UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF MISSOURI, ex rel.	)	
	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 11-1937
	)	
UNITED STATES ARMY CORPS OF ENGINEERS, et al.	)	
	)	
	)	
Respondents.	)	

MOTION FOR INJUNCTION PENDING APPEAL

Pursuant to Fed. R. App. P. 8(a)(2), the State of Missouri requests an injunction pending appeal to bar the defendant U.S. Army Corps of Engineers from breaching the Front Line Levee, thus flooding 130,000 acres of Missouri land. Today, the District Court denied the State's request for a temporary restraining order or preliminary injunction. The Corps has indicated it may act in the next forty-eight hours.

BACKGROUND

Facts

The Birds Point-New Madrid Floodway ("the Floodway") encompasses most of Mississippi County, Missouri, and parts of New Madrid County, Missouri, and covers over 130,000 acres. The Floodway, located just below the confluence of the Ohio and Mississippi Rivers, is bounded by two levees. One

levee—the Front Line Levee—follows the western bank of the Mississippi River over approximately forty miles starting upstream at a point across the River from Cairo, Illinois, and ending just upriver from New Madrid, Missouri. Between these two cities, the River forms a wide arc. The second levee—the Setback Levee—is fairly straight and connects the two ends of the arc, creating an open area between the two levees that is about thirty miles long and is, in places, more than ten miles wide. (See maps attached to the Decision as Exhibits 1 and 2.) The Front Line Levee is 62.5 feet; the Setback Levee height is 65.5 feet. However, 16 miles of the 40 mile length of the Front Line Levee are 60.5 feet, and a 1,500 foot gap exists at the southern portion of the Front Line Levee to allow drainage and backflow into the Floodway.

The area inside the Floodway, although mostly farmland on which corn, soybeans, wheat, cotton, rice, and other crops are grown, is home to approximately 200 people and 90 residences. These farms use agricultural chemicals, petroleum products, and propane tanks in their normal operations.

Because of the current flooding, the United States Army Corps of Engineers ("Corps") announced that it intends to artificially crevasse the Front Line Levee in order to implement the Birds Point-New Madrid Floodway Operations Plan, a plan developed by the Corps in 1986 for flood control. The Plan gives the Corps the discretion to place the Floodway into

operation (in other words, blow up the levee) when the flood heights are predicted to be in excess of 60 feet on the Cairo gage. Birds Point-New Madrid Floodway Operations Plan, October 1986, § I(B)(2)(a) (the "Plan"). According to the Plan, the Corps must use explosives to blow up the fuse plug on the Front Line Levee "only as absolutely essential to provide authorized protection to all citizens." *Id.* at § I(A) (emphasis added). The Corps expects natural overtopping of the fuse plug to occur, and as such, the Plan requires such natural overtopping prior to determining the "necessity to artificially crevasse the frontline levee." *Id.* at § II(A). The fuse plug is 60.5 feet tall. To naturally overtop, the flood height must be at least 60.5 feet thus relieving the Corps of some of the unbridled discretion it bestowed upon itself in adopting the Plan.

The Corps says it will artificially crevasse, or intentionally breach, the Front Line Levee at the fuse plug, when the Cairo river gage reaches 61 feet. On the morning of the hearing on this matter, the Cairo river gage read 58.67 feet. The Corps has dispatched a barge loaded with explosives upriver from Memphis, Tennessee. At the time of the hearing, the barge was docked at Hickman Harbor, approximately six hours from the Front Line Levee. Once the explosives barge arrives at the Front Line Levee, it will take 15-20 hours to mix and load the explosive charges into the Levee.

The Corps' detonation will demolish over two miles of the Levee, with the demolition happening in a matter of milliseconds, sending a fifteen-foot wall of water across the Floodway. When in operation, the Floodway will divert 550,000 cubic feet per second of floodwaters—or one quarter of the total flow of the Mississippi River—into the Floodway. This water will rush over the farmland, destroying homes and outbuildings, and taking the agricultural chemicals, petroleum tanks, diesel fuel, and propane tanks stored and in use with it.

The Setback Levee, the Commerce Levee—which is the levee that protects communities up river from the Floodway—and the levee that surrounds Cairo, Illinois, provide sixty-five feet of protection. Because the fuse plug at the Front Line Levee is only 60.5 feet tall, the Front Line Levee will overtop before any other levee and provide relief to all the other levees. Testimony demonstrated significant differences in the impacts to the Floodway if natural overtopping is allowed, rather than an intentional breach. The intentional breach and resulting fifteen-foot waive of rushing water will have far more drastic consequences. The wall of water will scour the soil, destroying buildings and releasing farm chemicals, petroleum products and other water contaminants into the water coming into the Floodway and into waterways within the Floodway.

Farmer Milus Wallace testified that the scouring that would result from the intentional breach of the Front Line Levee will likely render his farm unproductive for years to come. The water will bring a layer of silt and sand that could reach as high as two feet. Mr. Wallace testified that he had no idea what he would do for his livelihood in such an event, as his farm would be compromised, his home would be inundated, and his three full-time employees would be without jobs. These farmers' crop insurance policies will not cover flooding caused by the demolition of the Front Line Levee because their insurance company does not cover manmade events. Should the Levee naturally overtop, the insurance company could cover their losses.

State Emergency Management Agency Director Paul Parmenter testified at length regarding the devastation the rush of water would cause to the residents of the Floodway. His agency has been coordinating emergency response and disaster relief efforts for the state of Missouri for the last week.

Summary of Decision Below

The State sought a temporary restraining order ("TRO") based on two of the three counts alleged in its complaint. Count I alleges violations of the State's Clean Water Law. Count III alleges that the Corps has abused its discretion in the implementation of the plan. The Court denied the State's motion for Temporary Restraining Order ("TRO motion"). As to Count I, the court noted that the State relied upon the waiver of sovereign immunity contained in § 313(a) of the Clean Water Act ("CWA"), 11 U.S.C. § 1323(a), and also that the Corps relied upon §511(a) of the CWA, 33 U.S.C. § 1371(a), that states, "This chapter shall not be construed as . . .(2) affecting or impairing the authority of the Secretary of the Army (a) to maintain navigation. . . ." The court found based on testimony of Corps witness David Berretta, that the navigation exception to the waiver of immunity applied, so the Corps was not subject to state water laws.

As to Count III, the court ruled that it is bound by the decision in *Story v. Marsh*, 732 F.2d 1375 (8th Cir. 1984). The court found that even if the *Story* decision did not apply, that "no aspect of the Corps' response to these historic floods suggests arbitrary or capricious decision-making is occurring." Decision at 11.

REASONS FOR GRANTING INJUNCTION

This court has set out a four-part test to be used in deciding whether to grant an injunction pending appeal – the same test that the district court was required to use when deciding whether to grant preliminary relief:

'To be entitled to an injunction pending appeal, appellants must meet the requirements outlined in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109 (8th Cir.1981). Under *Dataphase*, they must show (1) the likelihood of success on the merits; (2) the likelihood of irreparable injury to appellants absent an injunction; (3) the absence of any substantial harm to other interested parties if an injunction is granted; and (4) the absence of any harm to the public interest if an injunction is granted. *Shrink Missouri Government PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998) (citations omitted). The State meets this test; the Court should act to prevent the Corps from prematurely and deliberately flooding approximately 130,000 acres of Missouri.

Likelihood of success on the merits.

A. Congress has required that the Corps of Engineers federal agencies comply with Missouri's clean water law, and waived the Corps' immunity to suit brought to enforce state law.

Congress has specifically required that federal agencies comply with state clean water law: This section states in pertinent part:

> Each department, agency or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, an each officer, agent or employee thereof in the performance of his official duties shall be subject to and comply with, all Federal, State, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.

33 U.S.C. § 1323(a) (emphasis added). This Court has applied that requirement to the Corps in a case alleging that the Corps was causing the discharge or runoff of pollutants. *State of Missouri v. Department of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982). In that case, this Court upheld the district court's determination that the operation of a hydroelectric generator at a Corps reservoir did not constitute the discharge or runoff of pollutants. Because the federal law did not define "runoff," the district court deferred to the ordinary usage as the "flow of excess precipitation (such as rain or snow) into a stream." It concluded that the rise and fall of water level in the river because of fluctuations in the discharge of the dammed

stream did not constitute runoff. The court of appeals affirmed the district court's conclusion that § 1323 of the federal Clean Water Law subjects the Corps to state water quality laws if the Corps is causing the discharge or runoff of pollutants. *Id.* at 1304.

The Corps' action in destroying a segment of the Birds Point – New Madrid Front Line Levee will immediately result in the inundation of flood waters that will directly cause the discharge or runoff of pollutants, including farm chemicals and other contaminants into waters of the state. The Corps is effectively redirecting runoff, caused by excess rainfall, into an area where chemicals and other pollutants are present. The direct cause of that activity will be pollution of waters of the state and potential harm to Big Oak Tree State Park. This action fits squarely within the definition of "runoff of pollutants" as that term is used in 33 U.S.C. § 1323, as interpreted by this Court in *State of Missouri v. Department of the Army*. This action is prohibited by § 644.076, RSMo, of the Missouri Clean Water Law.

B. The Corps cannot invoke the navigation exception to the waiver of sovereign immunity here, where the action to be taken does not protect navigation.

1. As a matter of law, the purpose of the Birds Point – New Madrid Floodway project is for flood control, and the navigation exception does not apply.

Seeking to avoid liability for its actions under the Missouri Clean Water Law, the Corps of Engineers argues that 33 U.S.C. § 1371(a)(2)(a) applies to the operation the Birds Point – New Madrid Floodway Operations Plan. This section states in pertinent part:

> This chapter shall not be construed as . . . (2) affecting or impairing the authority of the Secretary of the Army (a) to maintain navigation . . . .

The Corps argued, and the district court agreed, that this exception to sovereign immunity waiver applies because the design and implementation of this Plan encompasses the maintenance of navigation on the Mississippi River. This conclusion is contrary to the plain language of Congress.

a. *The Flood Control Act of 1928*

The Birds Point – New Madrid Floodway Project was first authorized by the Flood Control Act of 1928 (the "1928 Act"), 45 Stat. 534, and later by the Flood Control Act of 1965 the "1965 Act"), 79 Stat. 1079. In the preamble to the 1928 Act, Congress identifies the primary purpose of the authorized projects as flood control:

> Be it enacted . . . that the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in

> accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers . . . .

(emphasis added).

By their very nature, almost all flood control projects convey some indirect benefit to other activities, such as navigation, agriculture, water supply, and recreation, to name a few. This was recognized by Congress later in the 1928 Act when it required a report from the Corps to include

> the effect on the subject of further flood control of the lower Mississippi River to be attained through the control of the flood waters in the drainage basins of the tributaries by the establishment of a reservoir system; the benefits that will accrue to navigation and agriculture from the prevention of erosion and siltage entering the stream . . .

Section 10 of the 1928 Act, 45 Stat. 534. It is clear from this language that flood control is the primary purpose, with incidental impacts on navigation, agriculture and other public and private uses being residual.

Unlike the 1928 Act, other Congressional authorizations have specified both flood control and navigation as the primary purposes of the projects. This Court should compare the preamble language quoted above with the following language of the 1944 Flood Control Act, ch. 665, 58 Stat. 887, which states in part:

> Be it enacted . . . in connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized . . . .

This and other language in the 1944 Flood Control Act was later interpreted as by the Supreme Court as identifying both navigation and flood control as the primary purposes of that Act. *Esti Pipeline Project v. Missouri,* 484 U.S. 295 (1988). A similar finding has not been made with respect to the 1928 Act authorizing the project at issue. Consequently, navigation can be viewed as no more than a residual benefit or secondary purpose.

b. *The Flood Control Act of 1965*

The Corps' mischaracterization of the Birds Point – New Madrid Floodway Operations Plan as a navigation project is even further undermined by the plain language of the 1965 Flood Control Act. Section 201 of the 1965 Act authorizes the Secretary of the Army to "control, operate and maintain any water resource development project, including single and multiple purpose projects involving, but not limited to, navigation, flood control, and shore protection . . . ." Public Law 89-298, 79 Stat. 1079, Tit. II (1965). A multitude of projects are later identified in the act, with the purpose of each project specifically

identified. *See generally id.* The Birds Point – New Madrid Floodway project is specifically identified with the project for the "Lower Mississippi River Basin." *Id.* The purpose for the project mirrors the 1928 Act purpose as "for flood control and improvement of the lower Mississippi River. . . ." 45 Stat. 534 (1928). This language should be compared to of other listed projects, such as the "Great Lakes Basin" appearing later in the document, which is identified as "the project for flood control and navigation on the Chagrin River . . . ." *Id.*

While other documents involving the Birds Point – New Madrid Floodway Project may recite benefits from the project to navigation, the language of statute enacted by Congress shows that the primary purpose of the project is for flood control. The project is not like reservoir, which is actively managed to provide water for navigation. Consequently, this case is easily distinguishable from *In re: Operation of the Missouri River System Litigation*, 418 F.3d 915 (8th Cir. 2005), in which the court of appeals held that the state of North Dakota was barred from suing the Corps of Engineers to enforce state water quality standards. That case involved alleged violations of the state water quality law involving the release of water from a Missouri River reservoir for the purpose of supporting navigation. *Id.* at 918 (finding that North Dakota's complaint was intended to use the state's water quality standards "to affect the Corps' authority to release water from Lake

Sakakawea to support navigation"). Missouri's Complaint is intended to prohibit imminent violations of the Missouri Clean Water Law from the discharge or runoff of pollutants into its waters caused by the Corps' intentional flooding activities under its flood control authority, not to affect water levels needed for navigation.

Under the Corps' logic, any Corps project authorized for flood control with incidental impacts on navigation will not be subject to federal or state clean water laws. But if the intent of Congress was to create an exception to Clean Water Act's waiver of sovereign immunity for flood control projects, it would have used said "navigation or flood control" in 33 U.S.C. § 1371(a)(2)(a). Instead, it just exempted activities affecting or impairing "navigation." The Corps should not be allowed to pollute state waters by now characterizing the project as a navigation project, when the Congressional authority plainly says otherwise. Nor should the Corps be allowed to read into a statute a word that Congress intentionally left out.

2. Evidence presented to the Court supports the characterization of the Birds Point – New Madrid Floodway as flood control project.

While the issue of waiver is one of law, the court erred in its finding regarding the impact of the levee on navigation. There is no dispute that flooding has the potential to impact navigation, but that is not the purpose of the levee system and in particular, not the purpose of the Floodway. The

court relies on the testimony of David Berretta. Mr. Berretta did, indeed, testify that not blowing the levee would impair navigation because it would have "the possibility of creating cutoffs or the river taking a short circuit." Yet the Birds Point New Madrid Floodway Project is, by design, a short circuit or cutoff, which directs the River through a short circuit from the upper fuse plug through the Floodway to the lower fuse plug. Mr. Berretta said that flooding can also cause silting in of the navigational channel. However, on cross-examination, Mr. Berretta conceded that all these same impacts—cutoffs, short circuits and siling—will result from the operation of the floodway.

Again, section 511(a) of the CWA, 33 U.S.C. § 1371(a), states "This chapter shall not be construed as . . .(2) affecting or impairing the authority of the Secretary of the Army (a) to maintain navigation. . . ." It is clear that the acts involved here are for flood protection and that the act of opening the Floodway does not maintain navigation. As Mr. Berretta conceded on cross, and confirmed in redirect, the demolition of the levee at most moves or reschedules, but does not eliminate or event reduce, the navigational problems caused by flooding. As a consequence, the demolition of the Front Line Levee does nothing to maintain navigation.

C. The Corps' action will violate the Missouri Clean Water Law.

Because of its jurisdictional holding, the district court did not consider whether the Corps' action will violate the Missouri Clean Water Law. Defendants' threatened crevassing of the Front Line Levee will cause pollution to waters of the state of Missouri and will place or cause or permit to be placed water contaminants in a location where they are reasonably certain to cause pollution of waters of the state of Missouri in violation of section 644.051.1(1), RSMo, of the Missouri Clean Water Law.

Section 644.051.1(1), RSMo, of the Missouri Clean Water Law provides that it is unlawful for any person to cause pollution of any waters of the State or to place or cause or permit to be placed any water contaminant in a location where it is reasonably certain to cause pollution of any waters of the State. Section 644.016(14), RSMo, of the Missouri Clean Water Law defines "person" to include any agency, board, department, or bureau of the federal government. Section 644.016(16), RSMo, of the Missouri Clean Water Law defines "pollution" as

> such contamination or other alteration of the physical, chemical or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will

> or is reasonably certain to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, industrial, agricultural, recreational, or other legitimate beneficial uses, or to wild animals, birds, fish or other aquatic life.

Section 644.016(26), RSMo, defines "waters of the state" as all rivers, streams, lakes and other bodies of surface and subsurface water lying within or forming a part of the boundaries of the state which are not entirely confined and located completely upon lands owned, leased or otherwise controlled by a single person or by two or more persons jointly or as tenants in common and includes waters of the United States lying within the state.

At the hearing, Charles Kruse testified that flooding moved great amounts of silt, sediment and debris through a flood plain. He also testified that herbicide and fertilizer residues, and stored chemicals customarily used in farming operations also move through a floodplain during flood events. Milus Wallace testified that silting and scouring has occurred in the Floodway previously and will do so again if the Corps breaches the Front Line Levee. Mr. Wallace uses herbicides and fertilizers in his farming operations, and the residues of these chemicals and any stored chemicals left in the Floodway will also move through the Floodway if the Front Line Levee were intentionally breached.

Davis Minton testified that petroleum storage tanks, farm chemical storage buildings, and LP gas tanks will move through the Floodway. Mr. Minton testified that any water bodies in and surrounding the Floodway will become contaminated with these pollutants. Mr. Minton further testified that the terms "waters of the state" includes drainage ditches and almost any other water body in the state of Missouri. Mr. Minton testified that the addition of these chemicals to waters of the state will be harmful and detrimental to public health and safety. He also testified that agricultural and recreational uses of the water will be impacted, as will wild animals and aquatic life.

The testimony of Mr. Kruse, Mr. Wallace, and Mr. Minton on these points was not contradicted. If the Corps destroys the Front Line Levee, it is certain that pollutants will enter Missouri waters of the state, in violation of section 644.051.1(1), RSMo, of the Missouri Clean Water Law.

D. The Corps has established standards for the exercise of its discretion but has failed to follow those standards.

The court failed to properly apply the decision in *Story v. Marsh*. 732 F.2d 1375 (8th Cir. 1984). In *Story*, this court held that the Corps' action in developing the Birds Point-New Madrid Floodway Operations Plan (the "Plan") was unreviewable because Congress did not establish standards for the development of the Plan. As this court noted, "[i]n such circumstances,

the courts have little, if any, standards against which to assess the agency decision, thus rendering the substance of the agency action largely unreviewable." *Story* at 1381.

In contrast, in developing the Plan, the Corps has imposed upon itself a standard by which to judge its actions. The Corps stated in the Plan, "[i]t is the intent that operation occur only as absolutely essential to provide the authorized protection to all citizens." The Plan, § I(A). The Plan also goes on to say that[i]t is expected that natural overtopping of the fuse plug section [which is 60.5 feet in elevation] will be allowed to occur prior to determining the necessity to artificially crevasse the frontline levee." So the Corps has established that as a first step toward a decision, it will allow overtopping and only after overtopping occurs will it consider the necessity, at which time it will not detonate the levee unless absolutely essential. As a result, this court now has a standard to apply.

This court, in *Story*, recognized that while the Plan was unreviewable, that there are circumstances that would allow consideration of the Corps actions:

> This is not to say, however, that the procedures followed by the Corps of Engineers, or other collateral matters, are likewise unreviewable. As the court stated in *Local 2855, AFGE (AFL-CIO) v. United States, supra*, 602 F.2d at 580:

> Even when a court ascertains that a matter has been committed to agency discretion by law, it may entertain charges that the agency lacked jurisdiction, that the agency's decision was occasioned by impermissible influences, such as fraud or bribery, or that the decision violates a constitutional, statutory or regulatory command. For the APA circumscribes judicial review only " to the extent that ... agency action is committed to agency discretion by law;" it does not foreclose judicial inquiry altogether. (Emphasis in the original; footnotes omitted.)

Story at 1381 (emphasis added). Here, the Corps has imposed on itself a regulatory command. The issue of whether to include this particular regulatory command in the Plan is unreviewable, but having included it, the Corps has provided this court with a standard that it lacked in *Story*.

Having provided the court with a standard, the Corps is now subject to the Administrative Procedures Act, 5 U.S.C. 701, *et seq*., and this court may review the decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Here the decision is both arbitrary, capricious, an abuse of discretion and, as explained above, in violation of both the Clean Water Act and the Missouri Clean Water Law.

The decision is arbitrary, capricious, and an abuse of discretion an abuse of discretion because there is no demonstrated threat to anyone caused by allowing natural overtopping of the frontline levee without any man-made demolition. Other levees are holding and show no signs of deterioration. Other levees cannot overtop because they are five feet higher than the low points in the frontline levee and the predicted crest is only 60.5 feet. In addition, the Corps own economist stated that the Corps has multiple engineering solutions for protecting the other areas but that he claims are economically unfeasible. The Corps' self-imposed standard does not consider economics. Rather, the standard calls for "protection to all citizens." The Plan, § I(A). Here, the demolition will cause the release of dangerous chemicals and devastate the residents of the Floodway. This will be done despite the fact that the integrity of the levees is being maintained and the levees, other than the frontline levee, cannot be overtopped until the water reaches a level of more than sixty-five feet. The decision to demolish the levees, under these circumstances is arbitrary, capricious, and an abuse of discretion.

Irreparable harm to Missouri

The agricultural and petrochemical pollutants that will be released into the Mississippi River and other Missouri waters will certainly have irreparable, harmful effects on aquatic life and the sustainability of the

impacted waterways, although there is no way to judge the breadth and depth of these effects without further information. Water pollution from agricultural and petrochemicals will harm the state of Missouri irreparably. As a sovereign, the state is entitled to protect its state waters—a cherished state resource from the disastrous consequences of a fifteen-foot torrent of water.

Mississippi and New Madrid Counties are two of the poorest counties in Missouri.[1] In the best of times, the people who work and live in this 130,000-acre flood plain would have great difficulty recovering from a flood. In the current economy, the Missourians who will be affected by the destruction of the Front Line Levee may have no hope of recovery. Charles Kruse testified that after the 1993 flood, a number of Missouri farmers left farming after being financially wiped out or deciding that they simply could not stand the emotional toll of another catastrophic flood. The Corps' own economist, Robert Learned, testified that by his estimation, Missouri would suffer an economic impact of over $300 million, and that he was not aware of any mechanism to compensate Missouri for these economic losses other an act of Congress or the President. He also acknowledged that his estimate

[1] The U.S. Department of Agriculture, Economic Research Service reports that the median income for Missouri was $45,149 in 2009. The median income for the same period in New Madrid County was $34,332. For Mississippi County, the median income was even less in 2009, $29,009.

only included "direct" impacts from the flood. Certain long-term impacts on the area, like loss of services in and around the Floodplain, were not included in his estimate. He also testified that he did account for the loss of usable farmland from scouring by treating the scoured lands as permanently unusable. Farmlands rendered permanently unusable constitutes one of the many irreparable, uncompensable injuries that will befall Missouri if the Corps breaches the Front Line Levee.

Harm to other interested parties

The Corps has suggested that failing to blow up the Front Line Levee would harm a long list of other locations. However, the Corps failed to present sufficient evidence at the hearing to support this claim. In fact, the state of Illinois' expert, Mr. Arlan Juhl, explained that the city it's most concerned about, Cairo, Illinois, is currently safely protected by the sixty-five foot levees that surround the city's borders. The levees are not currently overtopping, as the flood height has only reached a stage of approximately fifty-eight feet on the Cairo gage. Mr. Juhl expressed his confidence in the integrity of the levees and stated emphatically that he did not believe the conditions warranted the intentional breach of the fuse plug on the Front Line Levee protecting the Floodway at this time.

State Emergency Management Agency Director Paul Parmenter echoed Mr. Juhl's confidence in the Commerce Levee, which protects the remaining

communities upstream of the city of Cairo. Director Parmenter explained that the Commerce Levee is sixty-five feet high, and the Corps told him on at least one occasion that it was confident that it would not breach at all. In fact, the Corps assured Director Parmenter that, "we build good levees—they don't breach." The Commerce Levee protects several communities, including the city of Cape Girardeau, Missouri. Based on these assurances, Director Parementer could not understand nor justify the state of emergency that would certainly result from the intentional breach of the fuse plug at the Front Line Levee. The Corps failed to introduce any evidence that the remaining upstream communities on the Ohio River would be in danger. Thus, no similar state of emergency is sure to result if the fuse plug is **NOT** intentionally breached.

If the upstream cities along the Mississippi and Ohio Rivers are safely protected by levees that will not breach, then the state of Missouri has met its burden by proving that no harm to other interested parties will result if the state prevails. The only harm that is certain is the harm that an intentional breach of the Front Line Levee will cause to Missouri and more than 200 Missourians, wiping out 90 homes, livelihoods, and crippling 130,000 acres of valuable farmland for years to come.

The public interest

The final *Dataphase* factor is to look at the impact of an injunction on "the public interest." The pertinent "interests" are discussed above. True, they exist on both sides of this question, but unless and until there is an immediate threat to Cairo, the public interest point argues strongly for delay – and protection of the families and businesses located in the Floodway.

As to this point, the Corps' argument below was largely that Congress had decided, when authorizing the Floodway, what was in the public's interest. But the Floodway was authorized decades before the Clean Water Law was enacted. It was authorized when we knew comparatively little about pollutants that are found on land such as that in the Floodway—and before we knew the impact that such pollutants can have, not just locally, but when washed downstream and into the Gulf of Mexico. If Congress meant for the Flood Control Acts to trump the Clean Water Act, it could have expressly excluded those projects from regulation.

In addition, the Corps conceded that the upstream levees, all of which are over sixty-five feet, are structurally sound and show no signs of being compromised, even in the face of the current flooding. Nor was any evidence presented that these other levees would overtop. To the contrary, the predicted flood is only 60.5 feet, so the sixty-five foot levees cannot overtop. Thus, we have no evidence of a real threat to the other communities in

Missouri and the other states. In comparison, the damage to the Floodway, including both economic losses and pollution of state waters, is certain if the Corps proceeds with the destruction of two miles of levee. As a result, it is in the public interest not to allow the Corps to destroy 130,000 acres of Missouri land.

Respectfully Submitted,

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