

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

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

Plaintiff,

Minnesota Department of Natural
Resources,

Plaintiff-Intervenor,

vs.

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

**DNR'S OMNIBUS RESPONSE TO THE
DEFENDANTS' MOTIONS TO
MODIFY THE SEPTEMBER 7, 2017,
ORDER GRANTING A PRELIMINARY
INJUNCTION**

Defendants,

and

Fargo-Moorhead Flood Diversion Board
of Authority,

Defendant-Intervenor,

and

City of Oxbow,

Defendant-Intervenor.

INTRODUCTION

The Minnesota Department of Natural Resources (“DNR”) comes to this Court on the horns of a dilemma. When this Court entered its September 7, 2017 Order issuing an injunction (“Order”), this Court admonished the parties to find a joint resolution for flood risk reduction for the Fargo Moorhead metropolitan area. (Dkt. No. 530 at 58.) The Governors of North Dakota and Minnesota heard the Court and took on this task. After consultation with affected communities on the Red River of the North (“Red River”), including the cities of Fargo and Moorhead, a revised project plan was developed for which the DNR issued a permit on December 27, 2018 (“Permit”). After issuance of the Permit, two communities, Comstock and Wolverton, and the Buffalo Red River Watershed District requested a contested case hearing. Under Minnesota law the filing of a contested case hearing voids the permit. Minnesota now finds itself with a project that it believes meets all permitting requirements but that no longer has a permit. Should this Court modify the injunction without requiring compliance with the Permit conditions, the Plan B Project would not comply with Minnesota law. Moreover, without an order requiring compliance with the Permit conditions, Minnesota has no mechanism to regulate the Plan B Project and enforce its Permit conditions. The interests of Minnesota would be put in jeopardy. For these reasons, Minnesota now asks the Court to either order that construction may commence consistent with all of the requirements set forth in DNR’s pending Permit or deny the Defendants’ motion to modify the injunction.

As this Court is aware, the Fargo-Moorhead metropolitan area is located on the Red River. The Red River has reached or exceeded the National Weather Service flood

warning stage at the United States Geological Survey (“USGS”) gage in Fargo 52 years between 1902 and 2017 and every year except 2012 and 2016 from 1993 through 2017. (Declaration of Barbara Naramore (“Naramore Decl.”), Ex. 2 December 27, 2018, Findings of Fact, Conclusions, and Order (“Permit Order”), ¶ 5.) Since the 1997 flood, the cities of both Fargo and Moorhead and surrounding communities have implemented a number of flood risk reduction measures. (*Id.*, ¶ 9.) To further reduce flood risks, the two cities and surrounding communities together with the United States Army Corps of Engineers (“Corps”), in 2011, began development of a flood risk reduction project framework for the design, construction, and management of a project to further reduce flood risk to the Fargo-Moorhead metropolitan area. (*Id.*, ¶ 23). This project was advanced through the Corps for environmental review under NEPA. (*Id.*, ¶ 18; Dkt. No. 625 at 5.) On February 18, 2016, during the pendency of state environmental review, the DNR received a permit application for a flood control project (“Plan A Project”) from the Fargo-Moorhead Flood Diversion Board of Authority (“Diversion Authority”). (Permit Order, ¶¶ 18-19, 21.) On October 3, 2016, after completion of state environmental review and analysis of the permit application, the DNR denied the 2016 Application for the Plan A Project, finding that it did not protect the public health, safety and welfare, was not reasonable or practical, and gave rise to significant unmitigated environmental impacts. (*Id.*, ¶ 25.) The DNR also found that the Plan A Project did not provide adequate mitigation for adverse environmental impacts, and was inconsistent with local plans. (*Id.*)

Shortly thereafter, the DNR sought and this Court enjoined construction of the Plan A Project without the applicable DNR permit. The Court further encouraged the parties to find a solution. To that end, the Governors of Minnesota and North Dakota created a joint Task Force (“Governors’ Task Force”), the purpose of which was to develop design principles and concept-level engineering solutions to achieve balanced flood risk management for the Fargo-Moorhead region, including upstream and downstream communities and properties.¹ Based on concepts developed in the Governors’ Task Force, the Diversion Authority, the City of Fargo, the City of Moorhead, and the Corps submitted a permit application for a revised project (“the Plan B Project”) on March 16, 2018. Among other alterations, the Plan B Project reduced the acreage of the flood storage area in Minnesota so that both the burdens and benefits of the Plan B Project in Minnesota were roughly proportional at 20%, moved the City of Comstock outside the flood storage area eliminating the need to construct a ring dike around the City, reduced the acreage of undeveloped flood plain that would be protected for future development by moving the southern embankment further north, and required greater flows through the Fargo-Moorhead metropolitan area during flooding to reduce the impact of project operation on upstream communities during a flooding event. (Naramore Decl., ¶ 3; *see also*, Permit Order, ¶¶ 29, 61, 79, 81-82, 89, 96, 182, 289.)

Following receipt of the permit application for the Plan B Project, the DNR prepared a State Supplemental Environmental Impact Statement (“SEIS”) and the Corps

¹ https://www.dnr.state.mn.us/waters/watermgmt_section/fargo-moorhead-task-force/index.html

developed a Supplemental Environmental Assessment (“SEA”). In preparing the SEIS and evaluating the permit application, the DNR engaged in a ten-month process of analyzing environmental and socioeconomic impacts related to the Plan B Project, assessing the Plan B Project’s permissibility, and engaging the public through a public meeting and responding to public comments.² On December 27, 2018, the DNR issued its Permit Order finding that the Plan B Project, subject to applicable Permit conditions, met the statutory requirement for both a public waters work permit and a dam safety permit and ordered that a combined Permit with 54 conditions be granted for the Plan B Project. The DNR believed at the time of permit issuance and continues to believe today that, as permitted, the Plan B Project meets all permitting requirements of state law. (Naramore Decl., ¶ 4.) Indeed, the Permit conditions specifically require mitigation to be funded and construction of mitigation to commence five years prior to completion of project construction, that owners of all Minnesota property impacted by project operation be compensated under the State and Federal Constitution regardless of the degree of impact, and that the permittees acquire all local permits except those that would expressly preclude construction of a regional flood control project. (Naramore Decl., Ex. 1 Permit, Conditions 21, 22, 23, 24, 27, and 46-50.)

Within 30 days of the DNR’s issuing the Permit, two cities, Comstock and Wolverton, represented by counsel for the Richland Wilkin Joint Powers Association (“JPA”), and a watershed district requested a contested case hearing be initiated. The

² https://www.dnr.state.mn.us/input/environmentalreview/fm_flood_risk/index.html

impact of the Plan B Project on the two cities, at most, is only incrementally increased over existing conditions and significantly less than under Plan A. However, pursuant to Minnesota Statutes Section 103G.311, upon the filing of a valid contested case hearing, the order issuing the permit is no longer final, and the permit is put into abeyance and ceases to be valid. Minn. Stat. § 103G.311 (“The commissioner must...make a determination on issuing or denying the permit as though the previous order had not been made.”) Thus, despite the fact that the DNR believes the Plan B Project is permissible, subject to conditions contained in the permit, the fact remains that Minnesota law allows these local units of government to initiate a contested case hearing, thereby putting the Permit into abeyance pending the outcome of the contested case hearing and a final order of the DNR Commissioner.

Regardless, the DNR believed when it issued the Permit and believes today that allowing the Plan B Project to proceed forward as permitted is in the public interest. However, Minnesota law precludes the State from allowing the Plan B Project to proceed absent a court order that any construction on the Plan B Project be in accordance with the terms and conditions of the state Permit. Absent such an order, the state is compelled to request that this court maintain its current injunction to maintain the integrity of Minnesota’s permitting process under Chapter 103G.

BACKGROUND

I. FEDERAL REGULATORY FRAMEWORK.

A. WRDDA 2014 Requires Local Sponsors To Obtain State Permits And The Corps To Ensure Compliance With This Requirement.

In 2014, Congress authorized the Project pursuant to the Water Resources Reform and Redevelopment Act of 2014 (“WRRDA 2014”) and the Project is governed by that authorization. Pub. L. No. 113-121, 128 Stat. 1193 (codified at 33 U.S.C. §§ 2201 *et seq.* (2014)). This Court held in its Order that WRRDA 2014 mandated the Project be carried out “substantially in accordance with the plan, **and subject to the conditions** described in the respective reports.” (Dkt. No. 530 at 39 (emphasis in the original).) This Court also held that WRRDA 2014 required that “[b]efore the Diversion Authority carries out the Project, it must obtain **any permit** or approval required in connection with the project . . . under Federal or **State** law.” (*Id.* at 36 (emphasis in the original).) Likewise, this Court held WRRDA 2014 requires oversight, compliance audits, and monitoring by the Corps: “monitor and audit **any** water resources development project...to ensure that...the construction is carried out in compliance with the requirements of this section.” (*Id.* at 23 (emphasis in the original).)

B. Congress Amended WRRDA But Did Not Eliminate The Need To Obtain State Permits.

After this Court issued its Order, Congress amended WRRDA the following year, in October 2018. In fact, Congress amended the very provision that formed the basis of the Court’s order, which this Court had held required state permits be obtained before project construction. (*Id.* at 36.) In amending WRRDA, however, Congress only

eliminated a requirement related to federal permits, providing that non-federal sponsors “shall not be required to obtain any Federal permit or approval.” 33 U.S.C. § 2232(b)(2)-(3). Congress did not eliminate the requirement that local sponsors, like the Diversion Authority, must obtain all necessary state permits, or the requirement that the Corps monitor, audit, and ensure such state permits are obtained before construction commences. 33 U.S.C. § 2232(b)(2) & (d).

II. MINNESOTA REGULATORY FRAMEWORK.

A. Minnesota Statutes Section 103G Requires A DNR Permit For Any Construction Of A Dam In Public.

Minnesota Statutes Section 103G.245 does not allow any person, private or public corporation or any governmental unit of the state to “construct, reconstruct, remove, abandon, transfer ownership of, or make any change in a reservoir, dam, or waterway obstruction on public waters” over which the State of Minnesota has jurisdiction without first obtaining a public waters work permit. Minn. Stat. § 103G.245, subd. 1(1). Section 103G.245 also prohibits a person from “chang[ing] or diminish[ing] the course, current or cross section of public waters” without first obtaining a public waters work permit. *Id.*, subd. 1 (2). Moreover, Minnesota Statutes Section 103G.315 prohibits the DNR from issuing a public waters work permit or a dam safety permit unless it is determined that the project plans are “reasonable, practical, and will adequately protect public safety and promote the public welfare.” Minn. Stat. § 103G.315, subd. 3. Individually and collectively, these statutes prohibit applicants from beginning construction of a dam that

will be built on or impact Minnesota's public waters unless the DNR has fully analyzed a proposed project and has issued the applicant the required permit.

B. Minnesota Rule 6115 Requires All Parts Of The Dam Be Evaluated As One Structure And Permitted By The DNR.

Minnesota law broadly defines a “dam” as “any artificial barrier, *together with appurtenant works*, which does or may impound water.” Minn. R. 6115.0320, subp. 5 (emphasis added). Where a project is an integrated system consisting of multiple structures, the DNR must consider the structure as a whole. *Id.*; (see also Declaration of Jason Boyle (“Boyle Decl.”), ¶ 7.) The Plan B Project proposed by the Diversion Authority and the Corps in 2018 is an integrated system of multiple structure to reduce overall flood damages and operates in conjunction with control structures, levees, and tiebacks, on both sides of the Red River. (Boyle Decl., ¶ 8); see also Permit Order, ¶ 336. For that reason, the DNR made clear in its Permit Order that “[a]ll parts of the Dam need to be considered as one structure” and prohibited construction of any phase of the Dam without specific written authorization from the DNR. (Permit Order, ¶ 408.)

The Permit relies on phased approvals, an approach expressly authorized by Minnesota Rule 6115.0410, subpart 9A (3) through (5). (*Id.*, ¶¶ 118-24.) Phased approval may be used when permitting dams with long term continuous construction so that modifications may be made based on new data and new technologies thereby maximizing public health, safety, and welfare. (Boyle Decl., ¶ 9.) As with many aspects of the design and construction of a project of this size and complexity, approval of various aspects of dam design and construction involves an iterative process between the

permitting authority and the applicant. (*Id.*, ¶ 10.) This process does not and should not stop at the moment the permit is issued. (*Id.*, ¶ 11.) As additional information becomes available, the DNR may require further information or impose additional requirements. (*Id.*, ¶ 12.) The DNR may require design modifications if necessary to meet regulatory requirements. (*Id.*, ¶ 13.) The DNR’s regulatory authorities provide the means to continue to impose whatever requirements may be necessary over time to assure compliance with all applicable regulations. *See e.g.*, Minn. R. 6115.0410, subp. 9(A)(2) (addressing alteration, modifications, additions to approved designs, plans, and specifications); *Id.*, subp. 9(A)(4) (if the “commissioner finds that changes are necessary to protect health, safety, welfare, and the environment, the commissioner shall order the owner to revise designs, plans, and specifications.”); *Id.*, subp. 12 (providing for impoundment approvals to be issued at future stages of project); Minn. R. 6115.0500 (noting permit may be canceled or modified at any time if deemed necessary for protection of public interests). (Boyle Decl., ¶ 14; Permit Order, ¶¶ 122-24.)

This Court, in its September 2017 Order, found that the Diversion Authority was required to obtain the necessary DNR permit and that the Corps monitor, audit, and ensure compliance with this requirement and directed the states to work together to find a permissible project. In accordance with the Court’s directive, the two Governors, with input from the communities, worked to assist the Diversion Authority develop a revised project that would comply with Minnesota permitting requirements. The Diversion Authority, City of Fargo, City of Moorhead, and the Corps submitted an application for the Plan B Project. On December 27, 2018, after analysis of the supplemental

environmental impact statement as well as documents supporting the permit application, the DNR issued a combined public water works and dam safety permit of the Plan B Project. In doing so the DNR determined that the Plan B Project, with applicable conditions, met the requirements of state law. (Permit Order, Conclusions 1-15.)

C. Minnesota Statutes Section 103G.311 Requires The DNR Grant A Hearing If Requested By A Local Unit Of Government.

Minnesota Statutes Section 103G.301, which sets forth the procedures for all state water permits, gives special status to local units of government. For example, during the permit review process, Minnesota Statutes Section 103G.301, subdivision 6 requires that a copy of the application be sent to local units of government for review “if the proposed activity for which the permit is requested is within a municipality, or is within or affects a watershed district or a soil and water conservation district.” Minn. Stat. § 103G.301, subd. 6. Additionally, if an order is issued granting or denying a permit application, and a hearing has not previously been held on the application, the permit applicant and certain local units of government may also demand a hearing on the application provided that the request for a hearing is made within 30 days of the order granting or denying the permit. *Id.*, subd. 5(a). Section 103G.311 provides that a hearing on an application must be conducted as a contested case hearing under chapter 14. Minn. Stat. § 103G.311, subd. 1.

The implication of ordering a contested case hearing is significant, for unlike an appeal of a final agency order taken directly to the Court of Appeals, by statute, the contested case hearing is not a review of the order issuing the permit but is a hearing on the actual application itself. *Id.* The statute also makes clear that, after reconsidering the

application, the DNR must “make a determination on issuing or denying the permit as though the previous order had not been made.” *Id.*

Indeed, DNR acknowledged in its December 2018 Permit Decision Frequently Asked Questions document that, “[i]f a contested case hearing is granted, the DNR’s permit decision is no longer treated as final. Parties may not undertake work governed by the permit until completion of the contested case hearing.” (Naramore Decl., ¶ 4.)³ This process is consistent with DNR’s long standing interpretation and Minnesota law that a permit issued prior to a contested case hearing demand pursuant to Minn. Stat. 103G.311 is no longer valid. Minn. Stat. 103G.311, subd. 5; *Re: In the Matter of the Appeal of Public Waters Permit No. 2010-0117 Issued To MNDOT For Structural Load Testing*, OAH Dkt. No. 11-2000-21160-2, 2010 WL 4813794, at *1 (Minn. OAH July 29, 2010) (“[T]he permit that had previously been issued by MnDNR to MnDOT was ‘terminated’ upon receipt of the hearing demand.”); *Cty of Greenwood v. Minnehaha Creek Watershed Dist.*, Case No. C2-94-1726, 1995 WL 91838, *1 (Minn. Ct. App. Mar. 7, 1995) (“After hearings were conducted, the administrative law judge recommended that the permit application be granted. The DNR followed the judge’s recommendation and issued the permit”); *see also, In re Big Stone Cnty. Request for Review of Public Watercourse—Section 13, T 123 Bm 46W, Almond Township*, Case. No. A17-1255, 2018 WL 1145736, *6 (Minn. Ct. App. Mar. 5, 2018)

³ *See also* https://files.dnr.state.mn.us/waters/surfacewater_section/damsafety/fargo_moorhead-faq-2018.pdf

III. SIGNIFICANT REVIEW, ANALYSIS, AND PUBLIC OUTREACH HAS OCCURRED SINCE THE COURT ISSUED ITS PRELIMINARY INJUNCTION IN SEPTEMBER 2017.

A. The DNR And The Corps Conduct Supplemental Environmental Review Because Of Substantial Differences In The Plan A And Plan B Projects.

On March 16, 2018, the Diversion Authority together with the City of Fargo, the City of Moorhead, and the Corps applied for the Permit with their permit application 2018-0819 (“2018 Application”) for the Plan B Project. (Boyle Decl., ¶ 6; Permit Order, ¶ 29.) After evaluating the 2018 Application, the DNR determined in April 2018 that the Plan B Project was substantially different than the Plan A Project and could result in potential significant adverse environmental effects not previously, or adequately, analyzed in Minnesota’s original Environmental Impact Statement (“EIS”) for the Plan A Project. (Naramore Decl., ¶ 7; Permit Order, ¶ 29.) Pursuant to Minnesota Rule 4100.3000, subpart 3, the DNR ordered the preparation of an SEIS to analyze the environmental effects of the Plan B Project. (Naramore Decl., ¶ 8; Permit Order, ¶ 30.) The DNR invited public comment on the scope of the proposed SEIS as required under Minnesota Rule 4410.3000, subpart 5A, on the Draft SEIS pursuant to Minnesota Rule 4410.3000, subpart 5C, and on the Final SEIS pursuant to Minnesota Rule 4410.3000, subpart 5D. (Naramore Decl., ¶ 9; Permit Order, ¶¶ 30-33.) The DNR considered all comments received during the public comment period on the Final SEIS that addressed the criteria for adequacy and made its final adequacy determination on the Final SEIS on December 26, 2018. (Naramore Decl., ¶ 10; Permit Order, ¶ 33.)

The Corps similarly determined it was required to conduct additional environmental review related to the Plan B Project. (Dkt. No. 625 at 5.) In August 2018, the Corps issued its draft SEA and also held a public meeting in September 2018 to discuss the Plan B Project during its 30-day public review period.⁴ On February 28, 2019, the Corps completed its environmental assessment for the latest changes to the Plan B Project and issued a “Finding of No Significant Impact.”⁵

B. The DNR Issues An Order Granting The Permit Subject To 54 Conditions.

The DNR reviewed the 2018 Application and supporting materials. (Permit Order, ¶ 450.) In accordance with the requirements of Minnesota Statutes Section 103G.301, subdivisions 6 and 7 and Minnesota Rule 6115.0250, subpart 2, the DNR also circulated the 2018 Application on June 5, 2018 to thirty-three state and local units of government and requested comments on it. (*Id.*, ¶ 110.) Some commenters expressed concerns regarding the Plan B Project. (*Id.*, ¶¶ 114-166.) As set forth in its 87-page Permit Order, the DNR found that the revised Plan B Project overcame the shortcomings of the Plan A Project and concluded that the Plan B Project, together with the applicable Permit conditions, protected the public health and welfare of the citizens of Minnesota, assured mitigation of environmental impacts, assured full compensation to owners of impacted property, reduced the amount of flood plain that would be removed from its natural function and protected for future development, and would comply with applicable

⁴https://www.mvp.usace.army.mil/FMM_FRM/

⁵<https://www.mvp.usace.army.mil/Media/News-Releases/Article/1774327/corps-of-engineers-completes-environmental-assessment-for-latest-changes-to-the/>

local regulations other than those expressly designed to preclude regional flood control projects. (*See id.*, Conclusions 1-15.) Thus, after considering the application, comments, and all other relevant factors, the DNR issued an order granting the Permit on December 27, 2018. (*Id.*, ¶ 450.)

The Permit contains 54 conditions, or requirements, that must continue to be met by the permittees throughout construction. (Permit; *see* Boyle Decl., ¶ 15.) Some of the more notable conditions address: required mitigation, including fish passage at Drayton Dam; acquisition of property rights for any impacted property in Minnesota; DNR review and approval of all final engineering prior to each construction phase; DNR review and approval of the project Operation and Maintenance Plan prior to completion of the construction phase; and coordination with Buffalo-Red River Watershed District on the Wolverton Creek crossing structure.⁶ (Boyle Decl., ¶ 16.) Through its Permit, the DNR maintains an ongoing regulatory role to ensure that the Plan B Project is built and maintained properly and all mitigation is completed. (*Id.*, ¶ 17.)

C. Three Local Units Of Government Initiate A Contested Case Hearing

Three local units of government, the Cities of Comstock and Wolverton, and the Buffalo Red River Watershed District, timely invoked their right to a contested case hearing in January 2019. (Dkt. No. 609.) The DNR is in the process of initiating the contested hearing requests, and the DNR's Permit Order is no longer a final order and the

⁶ The full list of conditions is found within the permit, which can be accessed at https://files.dnr.state.mn.us/waters/surfacewater_section/damsafety/fargo_moorhead-permit-2018.pdf

permit is put in abeyance. (*Id.*; Naramore Decl., ¶ 11.) Pursuant to the requirements of Minnesota Statutes Section 103G.311, upon completion of the contested case hearing, the DNR will issue a final order granting or denying the permit as though the previous order had not been made. (Naramore Decl., ¶ 12.) The length of contested case hearings vary based on many factors, including the issues to be examined and motion practice by the parties, but the process can take between one to two years. (*Id.*, ¶ 13.) From the DNR's perspective, the contested case process is the last regulatory barrier to DNR's final action on the Permit. (*Id.*, ¶ 14.)

ARGUMENT

I. STANDARD OF REVIEW

When analyzing whether to grant a motion for a preliminary injunction, a court must consider four factors: (1) the probability that the moving party will succeed on the merits; (2) the threat of irreparable harm to the moving party; (3) the balance of harms as between the parties; and (4) the public interest. *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)). Although no one factor is determinative, "in deciding whether to grant a preliminary injunction, likelihood of success on the merits is most significant." *Laclede Gas Co. v. St. Charles Cnty, Mo.*, 713 F.3d 413, 419 (8th Cir. 2013) (affirming grant of preliminary injunction). This Court previously found all four factors weighed in favor of granting the preliminary injunction because, at that time, the Diversion Authority had failed to obtain the necessary Minnesota permits. (Dkt. No. 530 at 56.)

Under Federal Rule of Civil Procedure 60(b)(6), a court may modify a preliminary injunction, but such relief “is to be granted only when exceptional circumstances prevented the moving party from seeking redress through the usual channels.” *Regional Multiple Listing Serv. of Minn., Inc. v. Am. Home Realty Network, Inc.*, 960 F. Supp. 2d 988, 994 (D. Minn. 2013). A preliminary injunction may be modified “in light of subsequent changes in the facts or the law, or for any other good reason.” *Movie Sys., Inc. v. MAD Minneapolis Audio Distribs.*, 717 F.2d 427, 430 (8th Cir. 1983).

II. THIS COURT SHOULD EITHER MODIFY THE INJUNCTION TO REQUIRE THE PROJECT TO PROCEED IN ACCORDANCE WITH THE REQUIREMENTS OF THE STATE PERMIT ISSUED PRIOR TO THE REQUEST FOR A CONTESTED CASE HEARING OR DENY THE MOTIONS TO MODIFY THE INJUNCTION.

A. Likelihood of Success.

This Court has ruled a movant must show a “fair chance of prevailing” on only one of its claims and in considering whether a movant is likely to prevail on the merits, “a court does not decide whether the movant will ultimately win.” (Dkt. No. 530 at 32-33.)

1. Claims Against The Corps.

Section 2232(b)(2)(a) of WRRDA requires that “before the Diversion Authority carries out the Project, it must obtain any permit or approval required in connection with the Project...under Federal or State law.” (Dkt. 530 at 36.) Section 7002 provides that the project was “authorized to be carried out by the [Corps] substantially in accordance with the plan, and subject to the conditions, described in the respective [Chiefs’] reports.” (*Id.*) This Court found that the Chief’s report repeatedly stated the project “would comply with Federal and State laws and regulations,” and that the report endorsed the

Final Feasibility Report and Environmental Impact Statement (“FFREIS”), in which the Corps itself acknowledged that the “non-federal sponsors [were] required to obtain a [DNR] protected waters permit.” (*Id.* at 38; *see also*, Dkt. No. 411, ¶ 20.)

This Court held the DNR had shown a likelihood of success on this claim and noted that the Eighth Circuit had previously affirmed its earlier ruling that the requirements of Minnesota law applied, “even when it only completed work outside the state, because ‘Minnesota has an interest in regulating the larger diversion project and its parts.’” (Dkt. No. 530 at 36-37.) The Court also admonished the states of Minnesota and North Dakota to find a resolution to the matter that would afford flood risk mitigation to the Fargo-Moorhead metropolitan area. (*Id.* at 58.)

Following that ruling, the Governors of Minnesota and North Dakota engaged the public in both states and convened a Governors’ Task Force to develop concept level engineering solutions to achieve balanced flood risk management for the Fargo-Moorhead region that recognized the concerns of both up and downstream communities. (Permit Order, ¶ 28). The Governors’ Task Force together with the Technical Advisory Committee/Group developed options and made recommendations to the Diversion Authority regarding specific aspects of flood risk reduction efforts. (*Id.*) In these efforts the Technical Advisory Committee/Group solicited input from members of the JPA. (*Id.*) As a direct result of these efforts the Diversion Authority and the Corps adopted the Plan B Project and the DNR reviewed and granted a Permit for the Plan B Project. (*See generally*, Permit Order.)

Unfortunately, the request for contested case hearing puts the Permit into abeyance pending the outcome of the contested case hearing. Thus, as of today, there remains no valid state permit for the Plan B Project. Allowing the Plan B Project to proceed forward without the Permit and the associated conditions or a court order encompassing the required Permit conditions would undermine Minnesota's entire public waters permitting program. Furthermore, if the Plan B Project modifying of the injunction did not include in the order a requirement to comply with the Permit conditions, the Plan B Project would no longer be permissible under Minnesota law for the Permit conditions are expressly designed to address such issues as environmental mitigation and compliance with the acquisition requirements of the Minnesota Constitution.

2. The MERA Claim Against The Diversion Authority.

The Minnesota Environmental Rights Act ("MERA") allows a person "to maintain a civil action for declaratory or equitable relief against another person for the protection of the air, water, land or other natural resources located within the state, whether publicly or private owned, from pollution, impairment, or destruction." Minn. Stat. 116B.03, Subd. 1. There are two distinct paths to prove a MERA violation. The first requires a showing of conduct that "violates or is likely to violate any environmental quality standard, permit, or similar rule." Minn. Stat. 116B.02, Subd. 5. The second requires a showing of conduct that "materially adversely affects or is likely to materially adversely affect the environment." *Id.*

Regarding the first path, this Court has already rejected the Diversion Authority's argument that the Diversion Authority is not required to obtain a Minnesota DNR permit

“until the Diversion Authority touches the Red River,” finding that the argument was inconsistent with the Eighth Circuit’s holding regarding Minnesota’s interest in regulating the project and its parts. (Dkt. No. 530 at 46-47.) No material change has occurred. Nothing has occurred that alters the Court’s reasoning. The Diversion Authority is still seeking to construct the critical aspects of the dam despite lacking a Minnesota permit.

Regarding the second path, Minnesota courts analyze the five Schaller factors, which include the severity and long-term impacts on the natural resources affected, as well as significant consequential effects on other natural resources. *See State ex rel Schaller v. Cnty. of Blue Earth*, 563 N.W.2d 260, 267 (Minn. 1997); (Dkt. No. 530 at 47-48.) In its October 3, 2016, Order, the DNR identified significant deficiencies in the proposed mitigation plan, and noted that the project would reduce the stability of streams and rivers, result in the loss of fish connectivity, and impact aquatic habitat. (Dkt. No. 411-1 at 10; Dkt. No. 530 at 48.) Those environmental issues remained a concern during the analysis of the 2018 Application and were addressed through the stringent conditions set forth in the Permit and supported by the rationale set forth in the Permit Order. (*See* Permit Order, ¶ 274 (outlining mandatory mitigation and permit mitigation requirements).)

The DNR determined that the issuance of the Permit with its conditions and continued regulatory oversight by the DNR assured compliance with the *Schaller* factors and applicable environmental standards. (*See, e.g.*, Permit, Condition 27.) DNR specifically retained the right to revoke the Permit if the necessary Permit conditions

designed to address the adverse environmental impact are not met and further retained the right to modify the Permit if deemed necessary by the Commissioner for protection of public interests. (*Id.*, Conditions 5, 54.) Allowing the Plan B Project to move forward without the Permit in place means that there is no mandatory mitigation for the Plan B Project, and the Plan B Project would fail to meet the *Schaller* factors. (Permit Order ¶ 449; Boyle Decl., Ex. 1 SEIS Record of Decision ¶ 85.) As the Supreme Court noted in *Citizens Advocating Responsible Development v. Kandiyohi County Board of Commissioners*, mitigation used to offset significant environmental effect must be more than “vague statements of good intentions.” 713 N.W. 2d 817, 834 (Minn. 2006). The mitigation must be reasonably certain to occur and one way to assure that certainty is through the regulatory permitting process. *Id.* Without the permit and its conditions, any promise by the Diversion Authority to mitigate adverse environmental effects is little more than vague statements of good intentions and cannot be relied on in determining that the Plan B Project will not have adverse impacts on the environment. *Id.*

Thus, DNR has a fair chance of demonstrating that without the Permit conditions, the Plan B Project will have a material adverse impact on the environment, within the meaning of MERA, and has a high likelihood of prevailing on its MERA claim.

B. Irreparable Harm

An alleged harm need not occur before a court may grant relief, but the harm must be certain 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); *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996).

With respect to irreparable harm, this project presents two challenges to the State of Minnesota. The first challenge was the central challenge addressed in the DNR's request for injunctive relief to prohibit the construction of Plan A. In that instance, the Corps and the Diversion Authority were arguing that they should be permitted to proceed forward with a project for which there was no permit because the Plan A was not permissible under state law. This was because Plan A did not meet the basic state requirements for a permit. That issue has largely been resolved with Plan B and the subsequent finding by the DNR that the Plan B Project is permissible.

After issuing a permit for the Plan B Project and upon receipt of the requests for a contested case hearing, the DNR found itself facing a new challenge. That is, although the DNR found and continues to believe the Plan B Project is permissible, under state law, once a contested case hearing was requested, the Permit was no longer valid. This element of state law is essential where the party requesting the contested case hearing is a permit applicant or a permit holder that is contesting a DNR permit decision. In that case, the abeyance is necessary to assure that the permit applicant or the permittee not use the contested case hearing to end run the permitting process. This is not the case here, where the permit was applied for and granted and not challenged by the applicant.

Furthermore, if the injunction is modified without an order that requires the Diversion Authority, City of Fargo, City of Moorhead, and the Corps to comply with the terms of the Permit, Minnesota is harmed because the very conditions that allow the Plan B Project to be permissible are no longer enforceable by DNR. As this Court has already held, "failure to comply with Minnesota law governing environmental permits "is a harm

in and of itself.” (Dkt. No. 530 at 52; *see also Dist. Ct. Order I*, 2015 WL 2251481, at *22.) Moreover, construction of the Plan B Project and the passage of time reduces the opportunity for DNR to influence not only the final iteration of the Project but also each individual phase, including the necessary mitigation to bring environmental impacts below the MERA thresholds set forth in *Schaller*. (Boyle Decl., ¶ 18; Dkt. No. 530 at 51-52.).

Nor is segmenting the Plan B Project a viable solution, for although the Diversion Authority and Corps couch their request to modify the injunction as only seeking to construct a small portion in North Dakota of the larger project, the harm to Minnesota is no less irreparable as the dam and its appurtenant structures (i.e. the impoundment structure, the tie back levees, the inlet structure and the diversion channel) are intended to be operated as one, integrated structure. (Boyle Decl., ¶ 19; Dkt. No. 530 at 37.) The integrity of any of the appurtenant structure will positively or negatively affect the integrity of the impoundment structure in the Red River. (Boyle Decl., ¶ 20.) Just as before, the DNR will suffer irreparable harm if construction commences without a Minnesota permit and associated conditions being enforced. (Boyle Decl., ¶ 21.) The only way to avoid this harm would be to order the Corps and the Diversion Authority to comply with the terms of the Permit until the contested case hearing is resolved. (*Id.*) Without such an order there is no state mechanism to assure that the interests of Minnesota will be protected. (*Id.*)

C. Balance of Harms

The significant actions taken by all parties since September 2017 impact the analysis related to the balance of harm in this case. As the Court previously acknowledged, a delay in construction will ultimately result in the project taking longer, costing more, and extending the risk of flood exposure to people on both sides of the river. (Dkt. No. 530 at 54.) Moreover, modeling shows that the Plan B Project will reduce the impact on the Minnesota side more than the Plan A Project would have. (Permit Order, ¶¶ 55-63.)

Conversely, the DNR still has a significant interest in protecting its permitting authority to regulate all the appurtenant structures of a high hazard dam and ensuring that it is constructed consistent with the conditions listed in the Permit and any subsequently issued permit or order by the DNR. (Naramore Decl., ¶ 15.) While the DNR believes the balance of harms still weighs in its favor, if the Court were to modify the injunction until the contested case hearing is resolved, the harm to the state could be mitigated by ordering that any construction undertaken prior to the conclusion of the contested case hearing be done in accordance with the requirements and conditions of the state permit. (*Id.*, ¶ 16.) Absent such an order the State will continue to suffer substantial harm if the injunction is lifted. (*Id.*)

D. Public Interest

DNR continues to have a compelling interest in protecting its citizens when multi-state projects that impact Minnesota waters are constructed, and the DNR does so by issuing permits with conditions to minimize those impacts. (Dkt. No. 530 at 55.) This

Court, however, has also acknowledged that the Fargo-Moorhead community will certainly benefit from permanent flood protection once the project is complete.” (*Id.*) Minnesota Statutes Section 103G.315 prohibits the DNR from issuing a public waters work permit or a dam safety permit if it is determined that the project plans are not reasonable, practical, and will not adequately protect public safety and promote the general welfare. Minn. Stat. § 103G.315. In issuing its Permit, the DNR found that the public safety and welfare would be adequately protected provided construction was completed pursuant to the DNR’s regulatory oversight and the 54 conditions listed in its Permit. (Permit Order, Conclusion ¶ 14; Naramore Decl., ¶ 17.) Currently, the DNR’s Permit is in abeyance as are the conditions that would ensure Minnesota citizens and its environment are adequately protected. Thus, the public interest weighs in favor of not allowing construction to proceed unless the Permit conditions are incorporated into a modified injunction during the pendency of the contested case hearing.

CONCLUSION

For the reasons stated above, the Minnesota Department of Natural Resources respectfully requests this Court either deny the motions to modify its September 7, 2017, Order granting the preliminary injunction, or, in the alternative, modify the injunction to incorporate the conditions and requirements of the DNR’s permit until resolution of the contested case.

Respectfully Submitted:

March 15, 2019.

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ATTORNEYS FOR MINNESOTA
DEPARTMENT OF NATURAL RESOURCES

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

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

Plaintiff,

Minnesota Department of Natural
Resources,

Plaintiff-Intervenor,

vs.

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

**DNR'S LOCAL RULE 7.1 WORD
COUNT AND FONT SIZE LIMIT
CERTIFICATE OF COMPLIANCE**

Defendants,

and

Fargo-Moorhead Flood Diversion Board
of Authority,

Defendant-Intervenor,

and

City of Oxbow,

Defendant-Intervenor.

Pursuant to Local Rule 7.1(f) and (h), Plaintiff-Intervenor Minnesota Department of Natural Resources (“DNR”) certifies as follows:

1. DNR’s Omnibus Response To The Defendants’ Motions To Modify The September 7, 2017, Order Granting A Preliminary Injunction Totals 6,508 words in proportional Times New Roman font. This word-count was generated using the word count feature of Microsoft Word 2010, set to include all text, including headings, footnotes, and quotations, and excluding the case caption, signature block text, and certificates of compliance.
2. All text in the Memorandum of Law is size 13-point font, Times New Roman.

Respectfully Submitted:

March 15, 2019.

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