine) for the violation of Minnesota permitting requirements. (Id.). Lewis further quoted language from the MDNR's Memorandum in Support of its April 21, 2017, Motion for Preliminary Injunction, in which the MDNR asserted that the Diversion Authority and the Corps "are proceeding with construction in open defiance of the DNR's order denying the Permit Application" and in which the MDNR

[2] The Diversion Authority filed a Memorandum in Opposition to the MDNR's Motion for Preliminary Injunction on May 31, 2017. (Mem. in Opp., [Docket No. 459]). The Corps and the individual Defendants sued in their official capacities filed a Memorandum in Opposition to the MDNR's Motion for Preliminary Injunction the same day. ([Docket No. 465]). A hearing on the Motion for Preliminary Injunction is set for July 18, 2017. ([Docket No. 486]).

cited and quoted Minn. Stat. § 103G.141. (Id. at 2-3; Mem. in Supp. of Motion for Prelim. Inj., [Docket No. 426], 20-21).

Lewis' letter expressed concern that the Diversion Authority and its members were potentially violating Minn. Stat. § 609.43, another criminal statute that prohibits, in relevant part, any public officer or employee, in his or her official capacity, from doing "an act knowing it is in excess of lawful authority or knowing it is forbidden by law to be done in that capacity." (Div. Auth. Exh. 1, [Docket No. 441-1], 3). Lewis "encourage[d] the Clay County Commission and the Moorhead City Council to come into compliance with MN law," even if that required "withdrawing from the Project Partnership Agreement and the Diversion Authority." (Id. at 4). Lewis concluded by asking the City Attorney to contact her "so that [Lewis] can determine whether [she] need[s] to take further actions regarding these violations of law by public officials." (Id.).

On May 11, 2017, the "JPA Editorial Team"[3] gave permission for an op-ed article originally published in the Wahpeton Daily News on May 11, 2017, to be republished on FMDam.org, a website entitled "Fargo Moorhead Diversion Authority Monitor | An Independent News Organization."[4] (Div. Auth. Exh. 2, [Docket No. 441-1], 6). The op-ed piece, entitled "Defending Richland and Wilkin Counties," cites Minn. Stat. § 103G.141 and Minnesota's criminal conspiracy statute, Minn. Stat. § 609.175. (Id. at 6-7). The article asserts that after the MDNR denied the Diversion Authority's permit application in October 2016, Moorhead's Mayor

[3] The "JPA Editorial Team" is not further identified in Exhibit 2, but the Diversion Authority asserts that the op-ed article is "the JPA add[ing] its voice." (Mem. in Supp., [Docket No. 440], 6). In its Response to the present Motion to Strike, the JPA states that "[p]ersons posting under the moniker 'Editorial Team' have called for a special prosecutor, but that is not the JPA's official position. (Resp., [Docket No. 443], 2). The JPA has submitted a declaration from Gerald Von Korff with an official statement of position from the JPA which says, in relevant part: "We have not called for an independent prosecutor, nor does JPA support commencement of criminal prosecutions to resolve this matter." (Dec., [Docket No. 444-1], 1).

[4] Similarly, the Diversion Authority asserts in its Memorandum in Support of its Motion to Strike that FMDam.org is the JPA's website. (Mem. in Supp., [Docket No. 440], 6).

(who is vice-chair of the Diversion Authority) "has physically participated in the construction of a high hazard dam on the Red River." (Id. at 7). The article further contends that Moorhead and Clay County officials "openly flaunt Minnesota's criminal laws," and the article cites to MDNR's April 21, 2017, Motion for Preliminary Injunction and Memorandum in Support. (Id.). The article concludes: "Moorhead and Clay County leaders could face criminal prosecution and jail for their actions. Have they been advised to ignore Minnesota's criminal laws and to continue with this conduct? Shouldn't there be an investigation by an independent prosecutor and, if warranted, criminal prosecutions?" (Id. at 8).

The Diversion Authority contacted the MDNR and asked whether the MDNR would remove paragraph 44 of its Complaint; the Diversion Authority asserted that the Complaint improperly seeks to hold the Diversion authority criminally liable in this civil proceeding. (Div. Auth. Exh. 3, [Docket No. 441-1], 12). The MDNR responded by voicemail and sent a follow-up email, stating: "[T]he DNR is not seeking to hold the Diversion Authority criminally liable in this proceeding." (Id.). The MDNR further asserted that it had not found any case law requiring it to remove paragraph 44, and that the criminal statute language included therein is "evidence of the significance of [the Diversion Authority's] conduct." (Id.).

The Diversion Authority responded by email on May 16, 2017, contending that the language in Counts III and IV "seek a declaration from the Court that the Diversion Authority is in violation of 103G, including as described in Paragraph 44, the asserted criminal activity. The plain language of your Complaint asks the Court to make a finding that the Diversion Authority is committing a crime." (Id. at 11). Moreover, the Diversion Authority asserted that whether the Diversion Authority is guilty of a misdemeanor is irrelevant to the MDNR's claim for injunctive relief and is disparaging of the Diversion Authority and its members. (Id.).

On May 17, 2017, the MDNR replied by email, reiterating that it is not seeking criminal charges against the Diversion Authority and noting that the Minnesota Attorney General's Office does not have statutory authority to seek criminal charges for violations of Minn. Stat. 103G. (Id. at 10). The MDNR again declined to remove paragraph 44 from its Complaint in Intervention, but offered to amend paragraphs 131 and 140-43 (in Counts III and IV) to remove any reference to paragraph 44 in an effort "to make clear the [M]DNR is seeking only civil relief in its prayer." (Id.). The Diversion Authority declined this offer. (Id.).

On May 18, 2017, the Diversion Authority filed its Motion to Strike, [Docket No. 437], now before the Court. Pursuant to Federal Rule of Civil Procedure 12(f), the Diversion Authority seeks to strike paragraph 44 and all references thereto from the MDNR's Complaint in Intervention and similarly remove it from consideration by the Court in conjunction with the pending Motions for Preliminary Injunction.[5] (Mem. in Supp., [Docket No. 440], 8-12). The Diversion Authority argues that the challenged language alleges criminal activity and that by including the challenged language, the MDNR is asking the Court to issue an order declaring the Diversion Authority criminally guilty of violating a Minnesota criminal statute. (Id. at 2). Moreover, the Diversion Authority argues that the language is irrelevant, scandalous, and prejudicial, and should therefore be stricken under Rule 12(f). (Id. at 9-12).

On May 23, 2017, the JPA filed a Response to the Diversion Authority's Motion to Strike. ([Docket No. 443]).

On May 25, 2017, the MDNR filed its Memorandum in Opposition to the present Motion to Strike. ([Docket No. 458]).

II. STANDARDS OF REVIEW

[5] In addition to the MDNR's April 21, 2017, Motion for Preliminary Injunction, [Docket No. 425], the JPA filed a Motion for Preliminary Injunction on March 30, 2017, [Docket No. 412], which will be heard at the same July 18, 2017, hearing.

In the context of a motion to strike, the non-movant's well-pleaded facts must be accepted as true. See, In re RFC and ResCap Liquidating Trust Litigation, No. 13-cv-3451 (SRN/JJK/HB), 2015 WL 2451254, *3 (D. Minn. May 21, 2015) (citing Barnidge v. United States, 101 F.2d 295, 297 (8th Cir. 1939)). Federal Rule of Civil Procedure 12(f) states: "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "'A matter is immaterial or impertinent when not relevant to the resolution of the issue at hand.' 'Material is scandalous if it generally refers to any allegation that unnecessarily reflects on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court.'" McLafferty v. Safeco Ins. Co. of Ind., No. 14-cv-564 (DSD/SER), 2014 WL 2009086, *3 (D. Minn. May 16, 2014) (quoting Kay v. Sunbeam Prods., Inc., No. 2:09cv-4065, 2009 WL 1664624, at *1 (W.D. Mo. June 15, 2009)).

> Even matters that are not "strictly relevant" to the underlying claim should not necessarily be stricken if they provide "important context and background to [a plaintiff's] suit" or pertain to the object of the suit. "Matter will not be stricken unless it clearly can have no possible bearing on the subject matter of the litigation."

McLafferty, 2014 WL 2009086, at *3.

A district court considering a motion to strike under Rule 12(f) "'enjoys "liberal discretion."'" Krueger v. Ameriprise Fin., Inc., 304 F.R.D. 559, 565 (D. Minn. 2014) (quoting Stanbury Law Firm, P.A. v. I.R.S., 221 F.3d 1059, 1063 (8th Cir. 2000)). "Despite this broad discretion, however, striking a party's pleadings is an extreme measure, and, as a result, . . . '[m]otions to strike under Fed. R. Civ. P. 12(f) are viewed with disfavor and are infrequently granted.'" (Citations omitted.) Stanbury Law Firm, P.A., 221 F.3d at 1063; see, also, Shukh v. Seagate Tech., LLC, 873 F. Supp. 2d 1087, 1090 n.1 (D. Minn. 2012) ("While the Court has liberal discretion under Rule 12(f), such motions are typically viewed with disfavor.").

III. ANALYSIS

The MDNR has said in its Memorandum in Opposition to the Motion to Strike that, by its Complaint in Intervention, it is not seeking any sort of Declaratory Judgment or other remedy in this Federal Court proceeding which would require the U.S. District Court, District of Minnesota, to make a finding and/or conclusion of law that the Diversion Authority was criminally guilty of a "misdemeanor" pursuant to Minn. Stat. § 103G.141, subd. 1(1), (3). (See, e.g., Mem. in Opp., [Docket No. 458], 4). The MDNR repeated this concession during the June 19, 2017, oral argument on the Motion to Strike. (June 19, 2017, Motion Hearing, Digital Record, 1:58-2:00).

As stated more generally above, the MDNR's Complaint in Intervention alleges multiple bases for relief other than a possible criminal violation by the Diversion Authority under Minn. Stat. § 103G.141, subd. 1(1), (3). Count III of the Complaint in Intervention seeks a declaratory judgment by this Court that "the Diversion Authority's conduct [is] a violation of MERA" and it seeks an order permanently enjoining "construction and operation of the Project by the Diversion Authority until such time as the [M]DNR has issued public waters work and dam safety permits for the Project." (Compl. in Interv., [Docket No. 411], 33). This claim is based upon Minn. Stat. § 116B.03, which authorizes "a civil action in the district court for declaratory or equitable relief in the name of the State of Minnesota . . . for the protection of the air, water, land, or other natural resources located within the state . . . from pollution, impairment, or destruction," and Minn. Stat. § 116B.07, which allows for declaratory relief and permanent equitable relief when "necessary or appropriate to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction." See, Minn. Stat. § 116B.03, subd. 1; Minn. Stat. § 116B.07; see, also (Compl. in Interv., [Docket No. 411], 31-32). The MDNR alleges in its

Complaint in Intervention that it is entitled to such relief because the Diversion Authority's "actions constitute a violation or a likely violation of Minnesota's environmental quality standards, rules, and/or [M]DNR Order dated October 3, 2016[,] denying the Diversion Authority's Permit application." (Id. at 32). Nothing in the statutes upon which this claim is based requires a finding of criminal activity.

Similarly, Count IV, which is also directed at actions taken by the Diversion Authority, seeks judgment from the Court declaring that the Diversion Authority's actions violate the MDNR's October 3, 2016, denial of the Diversion Authority's permit application, "and/or [violate] Minn. Stat. chs. 103G and 103F." (Id. at 35). Count IV also seeks permanent equitable relief enjoining "construction and operation of the Project by the Diversion Authority until such time as the [M]DNR has issued public waters work and dam safety permits for the Project." (Id.). Minn. Stat. 103G.135 provides:

> Upon application of the commissioner, the 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 or chapter 103F, or restrain the violation of this chapter or chapter 103F.

Again, nothing in this statute requires the finding of criminal conduct. Moreover, the factual allegations by which the MNDNR supports its claims in both Count III and Count IV include allegations that the Diversion Authority "move[d] forward with Project construction, both before the [M]DNR issued its permit decision and after the [M]DNR's permit denial." (See, Compl. in Interv., [Docket No. 411], 32, 35 (citing pages 24-27 of the Complaint in Intervention)). To the extent that paragraph 44 of the Complaint in Intervention can be construed as alleging criminal conduct by the Diversion Authority, such an allegation is not necessary for the MDNR to move forward on Counts III and IV as pled in the Complaint in Intervention.

The Plaintiff JPA, through its attorney, acknowledged at oral argument, that it did not plead possible criminal violations under Minn. Stat. § 103G.141, subd. 1(1), (3), in its own Complaint as a remedy being sought (nor as a basis for injunctive relief) because it was not necessary for the JPA to actually seek the civil injunctive remedies available to them under other provisions of Minn. Stat. Ch. 103G. (June 19, 2017, Motion Hearing, Digital Record, 2:19-21). The attorney for the JPA suggests that if it should make any mention of potential criminality in support of the pending Motion for Preliminary Injunction, it would simply be that the Minnesota legislature has expressed its public policy priority for the requirement that permits be issued before water diversion projects can begin by the fact that the Minnesota legislature has made potential criminal penalties as possible consequence of failing to first obtain the allegedly required permits before work begins. (Id. at 2:18-20).

Neither the Diversion Authority nor the MDNR were able to articulate any prejudice either of them would suffer if paragraph 44 respectively was not stricken or was stricken from the Complaint in Intervention. (Id. at 1:50-56, 2:04-09). The Diversion Authority complains only about negative public relations arising from private citizens entering the public debate over the merits of the flood diversion project, while the MDNR, despite being asked several times, never actually asserted that it would be blocked in any way from seeking the civil injunctive remedies set forth in its pleading. (Id. at 1:54-58, 2:02-09, 2:14-16). Moreover, both the Diversion Authority and the MDNR acknowledged at oral argument that it would be potentially constitutionally improper (i.e., no subject matter jurisdiction, procedural due process violations) for the U.S. District Court, District of Minnesota, to even issue a declaratory judgment to the effect that the Diversion Authority had committed an "actual" criminal violation of the provisions of Minn. Stat. Ch. 103G. (Id. at 1:51-52, 1:54-55, 1:58-2:00).

The different standards of proof and rights and the different privileges afforded in criminal and civil proceedings is well established, and it is undeniable that it would be prohibited for the District Court, District of Minnesota to make a finding of criminal guilt under a Minnesota state statute by way of a declaratory judgment. See, e.g., Boddie v. Connecticut, 401 U.S. 371, 390-91 (1971), J. Black, dissenting (noting substantial differences in the Constitutional rights to due process and equal protection in criminal cases and in civil cases); United States v. Grunewald, 987 F.2d 531, 534 (8th Cir. 1993) (noting that "[s]ignificantly different rights, responsibilities, and expectations apply to" civil and criminal proceedings.); Crary v. Porter, 157 F.2d 410, 414 (8th Cir. 1946) (noting "the rules or privileges of a criminal prosecution" do not apply in civil proceedings); Bremson v. United States, 459 F. Supp. 121, 126 (W.D. Mo. 1978) (noting different burdens of proof in civil and criminal proceedings); see, also, Kelly v. Robinson, 479 U.S. 36, 49 (1986) ("[T]he States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief."); United States v. Smith, 75 F.3d 382, 385 (8th Cir. 1996) ("It is a feature of our system of justice that criminal and civil matters are adjudicated in separate cases.").

As the MDNR also acknowledged at oral argument, the prosecutorial discretion which allows a county prosecutor to bring criminal charges rests solely in Minnesota State criminal statutes and therefore any such criminal charges would be a matter for Minnesota state courts and could only be prosecuted in Minnesota state courts. (June 19, 2017, Motion Hearing, Digital Record, 2:10-11). See, also, State v. Carriere, 290 N.W.2d 618, 620 n.3 (Minn. 1980) (discussing provision in Minnesota Constitution that establishes that a prosecuting attorney's decision to

prosecute criminal charges is generally protected by the constitutional provision for separation of powers).

Nonetheless, the attorney for the MDNR argues that paragraph 44 of its Complaint in Intervention is "relevant" because criminal conduct violates Minn. Stat. Ch. 103G and therefore provides a possible basis for arguing why temporary or permanent injunction remedies should be provided by the U.S. District Court, District of Minnesota in this case. (Mem. in Opp., [Docket No. 458], 10-12; June 19, 2017, Motion Hearing, Digital Record, 2:00-09, 2:11-14). Yet, the attorney for the MDNR circularly argued that he was not seeking any declaration nor was any declaration necessary by the Court of "actual" criminality on the part of the Diversion Authority in order to provide the civil injunctive remedies being sought by the MDNR. (June 19, 2017, Motion Hearing, Digital Record, 1:58-2:00, 2:05-08, 2:11-13).

The MDNR's attorney is misreading the various provisions of Minn. Stat. Ch. 103G when he argues that a "violation" of Minn. Stat. sec. 103G.141, subd. 1(1), (3) provide grounds for the Commissioner of the MDNR to seek civil injunctive remedies for a violation of Minn. Stat. Ch. 103G. The civil injunctive remedies and the criminal remedies provisions of Minn. Stat. Ch. 103G are separate and distinct remedial provisions available to the Commission for "violations" of other provisions of Minn. Stat. Ch. 103G, i.e., beginning construction of a water diversion project without first obtaining state permits from the MDRN; the remedies provisions of Minn. Stat. Ch. 103G are not themselves "violations"—they are simply available "remedies" for other, specified "violations." Indeed, within the total scheme of Minn. Stat. Ch. 103G, nowhere can it reasonably be read that a misdemeanor conviction as the remedy available under Minn. Stat. § 103G.141, subd. 1(1), (3) is a prerequisite or condition precedent for the MDNR to seek (as they claim they are doing through their Complaint in Intervention) "civil" injunctive

remedies to halt construction of the diversion project (ultimately through a permanent injunction as sought in the Complaint in Intervention, and in the shorter term, through the Motion for Preliminary Injunction pending (but not yet heard) before Chief Judge Tunheim).

Accordingly, paragraph 44 of the Complaint in Intervention is not relevant to any affirmative claim made by the MDNR or the remedies being sought therein (as clarified by the representation made by the MDNR as part of the present motion practice).

However, poor drafting and/or irrelevance may not by itself rise to the high level required for the Court to exercise its discretion under Rule 12(f) and provide the exceptional remedy of striking a portion of an otherwise reasonably properly pled Complaint (in Intervention). "Considering the disfavor with which motions to strike are looked upon, a court ordinarily will not strike a matter unless the court can confidently conclude that the portion of the pleading to which the motion is addressed is redundant or is both irrelevant to the subject matter of the litigation and prejudicial to the objecting party." (Emphasis added.) Fed. Nat'l Mortg. Ass'n v. Cobb, 738 F. Supp. 1220, 1224 (N.D. Ind. 1990). "Inartful pleading does not constitute a proper basis for a motion to strike." Pain Prevention Lab, Inc. v. Elec. Waveform Labs, Inc., 657 F. Supp. 1486, 1490 (N.D. Ill. 1987).

A "Complaint is, by definition, an adversarial document, and the allegations will almost always be drafted so as to paint the opposing party in an unfavorable light." Scribner v. McMillan, No. 6-cv-4460 (DWF/RLE), 2007 WL 685048, *5 (D. Minn. March 2, 2007). But this does not always justify granting a motion to strike. When "objected-to allegations are not likely to be utilized at trial and . . . Defendants have not shown prejudice in leaving the allegations in the Complaint," it is within the Court's discretion to deny a motion to strike such allegations. See, Id.

In the present case, the challenged language in paragraph 44 does not explicitly allege that the Diversion Authority violated is guilty of a misdemeanor under Minnesota state criminal law. (Compl. in Interv., [Docket No. 441], 14). Nor does the MDNR's prayer for relief request such a finding. (Id. at 35-36). The MDNR repeatedly stated on the record at the June 19, 2017, Motion Hearing that it will not in the future proceedings in this case ask for a finding that the Diversion Authority is guilty of violating the criminal statute referenced in paragraph 44 of the MDNR's Complaint in Intervention. And the Diversion Authority, in its written submissions and at oral argument, failed to articulate prejudice that sufficiently justifies the extreme remedy of striking paragraph 44 from the Complaint in Intervention.

On the basis of the present record, there has been no evidence presented that the pleading of paragraph 44 in the Complaint in Intervention was due to any malicious or ill intent rather than simply inartful drafting. Accordingly, the Court **denies** the Diversion Authority's Motion to Strike, [Docket No. 437].

IV. CONCLUSION

Based on all of the files, records, and proceedings herein,

IT IS HEREBY ORDERED:

1. That Defendant Fargo-Moorhead Flood Diversion Board of Authority's ("Diversion Authority") Motion to Strike, [Docket No. 437], is **DENIED**, as set forth above.

Dated: July 17, 2017

s/Leo I. Brisbois
Leo I. Brisbois
U.S. MAGISTRATE JUDGE