

Richland – Wilkin Joint Powers Authority

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Richland –Wilkin Joint Powers Authority Commences Federal Suit to Challenge Fargo Moorhead Flood Control Project because it is Overpriced, Overbuilt, and Inflicts Unnecessary Damage on Our Communities

Today, the Richland-Wilkin Joint Powers Authority commenced an action in federal court challenging the project designated by the United States Army Corps of Engineers as the Fargo-Moorhead Metropolitan Area Flood Risk Management Project, North Dakota and Minnesota. The Complaint alleges that the project submitted to Congress is overpriced and overbuilt, and as a result, inflicts unnecessary damage on the rest of the Red River Basin. The damage inflicted on Richland and Wilkin County by Fargo's plan to dam the Red River of the North intentionally to flood our farms, homes and communities is the direct result of Fargo's decision, now supported by the US Army Corps of Engineers, to inflate the scope of this project far beyond the original \$400 million plan¹ to protect Fargo and Moorhead.

In 2009, the Corps of Engineers presented Fargo with 11 flood control options, including two levee options and 9 diversion options, ranging in cost from \$800 million to \$1.5 billion, and Fargo chose the most expensive and most damaging of these options. Now the cost of the project has ballooned even further, because a second major flood control project was required to address the flooding caused by the design Fargo selected.

The five-fold increase in project cost stems from the unwise and unlawful decision to expand flood control protection to over 50 square miles of undeveloped natural floodplain outside Fargo proper, a direct violation of state and national flood control policy. Originally begun as a much-needed project to provide flood protection to Fargo and Moorhead, the project has ballooned in scope to become an expansive billion dollar federally subsidized land development scheme to redirect new commercial development away from high ground, and onto of low-lying natural floodplain, where it would be exposed to future flood risk.

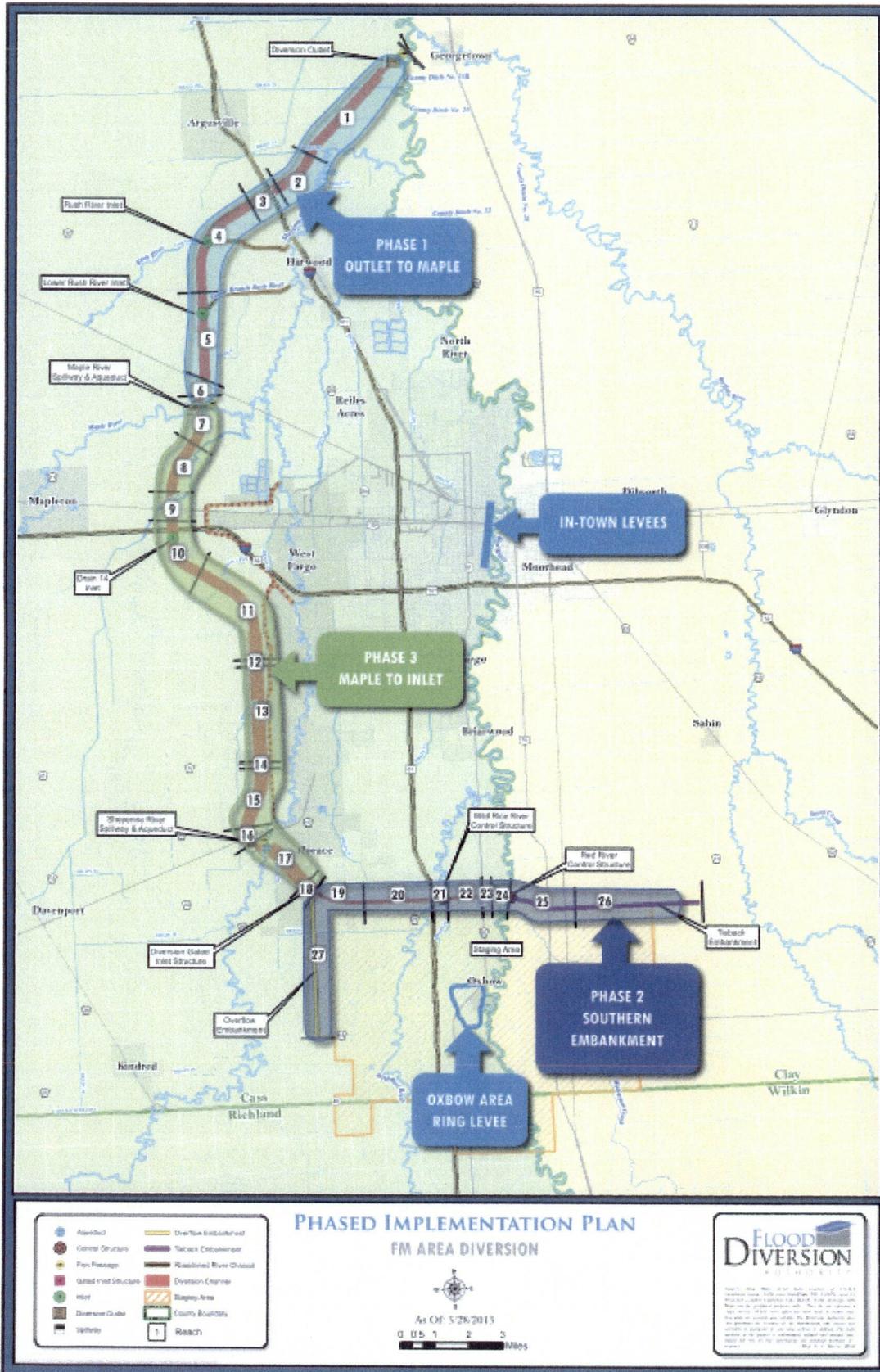
When the Army Corps of Engineers submits a request to Congress to authorize a major infrastructure project, the National Environmental Policy Act requires the Army Corps of Engineers to inform Congress transparently (1) the "environmental impact of the proposed action," (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented," (3) any "alternatives to the proposed action," and (4) any "irreversible or ir retrievable commitment of resources which would be involved in the proposed

¹ The Corp's Reconnaissance Study explained: "Because of the uncertainties regarding the final outcomes of the feasibility study and the potential for a justified project upward of \$400 million, the study team decided to take a phased approach to the feasibility study. Depending on the actual information gathered during the feasibility study, the costs of that study will be modified based on the information provided. It is estimated that a \$400-million project could have a feasibility cost of approximately \$21 million." 10. Feasibility Phase, Fargo-Moorhead Metropolitan Area Reconnaissance Study, Water Resources Development Act (WRDA) of 1986. Section 905(b) Analysis, page 27.

action should it be implemented." 42 U.S.C. § 4332(2)(C). The Corps request for Water Resources Development Act authorization of this project fails to provide Congress with the information it needs to make wise choices and to assure that scarce water resource development resources are used efficiently. As a result, the submission to Congress unlawfully presents Congress with a false choice: between wasting taxpayer money on an overbuilt, costly and damaging project, on the one hand, or doing nothing at all, on the other.

Lawful project design alternatives exist which can provide Fargo with the relief that it needs more rapidly, at substantially reduced cost, and without inflicting new flooding in Richland and Wilkin Counties. We trust that if the Corps provides accurate information to Congress, a cost effective project can be authorized and completed sooner than currently projected, so that all of us living in the Red River Valley can get the flood relief that we deserve.

Contact: Jerry Von Korff (320) 251-6700



UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Plaintiff,

Civil Action No.

vs.

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

COMPLAINT

Defendants.

Richland/Wilkin Joint Powers Authority, a Minnesota-North Dakota Joint Powers Authority (“Plaintiff”) as and for its Complaint against United States Army Corps of Engineers, Col. Dan Koprowski, District Commander, St. Paul District, Corps of Engineers (in his official capacity), John Mchugh, Secretary of the US Army Corps of Engineers (in his official capacity), Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works (in her official capacity), states and alleges as follows:

INTRODUCTION

1. By letter dated December 22, 2011, the Chief of Engineers conveyed to Secretary of the Army the recommendation of reporting officers in the St. Paul District of the Army Corps of Engineers (USACE) of a plan to reduce flood risk in the Fargo-Moorhead metropolitan area by constructing a diversion channel and Class I dam across the Red River of the North. The

two-billion dollar proposed project is five times as expensive as cost estimates prepared by the USACE in 2009. The cost of the project exploded exponentially because project sponsors sought to expand dramatically the scope of the project to extend protection unnecessarily to over 50 square miles of undeveloped natural floodplain. Project cost was further increased by proposing protection at a level of 60,000-66,000 cubic feet per second, more than double the peak flow actually experienced at Fargo at any time in the past century.

2. After expanding the scope of the project in this way, the Corps of Engineers discovered that this expansion of project mission would significantly increase the flow of water downstream (in the absence of other mitigating measures), causing the flooding of communities downstream.

3. Instead of scaling back the project to its original mission, project sponsors and Corps of Engineers (USACE) decided to divert the excess water by constructing a new Class I earthen dam in Minnesota and North Dakota, running across the Red River upstream of Fargo and Moorhead, intentionally to flood vast reaches of upland upstream of Richland and Wilkin Counties. This new design would intentionally flood large areas of valuable high ground, including communities and prime farm land in order to provide unnecessary flood protection to natural undeveloped floodplain and promote future development in areas vulnerable to flooding.

4. The plan advanced by local interests, called the "Locally Preferred Plan," consists of a 36 mile 20,000 cubic feet per second (cfs) diversion channel that would start approximately four miles south of the confluence of the Red and Wild Rice rivers and extend west and north around the North Dakota cities of Horace, Fargo, West Fargo and Harwood and ultimately re-enter the Red River of the North downstream of the confluence of the Red and Sheyenne rivers near Georgetown, Minnesota. The diversion channel would cross the Wild Rice, Sheyenne,

Maple, Lower Rush and Rush rivers and incorporate the existing Horace to West Fargo Sheyenne River diversion channel. Since submission to Congress, the plan has been substantially modified, such that the Report submitted to Congress does not reflect critical features of the project, nor does it address viable practical alternatives to those modifications.

5. This action challenges the Report of the Chief Engineer US Army Corps of Engineers (Chief's Report), and accompanying Environmental Impact Statement (EIS), because it proposes a costly and wasteful plan of flood control for the Fargo-Moorhead area, but fails to advise Congress of suitable alternative plans of flood control exists which are far less costly, capable of more rapid implementation, and which cause far less negative consequences. The Complaint alleges that the accompanying EIS violates the National Environmental Policy Act of 1969 (NEPA), codified as 42 U.S.C. § 4321 et seq. in its implementation of 42 U.S.C. § 4332(2)(C) and related laws and regulations. This Complaint alleges that these actions, including approval of the Environmental Impact Statement, are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law under the Administrative Procedures Act, ("APA"), 5 U.S.C. § 706. Through this lawsuit, Plaintiffs seek to have the unlawful Record of Decision set aside and to compel the Defendants to comply with NEPA and to cease efforts to obtain authorization to construct, or to construct any portion of the project that may be determined in violation of State or Federal law until all environmental and permitting reviews are complete.

6. This complaint further alleges that the Chief's Report and accompanying EIS fails adequately to disclose to Congress that:

- a. The Locally Preferred Plan proposed in the Chief's Report wastes scarce federal water development funds, because other suitable plans, not analyzed in the Report, can achieve flood protection to the cities of Fargo

- and Moorhead at vastly reduced cost, and that the EIS fails to provide Congress with information and analysis that would make this transparent;
- b. Suitable alternative plans exist which, at lesser cost, can provide adequate long term flood protection without flooding upstream and downstream communities, and that the EIS fails to provide Congress with information and analysis that would make this transparent;
 - c. Suitable alternative plans would afford greater benefit to the entire Red River Valley thereby maximizing the positive impact of federal dollars, whereas the Locally Preferred Plan submitted to Congress inflicts unnecessary harm on the rest of the Red River basin, and the EIS fails to provide Congress with information and analysis that would make this transparent;
 - d. Under Minnesota law, the Locally Preferred Plan cannot lawfully be authorized or permitted, and, despite written warnings from the State of Minnesota that the justification for the project is insufficient to authorize the project, the EIS fails to provide Congress with information and analysis that would make this transparent;
 - e. The Locally Preferred Plan submitted to Congress violates national and state policy by unnecessarily eliminating vast reaches of currently undeveloped natural flood plain at great expense, thus causing unnecessary harm to the basin, and consequently puts taxpayers at risk for future catastrophic uninsured flood relief expenditures, and the EIS fails to provide Congress with information and analysis that would make this transparent;
 - f. The Chief's Report and accompanying EIS arbitrarily manipulated cost-benefit figures, which originally showed that the locally preferred plan would cost significantly more than the benefits;
 - g. The Chief's Report and Environmental Impact Statement proposes a level of flood protection that is twice as high as any flood that has occurred in the last century in Fargo, and the Chief's Report fails to provide the Congress with sufficient information to evaluate the policy, cost and environmental implications of this choice. By failing to present an option with protection commensurate with FEMA's base flood standards, the Report and EIS presents Congress with the false choice between building a vastly overpriced, unnecessarily expansive project, or providing no protection at all.
 - h. The Environmental Impact Statement failed to address significant Minnesota regulatory requirements, thereby forcing the State of Minnesota to conduct a lengthy and costly environmental review process, a process

which could have been significantly truncated or eliminated, if a less costly and less damaging alternative were selected.

- i. The State of Minnesota has officially warned the USACE that EIS fails to sustain the conclusion that the project is ecologically sustainable, the least impact solution, one in which adverse effects can and will be mitigated, and consistent with other standards, ordinances, and resource plans of local and regional governments. These are requirements for authorization and permitting under Minnesota state law. The EIS itself and the ultimate selection of the Locally Preferred Plan ignored these requirements, resulting in an EIS that fails in its essential function, to consider legally viable project options.
- j. The Chief's Report does not advise the Congress of the significant likelihood that the Locally Preferred Plan may not be legally authorized in Minnesota nor does it analyze the alternatives that would avoid this problem.

**Role of the Chief's Report and Environmental Impact Statement
in the Authorization of Water Resource Projects**

7. The Water Resources Development Act (WRDA) is the vehicle for authorizing federally supported water projects. The last Water Resource Development Act to pass out of Congress was the Water Resources Development Act of 2007. 121 Stat. 1041 WRDA's historically have been omnibus bills including many earmarked provisions for site specific activities¹. Federal funds are insufficient even to fund maintenance of existing critical water projects, and there is insufficient funding to build numerous authorized water resource development projects authorized by 2007 and earlier water resource development acts.

8. A Water Resources Development Act encompasses two kinds of project assistance. The first-- navigation project assistance -- is designed to promote the United States' Commerce clause powers to manage navigation, by construction and improvement of harbors, lock and dam construction and maintenance, and the dredging of navigable channels on rivers

¹ Army Corps of Engineers Water Resource Projects: Authorization and Appropriations, Legislative Reference Service, 2011, Doc Ref No R41243.

which support movement of cargo. While the States have significant influence over the design, authorization and approval of these navigation projects, ultimately, applicable legislation authorizes the US Army Corps of Engineers to override local law and local permitting requirements.

9. The second kind of project assistance--State project assistance--is designed to provide financial assistance to the States and their political subdivisions, to implement State projects that promote State water management objectives. Flood control projects are typical examples of state project assistance. State assisted projects are constructed by state or local entities, and federal assistance is provided subject to a binding agreement by the state as "owner" of the project to construct and maintain the project consistent with an operational manual and consistent with applicable State law. These state assisted projects are authorized subject to all State and local law, including state water policy, state environmental law, and state regulation of public waters.

10. Authorization of water resource development projects for construction is typically considered in an omnibus bill based on a submission by the Chief Engineer of the United States Army Corps of known as the "Chief's Report". The Corps of Engineers sends an informational copy of the Chief's Report to the Office of Management and Budget (OMB), so that the OMB can evaluate the project for consistency with executive guidelines and assure budgetary integrity.

11. The Chief's report is subject to the requirement found at section 42 USC 4332(C)(i)-(v) that directs all agencies of the federal government to fullest extent possible "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the

responsible official” the information specified by that section. The Chief’s report is a recommendation or report on proposals for legislation and other major Federal action.

12. The information specified in Section 43 USC 4332(C) includes (1) the "environmental impact of the proposed action," (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented," (3) any "alternatives to the proposed action," and (4) any "irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(2)(C).

13. The function of the NEPA environmental review extends far beyond providing an inventory of the impacts on fish, wildlife, and other environmental resources. The NEPA environmental review is designed to give policy makers, including the executive and legislative branches, meaningful choices to assure that scarce federal resources are allocated efficiently and in accord with national policy.

14. It is thus critically important to the sound management of national water resources policy that the Chief’s Report faithfully and adequately advises Congress in a transparent manner if alternatives to the proposed action can meet state and national objectives for a lesser cost and with lesser negative environmental impacts. Otherwise, the Chief’s report poses to Congress a false choice between overbuilding a wasteful and costly project with avoidable consequences, on the one hand, and denying any flood protection at all, on the other.

15. The Chief’s Report and accompanying Environmental Impact Statement submitted to Congress for the Fargo-Moorhead flood control project fails in this essential objective. A viable alternative to the project recommended by the Chief’s Report exists that can be built for less than half the cost. Unlike the currently proposed project, the alternative project could be approved under Minnesota law. Alternatives exist which achieve flood control

objectives which will fully protect Fargo and Moorhead's developed areas, offering protection sufficient to control all known historic floods with room to spare. The option would eliminate the need to flood Richland and Wilkin Counties. Moreover, the benefits of the project, if so configured, would extend benefits to the rest of Red River Valley, instead of exacerbating flooding. The alternative would reduce environmental impacts significantly, and would provide needed flood relief to Fargo much sooner. Although markedly less costly, this option has not been made transparent in the Chief's Report nor the accompanying Environmental Impact Statement.

PARTIES

16. Plaintiff Richland/Wilkin Joint Powers Authority is an organization representing local government in Wilkin County Minnesota and Richland County North Dakota to prevent damage to lands and communities targeted for flooding by the expanded Fargo Moorhead flood diversion project. The Joint Powers Authority was formed, pursuant to Minnesota and North Dakota joint powers legislation to protect the citizens and property of Richland and Wilkin Counties and to take any and all steps necessary to prevent the flooding of Richland and Wilkin Counties by the Fargo Metropolitan Area Flood Risk Management Project and thereby to prevent the loss of tax revenues, loss of population, damage to public structures, rights of ways and ditch systems, reduction in land values, elimination of government entities, reduction in school funding and enrollment within the boundaries of impacted governmental units.

17. Members of the Joint Powers Authority include over 20 cities, townships and a school district in addition to the county members. The members, and their citizens, will suffer direct and indirect irreparable harm, more fully explained in this Complaint, because the locally preferred plan recommended by the Chief's Report will dam the Red River causing repeated flooding of lands within both counties. That harm includes the unnecessary repeated intentional

flooding of large expanses of each County, the impairment of tax base of counties, townships, cities, and school districts, the interference with governmental infrastructure, loss of property values and interference with local planning and zoning.

18. Plaintiff Richland/Wilkin Joint Powers Authority brings this action on its own behalf, on behalf of its constituent member political subdivisions, and on behalf of its citizens. The Corps' violation of the APA and the violations enumerated herein will cause plaintiff and its citizens procedural and substantive injuries from the Corps' arbitrary and capricious action.

DEFENDANTS

19. Col. Dan Koprowski, District Commander, St. Paul District, Corps of Engineers, is directly responsible for the day to day implementation of Corps of Engineers actions in the St. Paul District, which encompasses the proposed project. The vast majority of work performed by the Corps of Engineers on this project, including the design, environmental impact statement, and recommendations for the project configuration, occurred and is occurring under the District Commander's supervision in the St. Paul headquarters of the St. Paul District.

20. Defendant United States Army Corps of Engineers is a federal agency of the United States of America, within the Department of the Army of the United States Department of Defense. The Corps has been delegated responsibility by the Department of the Army, for, among other things, construction, management and operation of various rivers, lakes and other water resources of the United States of America, and the issuance, modification and revocation of permits relative to various activities taken or proposed to be taken on waters of the United States and its tributaries.

21. Defendant the Honorable John McHugh is named in his official capacity as the Secretary of the Army. Secretary McHugh is responsible for implementing the policies,

procedures and requirements of the Corps and applicable statutes and regulations relative to all water resources and Corps-owned or operated properties within the United States of America.

22. Defendant the Honorable Jo-Ellen Darcy is named in her official capacity as the Assistant Secretary of the Army for Civil Works ("ASACW"). ASACW Darcy establishes policy direction and provides supervision of the Department of the Army functions relating to all aspects of the U.S Army Corps of Engineers' Civil Works program, including all reimbursable work performed on behalf of Federal and non-Federal entities. These responsibilities include programs for conservation and development of the nation's water and wetland resources, flood control, navigation, and shore protection.

JURISDICTION

23. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); 5 U.S.C. § 702 (APA); 28 U.S.C. § 1361 (action to compel a federal officer to do his duty), and the Court has the power to issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201 and 2202 (declaratory and injunctive relief).

24. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (e). A substantial part of the events or omissions giving rise to the claims occurred in Minnesota. The arm of the Defendant Corps of Engineers implementing preparation of the proposed project is located in St. Paul, Minnesota. The project area includes the Red River which is a Minnesota public water lying in the State of Minnesota and the adverse effects and lack of claimed benefits will substantially affect Minnesota and its political subdivisions within the Red River Valley.

History of Project Development and its Environmental Review

25. The Red River Valley is subject to frequent flooding. The magnitude of a flood at a given point is often characterized by reporting the peak flow, measured in cubic feet per

second, occurring at a recognized gauging station. Another way of reporting the magnitude of floods is to report the unprotected peak floodwater elevation that would occur if this peak flow occurs. Measured in this way, the record flood of the last 100 years delivered a peak flow of 29,234 cubic feet per second at Fargo at an unprotected estimated elevation of about 40 feet.

26. Planning in the Red River Valley is predicated upon protection against the so-called “base flood,” the flood which is estimated to occur in any given year with probability 1/100.

27. The Federal Emergency Management Agency (FEMA) currently has the base flood elevation designated for Fargo under review and is proposing to readjust the base flood to 29,300 cfs with an estimated unprotected elevation of just under 40 feet. In 2008, the USACE estimated the elevation and discharge for the 100 year flood elevation at 39.7 feet and discharge 27,574 cfs respectively.

28. After the floods of 1997 wreaked havoc throughout the Red River Basin, the State of Minnesota, in cooperation with the US Army Corps of Engineers and others, engaged in a searching and comprehensive review of Red River Valley flood control policy, seeking to modernize the approach to flood control policies consistent with an emerging national consensus focusing on mitigation and flood avoidance on a basin-wide basis. This effort, promoted by the State legislature and the Department of Natural Resources, resulted in an agreement often called the “mediated settlement agreement.” State and Federal governmental authorities, including the USACE, entered into the mediated settlement agreement which has become the Minnesota framework for a new, collaborative approach to implementing both flood damage reduction and natural resource protection and enhancement in the Red River Basin in ways that will benefit all

Minnesota's citizens. The mediation process developed flood damage reduction principles which have guided planning for the Red River Basin in Minnesota. The first four are:

- a. Reduction of overland flooding is needed. Any solution will probably require on-site and upstream solutions.
- b. Water resource problems should not be passed along to others. A solution for a watershed should not create a problem upstream or downstream.
- c. Water should be stored/managed as close to where it falls as is feasible and practical.
- d. A systems approach should be used to manage the timing of flow contributions from multiple minor watersheds.

29. The mediated process envisioned a collaborative conflict resolution process that would assure that State and Federal regulators and impacted landowners were equal partners in the planning process. The purpose of this mediated settlement was to move flood control planning away from old-style single-purpose engineering solutions that seek to pass water problems down the line at others expense. The principles embodied in the mediated settlement agreement have become a guiding feature of Minnesota's flood control policy.

30. Throughout most of the twentieth century, management of floods nationally and in the Red River Valley by both Federal and State authorities was dominated by construction of a series of single-purpose projects that focused primarily on local problems of the project proponents, rather than treating water resources as interdependent parts of ecological systems.² If one area of a basin caught the ear of the USACE or a Congressman, often that location was

² See National Research Council, REVIEW PROCEDURES FOR WATER RESOURCES PLANNING, 52-54 (Nat'l Academy Press), Schwert, A Geologist's Perspective on the Red River of the North: History, Geography, and Planning/Management Issues, Department of Geosciences North Dakota State University, 2003).

able to obtain protection at the expense of the rest of the basin.³ Under this prior approach, the Corps of Engineers had promoted “projects that solve one problem, but may inadvertently create others,” because of a failure to “look at watersheds first; then design projects consistent with the more comprehensive approach.” The mediated settlement reflected Minnesota’s agreement with the Corps of Engineers and other State and Federal entities that flood control projects would be evaluated from a basin wide perspective. Selection of the Locally Preferred Plan violates the mediated settlement agreement.

31. Following the execution of the mediated settlement agreement, in September 2005, the Corps of Engineers issued its “Upstream Feasibility Study” exploring the potential for flood mitigation to reduce flood flows. The study determined that “A system of multi-purpose impoundments has the potential to reduce the 100-year flood elevations in Fargo-Moorhead by as much as 1.6 feet.” Such a system, when constructed in tandem with other measures, would support the watershed wide approach envisioned by national and state policy. Properly implemented in conjunction with other mitigating strategies such a system would avoid the rationale for flooding Richland and Wilkin Counties. Project sponsors and the USACE arbitrarily and capriciously eliminated consideration of these flood mitigation strategies predicated on a rationale that such flood reduction strategies would reduce, but not completely eliminate, Fargo’s flooding problems.

32. In 2006, the Energy and Environmental Research Center in Grand Forks, North Dakota, (EERC) announced the results of studies funded by the United States Department of

³ See Issues Pertaining to Water Resources Development Programs Within the U.S. Army Corps of Engineers Hearing Before the Senate Comm. on Env't and Public Works, 107th Cong. 3 (June 18, 2002) (statement of Lt. Gen. Robert B. Flowers, Chief of Engineers, U.S. Army Corps of Engineers).

Agriculture, showing that another distributed storage system known as the “Waffle Plan” could reduce peak flood flow on the Red River by nearly 5 feet. The EERC is a branch of the University of North Dakota recognized as one of the world's leading developers of cleaner, more efficient energy and environmental technologies to protect and clean our air, water, and soil. The report further explained that implementation of the plan could offer long-term security from floods like the one in 1997 and provide necessary augmentation to conventional flood mitigation measures such as dikes in order to combat even larger floods. Project sponsors and the USACE later arbitrarily and capriciously eliminated consideration of this flood mitigation strategy predicated on a rationale that such flood reduction strategies would reduce, but not completely eliminate, Fargo’s flooding problems.

33. It is official Minnesota policy that small distributed floodwater storage must be a major component of a long-term flood mitigation strategy for the Red River Basin. The Minnesota Board of Water and Soil Resources indicates that associated hydrologic analyses indicate that approximately 1 million acre-ft. of additional temporary storage throughout the tributary watersheds would reduce the peak flow on the main stem of the Red River by 20% for a flood equivalent to the 1997 flood. See Kean, Brief Analysis of Flooding in Minnesota, Recent Flood Events, Statewide Flood Risk Assessment, and Hazard Mitigation, Minnesota Board of Water and Soil Resources (March 2011).

34. In 2008, the US Army Corps of Engineers issued a Reconnaissance Report recommending analysis of nine alternative flood diversion plans to transport waters from the Red River around the Cities of Fargo and Moorhead. The Reconnaissance Report further recommended that the analysis conducted under the National Environmental Policy Act and Water Resources Development Act should include study of a variety of flood mitigation

strategies to be used on conjunction with diversions, including small distributed impoundments and the Waffle strategy. However, project sponsors later eliminated these strategies from the locally preferred plan based on the rationale that used alone, they would only reduce, but not eliminate Fargo's flooding problems.

35. The preference for small distributed storage impoundments and other storage concepts in the mediated settlement agreement incorporates several policy objectives. Storing excess water where it falls avoids passing water problems downstream. Distributed storage solutions benefit both the subwatershed where the storage is located and the mainstream of the Red River. Distributed storage is more ecologically sustainable and results in lesser negative impacts.

36. In its 2008 report, the Corps of Engineers estimated that the benefits deriving from improved flood control protection would likely justify a project costing "upwards of \$400 million."⁴

37. The Reconnaissance Study recommended that mitigation efforts, including distributed small flood storage impoundments and the waffle plan, should not be considered as a stand-alone alternative for the Fargo-Moorhead area, because flood storage alone could not solve Fargo's problems. However, it found that the flood storage concept should be retained for

⁴ The Corp's Reconnaissance Study explained: "Because of the uncertainties regarding the final outcomes of the feasibility study and the potential for a justified project upward of \$400 million, the study team decided to take a phased approach to the feasibility study. Depending on the actual information gathered during the feasibility study, the costs of that study will be modified based on the information provided. It is estimated that a \$400-million project could have a feasibility cost of approximately \$21 million." 10. FEASIBILITY PHASE, FARGO-MOORHEAD METROPOLITAN AREA RECONNAISSANCE STUDY, Water Resources Development Act (WRDA) of 1986. Section 905(b) Analysis, page 27.

possible implementation because it could mitigate for any adverse impacts of other plans. It stated, “The local communities should continue to seek opportunities for storage in the basin.”

38. The Reconnaissance Report’s investigation of cost effectiveness further determined that of the nine diversion plans investigated in preliminary screening, none of the North Dakota diversion plans provide a positive return on investment.

39. On May 9, 2009, consistent with the mediated settlement agreement, representatives of the Corps of Engineers represented to Congress that Congressional funding appropriated for environmental study would be used to integrate basin-wide flood control strategies.⁵ The Committee was told that based upon preliminary estimates, a diversion project would not be cost effective with a benefit to cost ratio of approximately 60% and that the most cost effective option, a levee option, did not preliminarily have a positive return on investment.⁶

40. However following the 2009 presentation to Congress, the USACE allowed project decisions to be driven almost entirely by the City of Fargo, ignoring basin-wide benefits and impacts. As a result, options which promised basin wide benefits were abandoned in favor of options that focused entirely on the benefits to Fargo and its immediate vicinity. Small distributed storage options were summarily removed from the environmental review, and in so doing, the benefits of distributed storage to the rest of the basin were disregarded. The geographic extent and level of protection was decided by Fargo, without regard to the impact on

⁵ Fargo-Moorhead Metro Area Flood Control And Red River Basin Flood Control Issues, Hearing Before A Subcommittee Of The Committee On Appropriations United States Senate One Hundred Eleventh Congress First Session, May 27, 2009, Statement Of Colonel Jon Christensen, District Commander, St. Paul District, Army Corps Of Engineers page 10-11.

⁶ Congressional Hearing, *supra*, pages 19-20.

the rest of the Basin. The decision making process was now driven by the “single-purpose” project approach which the mediated settlement and Minnesota water policy rejected.

41. The local sponsors of the project, particularly Fargo and Cass County favored an engineering intensive costly diversion project that would encircle large portions of Fargo’s undeveloped flood plain, despite the USACE’s determination that this configuration was more costly and afforded a negative return on investment.

42. In October, 2009, after further study, the Corps of Engineers presented 11 flood control options, including two levee options and 9 diversion options, ranging in cost from \$800 million to \$1.5 billion.⁷

43. In order to justify this more costly approach, the local sponsors, and then ultimately the Corps of Engineers, developed a variety of strategies to skew the cost-benefit analysis in ways which overstate the benefits of the Locally Preferred Plan and understate the costs. They counted the potential increment in value of floodplain which would be "protected" from flooding, even though the protection of that land is inconsistent with state and national floodplain strategy. This practice tilts the benefit-cost analysis toward structural projects and fails to account for the "residual" risk associated with its projects – that is the potentially catastrophic risk of flooding if projects fail, if flood waters exceed design capabilities, or if changes in the watershed reduce the level of protection provided. The Chief’s Report and accompanying EIS fails to make transparent to Congress that the inflation in project costs and the selection of the Locally Preferred Plan rest upon the future development of natural floodplain and the EIS fails to describe the environmental and cost implications of pursuing that strategy.

⁷ Fargo-Moorhead Metro Feasibility Study Initial Screening Results, October 2009, page 43.

44. In May of 2010, the US Army Corps of Engineers issued its Draft Environmental Impact Statement for the Fargo-Moorhead project. The Corps of Engineers recommended a project, sometimes described as the “Minnesota short-diversion,” as the National Economic Development Plan (NED-Plan). That recommendation meant that the Corps of Engineers determined that the Minnesota Short Diversion provided the greatest net benefits as measured by a comparison of costs and benefits, and that the Minnesota Short Diversion entailed reduced environmental impact as compared to the other projects.

45. The NED Plan was estimated to cost \$1.2 billion to construct. The Corps draft environmental impacts statement identified no downstream impacts arising from any of the proposed project alternatives, and concluded that consequently flood mitigation strategies, such as distributed storage, were unnecessary because the diversion strategy alone would protect Fargo and Moorhead without causing damage to communities downstream of Fargo and Moorhead. All flood storage options were thus completely screened out of consideration in the Draft Environmental Impact Statement.

46. Local sponsors of the project rejected the NED plan, and chose a more costly and more damaging alternative, in large part, because the “Locally Preferred Plan” would allow Fargo to extend protection to and then develop the undeveloped natural flood plain outside Fargo.

47. During the environmental review, as described below, the State of Minnesota repeatedly warned project proponents and the US Army Corps of Engineers that Minnesota law required selection of the least environmentally damaging alternative, and that the Corps’ environmental review contained insufficient information to address issues presented under Minnesota law.

Richland/Wilkin Flood Storage Proposal

48. The selection of the Locally Preferred Plan and its design concept rested upon a major engineering error in hydrology that was discovered only after the original Environmental Impact Statement was completed. The Corps of Engineers had originally assumed (erroneously) that the Locally Preferred Plan could be constructed without creating downstream flooding, despite the fact that it eliminates over 50 square miles of natural flood plain and contained no provision for upstream distributed small flood storage impoundments.

49. Months after issuing its draft environmental impact statement, the Corps of Engineers discovered that the Locally Preferred Plan would also cause unacceptable downstream flood damage. This damage would result from the failure of the project to incorporate design features that would eliminate such damage, features that had arbitrarily been eliminated in the environmental review – including the elimination of smaller distributed storage options, elimination of waffle plan options, and the decision to eliminate and develop over fifty square miles of natural floodplain, and the failure to configure flow through Fargo in Moorhead in the most effective way.

50. As a result, the Corps of Engineers was forced to recognize that flood storage of some kind would be required, but the Corps of Engineers decided to consider only one flood storage option, placed in primarily Richland and Wilkin Counties. Further, the Corps of Engineers failed to consider scaling back the scope of the project to its original purpose, the protection of existing Fargo and Moorhead infrastructure.

51. The Richland/Wilkin storage and staging modification was proposed by the local sponsors in 2011 for the very first time. The modification is massive in scope and the National Environmental Policy Act required a fully scoped environmental impact statement before federal funding could be authorized. It impacts over 100 square miles of property which was not

designated as impacted during the scoping or preparation of the original Draft Environmental Impact Statement. The newly proposed Richland/Wilkin Storage modification would construct a dam and extensive levee across the Red River. The dam and levee would block the Northward surface flow of water, a violation of the surface water rights of landowners in the region, completely changing the hydrology of that region of Minnesota and North Dakota.

52. In addition, a new “flood staging” area encompassing prime farmland in Richland and Wilkin Counties and the cities of Oxbow, North Dakota, and Comstock, Minnesota, would now be used to accept excess flood waters from the diversion project.

53. Under the National Environmental Policy Act, a project of this magnitude is subject to comprehensive environmental review, including a full analysis of all potential alternatives. However, project sponsors and the St. Paul District wanted to advance the proposal forward in the funding cycle, and consequently they chose to conduct a truncated and rushed review of the options available to avoid downstream damage. They gave no consideration to whether such a project could be permitted under Minnesota law, and ignored warnings from the State of Minnesota that there were major problems with the justification contained in the supporting documentation.

54. A variety of alternatives to the Richland/Wilkin Flood storage proposal exist, but were not considered, because the Corps of Engineers screened them out of consideration in the original environmental review, at a time when the Corps of Engineers wrongly believed that storage was not going to be required in connection with the Locally Preferred Project. Once it was discovered that the Locally Preferred Plan created downstream flooding, it was arbitrary and capricious to continue to screen these modifications out of the supplemental environmental review.

55. The review of options and alternatives available to avoid downstream damage was incomplete, arbitrary and capricious, and conducted without considering the authorization and permitting conditions applicable in Minnesota respecting the damming public waters.

Second Supplemental NEPA Review

56. As stated above, the NEPA review conducted in connection with the proposal to flood Richland and Wilkin County was conducted with the narrow focus of rushing a proposal to Congress and consequently the proposal did not receive the full and comprehensive review that NEPA requires.

57. Following submission of the Chief's Report to Congress, the US Army Corps of Engineers began to conduct a new options review. However, once again, the options review arbitrarily and capriciously and unlawfully excluded viable and suitable options that would more economically and effectively solve Fargo and Moorhead's flood control problems without flooding Richland and Wilkin Counties.

58. Among other changes, the Corps of Engineers and project sponsors now propose to encircle communities with 10-16 foot ring dikes at a cost of more than \$60 million. The original project has engendered the very domino effect of negative consequences that a basin-wide perspective is designed to prevent. Overbuilding and failure to mitigate created a new flooding problem, and that led to a proposal to construct new dam to create more flooding, which in turn has led to the need to create new structural measures to protect against the flooding. The purpose of these ring-dikes would be to provide protection against the artificially created flooding caused by the dam downstream. Construction of ring dikes around these communities has major environmental impacts on these communities and the surrounding areas outside the proposed ring dikes.

59. In addition, the Corps of Engineers proposes to eliminate even more natural flood plain thus exacerbating the flooding caused by the existing proposal.

60. Despite the fact that the proposed project changes contain substantial impacts that are relevant to environmental concerns, the U.S. Army Corps of Engineers has tentatively issued a Finding of No Substantial Impact (FONSI) indicating its intent to implement these changes without further environmental review. A supplemental environmental impact statement is plainly required because the agency has proposed substantial changes in the proposed action that are relevant to environmental concerns and there are new circumstances relevant to environmental concerns and bearing on the proposed action or its impacts. 40 CFR Title Section 1502.9(c).

61. Although the sole legitimate purpose of the ring diking project is to protect against flooding caused by the proposed Red River dam, it appears that the Corps of Engineers intends to build the ring dikes *before* the Red River dam is permitted and approved and before the environmental review necessary for that permitting is complete. In the event that the dam cannot be constructed and authorized, the construction of the ring dikes will have amounted to a monumental waste of taxpayer money and the infliction of major negative environmental consequences, without any compensating positive benefit.

COUNT I: GENERAL NEPA VIOLATION

62. NEPA makes environmental protection a part of the mandate of every federal agency and department. NEPA requires "agencies to consider environmental issues just as they consider other matters within their mandates." NEPA, requires all federal agencies to interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies of NEPA —to the fullest extent possible. 42 U.S.C. § 4332.

63. NEPA's essential purpose is "to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1 (c). In Water Resource Development Projects involving flooding, these environmental consequences include the destruction and development of natural floodplain and the increase in flooding upstream or downstream of the project.

64. To accomplish its purpose, NEPA requires that all agencies of the federal government must prepare a "detailed statement" regarding all "major Federal actions significantly affecting the quality of the human environment..." 42 U.S.C. § 4332(2)(C). This detailed statement, known as an Environmental Impact Statement, (EIS) ensures that relevant information about a proposed project is made available to members of the public so that they may play a role in both the decision-making process and the implementation of the decision.

65. The EIS must describe (1) the "environmental impact of the proposed action," (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented," (3) any "alternatives to the proposed action," and (4) any "irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(2)(C).

66. "Major Federal [*17] actions" requiring preparation of an EIS include projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies. 40 C.F.R. § 1508.18(a).

67. Agencies are required to prepare a Supplemental EIS (SEIS) if either: 1) substantial changes to the project are proposed, or 2) "[t]here are significant new circumstances

or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1).

68. Army Corps regulations require that the project proponent "initiate another 'hard look' to ascertain the adequacy of the previous analyses and documentation in light of" changes to the project or "significant new circumstances or information regarding environmental impacts of the project." 32 C.F.R. § 651.5(g)(2).

69. SEIS's must go through the same process as the original documents, including scoping, i.e. notice to the public of the proposed action and request for relevant information and concerns before even a draft document is produced. 32 C.F.R. § 651.24. However, if the supplement is undertaken within one year of the original record of decision, then the scoping process does not need to be repeated.

70. Federal agencies must cooperate with states to the fullest extent on environmental studies, and address inconsistencies between the proposed major federal action and state or local plans. 40 C.F.R. § 1506.2.

71. Regulations governing the preparation of Environmental Assessments are found at 40 C.F.R. § 1508.9 and 33 C.F.R. § 230.10.

72. NEPA requires an agency to include in every EIS or EA a —detailed statementl on —alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1508.9; see also 23 C.F.R. §§ 771.119, 771.125. NEPA provides that an agency must —study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.¶ 42 U.S.C. § 4332(2)(E). The agency is required to —[r]igorously explore and objectively evaluate all reasonable alternatives.

73. Defendants and their agency have not studied, developed, and described appropriate alternatives to recommended courses of action as required by 42 U.S.C. § 4332(2)(E). The EIS fails to “[r]igorously explore and objectively evaluate all reasonable alternatives, 40 C.F.R. § 1502.14(a) and as more specifically stated in subsequent counts, have failed to comply with the requirements of NEPA.

COUNT II: SELECTION OF PROJECT OPTION THAT VIOLATES MINNESOTA LAW – THE CHIEF’S REPORT AND EIS FAIL TO DISCLOSE THAT THE LOCALLY PREFERRED PROJECT VIOLATES MINNESOTA LAW

74. The National Environmental Policy Act requires that an environmental impact statement disclose whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment. 40 C.F.R. § 1508.27(b). Federal agencies must cooperate with states to the fullest extent on environmental studies, and address inconsistencies between the proposed major federal action and state or local plans. 40 C.F.R. § 1506.2.

75. Strict compliance with this requirement is essential for several reasons. First, non-navigation projects are passed by Congress subject to State law. Consequently, projects which violate state law should not be propounded as viable options in an NEPA review. Second, because there are many deserving projects which are authorized, but not yet funded, Congress and the Executive branch officials charged with allocating the President’s budgetary requests should have full transparent disclosure of the legal impediments to project implementation. Third, authorization of a legally futile project delays the process of arriving at a feasible solution to the problem involved.

76. When the state agency charged with interpretation and enforcement of state environmental law notifies the US Army Corps of Engineers that the proposed environmental

impact statement fails to satisfy State legal requirements, the Environmental Impact Statement is per se incomplete.

77. The Chief's Report appropriately recognized that as a state project, any activity conducted on the project is subject to all state and local regulations. Specifically, the Chief's Report specifically makes his project recommendation "subject toother applicable requirements of Federal and State laws and policies".

78. The project envisioned by the Chief's Report requires the construction of a Class I dam across the Red River, which if constructed will periodically flood large portions of Richland and Wilkin Counties. The United States Army Corps of Engineers has appropriately recognized and admitted that the construction of this project is thus subject to Minnesota's water law, Chapters 103A (Minnesota Water Policy), 103G (Minnesota Public Waters Regulation), Chapter 116B (Minnesota Environmental Rights Act) and Chapter 116D (Minnesota Environmental Policy Act) and implementing regulations as well as local governmental permits regulating such activity. See also 33 USC § 1344(t).⁸

79. Because the USACE refused to honor State of Minnesota objections to the completeness of the NEPA-EIS, the State of Minnesota determined that it must complete its own environmental review to address the issues necessary for state authorization and permitting.

80. The Minnesota Environmental Policy Act (MEPA) and Minnesota Environmental Rights Act (MERA) impose substantive prohibitions on the permitting or authorization of actions

⁸ t) Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements.

which significantly affect the quality of the environment. Where such actions are likely to cause pollution, impairment, or destruction of“water, land or other natural resources within the state”, actions which are likely to cause pollution, impairment or destruction of water, land or other natural resources within the state are prohibited, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.

81. The project submitted in the Chief's Report will cause pollution, impairment or destruction of water, land, and other natural resources in the state, and there exist feasible and prudent alternatives consistent with the reasonable requirements of public health, safety and the state's paramount concern for the protection of its air, water, and other natural resources from pollution, impairment or destruction. The Chief's Report and accompanying EIS had a legal responsibility to inform Congress of this legal constraint as well as the potential violation of State law, and the failure to do so is arbitrary, capricious and unlawful.

82. There exist viable alternatives, consistent with Minnesota law, that can meet the legitimate flood protection objectives for Fargo and Moorhead. One such alternative would eliminate the flooding of Richland and Wilkin County by some or all of the following strategies: (a) increasing flows through Fargo and Moorhead, (b) implementing a comprehensive coordinated system of smaller distributed storage across the basin, (c) retaining existing floodplain and prohibiting future development in that floodplain as contemplated by state and federal law, (d) scaling back the level of protection to a reasonable level consistent with FEMA projections and historic flood experience, (e) configuring the project in a way that is designed to

minimize downstream flooding, instead of configuring it primarily to facilitate the future development of natural floodplain.

83. The construction of a Class I dam across the Red River is also subject to Minnesota public waters regulations which prohibit construction of a dam without a showing of “a lack of other suitable feasible and practical alternative sites” and “A lack of economic hardship which would have a major adverse effect on population and socioeconomic base of the area affected.” Minn. Regs. Section 6115.410, subpart 8.

84. A Minnesota public waters permit affecting floodwaters may be granted only if the proposal meets all other state, local and federal requirements, and in addition, if: (1) the area covered by the public waters work permit is governed by a floodplain management ordinance approved by the commissioner; and (2) the conduct authorized by the public waters work permit is consistent with the floodplain management ordinance, if the commissioner has determined that enough information is available for the adoption of a floodplain ordinance. In addition: (b) A public waters work permit involving the control of floodwaters by structural means, such as dams, dikes, levees, and channel improvements, may be granted only after the commissioner has considered all other flood damage reduction alternatives. Minn. Stat. § 103G.255.

85. Under Minnesota law, natural floodplain is an environmental resource entitled to protection. Natural floodplain is an important component of the ecology of river systems. Natural floodplain performs an important storage and conveyance function during times of flood. Elimination of floodplain, as contemplated by the Chief’s Report, makes flooding worse. Construction on, and development of, floodplain, as contemplated by the Chief’s Report, is inconsistent with State and Federal law and policy, because it encourages development in areas with high flood hazard. The Chief’s Report fails to make this intention transparent to Congress,

and actually includes the uninsured development of floodplain as a positive benefit of the project.

86. Under Minnesota law, the lands proposed for flooding within Wilkin County are a protectable natural resource.

During the environmental review process, the State of Minnesota repeatedly warned the US Army Corps of Engineers that the review conducted by the USACE was inadequate to satisfy Minnesota law. In its June 16, 2011, letter to Aaron Snyder with respect to the Fargo Moorhead Draft Feasibility Report and Supplemental Draft Environmental Impact Statement, the Department warned that the project proponents had failed “...to demonstrate that the proposed project is:

- Ecologically sustainable;
- The least impact solution;
- One in which adverse effects can and will be mitigated; and
- Consistent with other standards, ordinances, and resource plans of local and regional governments.”

87. The Chief’s Report and accompanying EIS intentionally deferred consideration of these concerns and legal constraints to the Minnesota environmental review process to avoid making it transparent to Congress that the project had not been approved, nor could it be, under Minnesota law. By so doing, the Chief’s Report and EIS convey the false impression that the project is ready for authorization, and as stated above, leaves Congress without a flood control option which can be constructed consistent with Minnesota law.

88. The Chief’s Report and accompanying EIS violates NEPA by recommending to Congress a flood control option which cannot be constructed under State law.

89. The State of Minnesota has jurisdiction to determine, through its administrative and judicial process, whether a project complies with Minnesota State and Local law, and this project is fully subject to state and local law.

90. The elimination of distributed storage options on the grounds that they cannot alone solve Fargo's flood control problems violates Minnesota law, making it the failure to consider those options in the federal environmental impact statement arbitrary, capricious and unlawful. Elimination of these features, combined with other features, would eliminate the need to flood Richland and Wilkin Counties and would afford benefits to the entire basin that should have been considered.

91. A public waters permit affecting floodwaters may be granted only if the proposal meets all other state, local and federal requirements, and in addition, if: (1) the area covered by the public waters work permit is governed by a floodplain management ordinance approved by the commissioner; and (2) the conduct authorized by the public waters work permit is consistent with the floodplain management ordinance, if the commissioner has determined that enough information is available for the adoption of a floodplain ordinance. In addition, a public waters work permit involving the control of floodwaters by structural means, such as dams, dikes, levees, and channel improvements, may be granted only after the commissioner has considered all other flood damage reduction alternatives. Minn. Stat. § 103G.255. The official comments of the DNR, if sustained in Minnesota administrative or judicial proceedings, establish that the Locally Preferred Project is not a lawful option under these provisions.

92. Minnesota Regulations 6115.410 subpart 8 bars the issue of a permit to a dam "which inflicts economic hardship or has major adverse effects on population or socioeconomic base of the area affected". The applicable regulation requires the Dam Safety permit applicant

to show: (i) a lack of other suitable, feasible, and practical alternative sites, and (ii) a lack of economic hardship which would have a major adverse effect on population and socioeconomic base of the area affected. The official comments of the DNR, if sustained in Minnesota administrative or judicial proceedings, establish that the Locally Preferred Plan is not a lawful option under these provisions.

93. The project selected thus violates the Minnesota substantive prohibitions on the permitting or authorization of actions which significantly affect the quality of the environment, and the selection of the Locally Preferred Plan as a viable option is arbitrary, capricious and unlawful.

94. Adoption of the Environmental Impact Statement and issuance of the Chief's Report at a time that the State of Minnesota's official comments asserted that the project fails to meet conditions required for state authorization and permitting is arbitrary and capricious and unlawful. Leaving those comments unresolved and deferring them for resolution in the Minnesota environmental process improperly certified to Congress that the project selected is ready for funding, when in fact it is not, is arbitrary, capricious and unlawful. It was arbitrary and capricious to fail fully to explore and report on the options which can be constructed while avoiding destruction of floodplain and the flooding of Richland and Wilkin County.

COUNT III: VIOLATION OF EXECUTIVE ORDER 11988

95. The Chief's Report and accompanying EIS violate Executive Order 11988 and state and national flood plain management policy by selecting a project which has been designed and justified primarily to foster new development of over 50 square miles of undeveloped floodplain. Selection of the Locally Preferred Plan by the United States Army Corps of Engineers is unlawful in that it violates national flood plain policy. Failure to make this

violation transparent by describing the extent to which the violation is taking place is arbitrary and capricious and violates NEPA.

96. Section 2 of Executive Order 119888 requires that “ In carrying out the activities described in Section 1 of this Order, each agency has a responsibility to evaluate the potential effects of any actions it may take in a floodplain; to ensure that its planning programs and budget requests reflect consideration of flood hazards and floodplain management; and to prescribe procedures to implement the policies and requirements of this Order...” The Chief’s Report and EIS violate the requirements of Section 2.

97. Accommodating the desire to foster development in natural floodplain -- is largely responsible for the billion plus dollar increase in project cost originally estimated. The Chief’s report and accompanying EIS fail to make this objective transparent to Congress and arbitrarily and capriciously and unlawfully fail to examine the major costs and negative consequences of this design.

98. As Appendix P of the Environmental Impact Statement appropriately recognizes that:

“In terms of flood risk, it is unfortunate that floodplain areas are so attractive to commercial, residential, and industrial developers. The consequences associated with locating damageable property and people within such areas can be extreme to not only property owners and floodplain occupants, but to taxpayers at all levels who have, over the decades, largely evolved to “foot the bill” for flood response, recovery, and rebuild when a flood source decides to reoccupy its traditional floodplain,” Supplemental EIS, Appendix P.

99. Appendix P continues:

“Because structural alternatives reduce the frequency of flooding within a particular floodplain, they can affect the behavior of people living in or near the floodplain by allowing them to think that the floodplain is no longer subject to flooding. Because of this, structural alternatives, while they decrease the frequency of flooding, can actually increase flood risk if the consequences of flooding are allowed to increase. This occurs

when new development is placed in the floodplain that is inconsistent with reducing flood risk.”

100. However, the EIS fails to make transparent to Congress that the Locally Preferred Plan violates these principles, and fails to report the extent to which the original determination that the project could not be cost justified was altered by counting the projected benefits from fostering new development within natural floodplain. As a practical matter, the result is to propose a billion dollar public subsidy to move development in the metropolitan area off of high ground, where it is free of flood risk, and onto low ground, where it is subject to uninsured future flood risks.

COUNT IV PROPOSED FINDING OF NO SIGNIFICANT IMPACT

101. The impending Finding of No Significant Impact proposed by the Corps of Engineers violates NEPA because the agency has proposed substantial changes in the proposed action that are relevant to environmental concerns and there are new circumstances relevant to environmental concerns and bearing on the proposed action or its impacts. 40 CFR Title Section 1502.9(c).

102. The Chief’s Report and accompanying EIS arbitrarily, unlawfully, and capriciously fails to report to Congress that there exists a viable and fully suitable less costly flood control option that avoids the flooding of Richland and Wilkin Counties and lands downstream of Fargo and Moorhead while providing full protection to Fargo and Moorhead for floods reasonably likely to occur.

IRREPARABLE DAMAGE

103. The plaintiffs, member organizations and cities they represent will suffer irreparable harm should the project be authorized and implemented as presented to Congress.

WHEREFORE, Plaintiffs prays for the following relief:

1. For a declaratory judgment that, pursuant to the Administrative Procedure Act, the Army Corps' Action is arbitrary and capricious, and not in accordance with law.

2. For a declaratory judgment that under NEPA, the environmental analyses prepared by the Defendants and submitted to Congress do not adequately describe, analyze and consider the current project and new information and circumstances regarding the environmental impacts of the proposed project, and thus require supplementation in the form of a complete and legally adequate Supplemental Environmental Impact Statement; and the Corps is remanded to the agency to comply with NEPA prior to Project construction.

3. In the event that the Army Corps issues a Finding of No Significant Impact in conjunction with proposed modifications, remanding to the agency for a Supplemental Environmental Impact Statement.

4. Declaring that until the Minnesota environmental review and permitting is complete, that the NEPA review is incomplete because of failure to demonstrate compliance with Minnesota legal standards for authorization and permitting of the project..

Dated: August ____, 2013

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ACKNOWLEDGMENT

The party on whose behalf the attached document is served acknowledges through its undersigned counsel that sanctions, including reasonable attorney fees and other expenses, may be awarded to the opposite party or parties pursuant to Minn. Stat. § 549.211.

Gerald W. Von Korff, #113232