IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

STATE OF MISSOURI, ex rel. Chris Koster, and the MISSOURI DEPARTMENT OF NATURAL RESOURCES, MISSOURI STATE EMERGENCY MANAGEMENT AGENCY,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:11-cv-00067 S N J L
UNITED STATES ARMY CORPS OF ENGINEERS, MAJOR GENERAL MICHAEL J. WALSH, COLONEL VERNIE L. REICHLING JR.,	)	
Defendants.	)	

INTRODUCTION

Defendants—the United States Army Corps of Engineers, Major General Michael J. Walsh, and Colonel Vernie L. Reichling, Jr. (collectively the "Corps")—file this brief in opposition to the Motion for Temporary Restraining Order (the "TRO Motion") filed by Plaintiffs the State of Missouri, the Missouri Department of Natural Resources, and the Missouri State Emergency Management Agency (collectively "Missouri").

Plaintiff in this action seeks to interfere with the urgent use of the Birds Point Floodway that is authorized by Congress and designed precisely for the conditions presented now – a severe flooding event. After careful analysis, the Corps will determine the manner by which to operate the Birds Point-New Madrid Floodway to prevent far greater damage to a larger area containing a far greater population. The Eighth Circuit, in an earlier opinion involving this very

levee system and an injunction issued by the district court, held that Congress committed the operation of the floodway to the discretion of the Army Corps of Engineers. *Story v. Marsh*, 732 F.2d 1375, 1379 (8th Cir. 1984) ("The government contends that the decision of the Corps of Engineers to artificially crevasse both the upper and lower fuse plug sections and the frontline levee is an action 'committed to agency discretion by law' within the meaning of 5 U.S.C. § 701(a)(2) and that the substance of that decision is therefore unreviewable. We agree"). In the alternative, the Eighth Circuit made it abundantly clear that the Army Corps of Engineers has broad discretion in operating the flood control project. The management of the levee and the need to relieve pressure to avoid massive and uncontrolled damage in the area downstream and to more heavily-populated areas are the kind of decisions that must be left to those with the expertise and ability to act quickly and decisively.

A divergence from the Corps' reasonable decisonmaking to protect the safety of people and property from an uncontrolled flood, damage that can be substantially ameliorated by the controlled use of the floodway as intended by Congress. This facility has been developed over years for this very intended propose. Declaration of Major General Michael J. Walsh ("Walsh Decl.") (attached as Exhibit 1) at ¶¶ 1-2. The plan of operation was developed by the Corps in 1986, under the very broad statutory discretion recognized by the Eighth Circuit. No challenge to that plan was ever initiated by the Plaintiff, and any challenge to the plan itself is plainly barred by the 6 year statute of limitations. 28 U.S.C. § 2401(a).

There is no likelihood Missouri will succeed in this case. Missouri asserts only two grounds for success for this TRO. First, the State alleges that the Missouri Clean Water Law would be violated by the Corps breaching the levy by allowing water to flow into the floodway.

Missouri completely ignores Congress' determination that state water pollution control laws are not to impair the Corps' authority to maintain navigation. 33 U.S.C. § 1371(a). To be sure, Congress subjected federal agencies to state water pollution control laws in certain circumstances. 33 U.S.C. § 1313(a). At the same time Congress clearly directed that such regulation not interfere with the operation of flood control projects impacting the Corps' authority to maintain navigation. Missouri's state law claim in this case clearly runs afoul of Congressional intent.

Second, Missouri challenges the operation of the floodway under the Corps' plan. *Story v. Marsh* is compelling authority that Congress has committed to the Corps' broad authority to operate the levy under the Corps' discretion. The Corps is acting reasonably and well within the parameters of the plans that have been in the public domain for decades. Given the holding of the Eighth Circuit that the urgent flood control decisions are the province of the Corps, deference should be given to the Corps' expertise. The decision by the Corps to breach will be well thought out and thoroughly vetted.

The public interest and the balance of harms also compel denial of the TRO Motion. A temporary restraining order is an extraordinary emergency remedy that is not lightly granted. If the Corps is restrained from exercising its responsibilities to take effective flood control actions, the damage may well be catastrophic. This Court can take judicial notice of the ravages that uncontrolled floods cause. The floodway was designed specifically by Congress to be used to stop the harms associated with that flooding downstream. Congress authorized massive funding for the project and authorized the acquisition of flowage easements on the areas that would be used for a controlled flood in the floodway. Missouri is concerned with damage that could occur

in the floodway that the United States has already paid for, in emergencies such as that threatened now. Any property that was built in that area is subject to an easement. All people will be evacuated from that area. As contrasted with that, an uncontrolled flood will cause massive damage to property and risk the life, safety, and property to thousands of individuals and could severely damage other levees which presently provide protection to more densely populated areas. Congress has already made the public interest balance that using the floodway is in the best interests of the public. "On these two factors, we give great weight to the fact that Congress already declared the public's interest . . . ." *In re: Sac & Fox Tribe of the Mississippi in Iowa*, 340 F.3d 749, 760 (8th Cir. 2003) (citing *United States v. Oakland Cannabis Buyers' Coop*., 532 U.S. 483, 497–98 (2001) ("A district court cannot, for example, override Congress' policy choice, articulated in a statute . . . "). Consequently, the Court should deny the TRO application forthwith.

STANDARD OF REVIEW

Preliminary injunctive relief such as a temporary restraining order is an "extraordinary remedy never awarded as of right." *Winter v. Natural Resources Def. Council*, 129 S.Ct. 365, 376 (2008) (quoting *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008)). "[T]he burden of establishing the propriety of an injunction is on the movant." *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003) (citing *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987); *Goff v. Harper*, 60 F.3d 518, 520 (8th Cir. 1995)). "'The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.'" *Bandag, Inc. v. Jack's Tire & Oil, Inc.*, 190 F.3d 924, 926 (8th Cir. 1999) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959)). When there is an adequate

remedy at law, a preliminary injunction is not appropriate. *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 871 F.2d 734, 738 (8th Cir.1989).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter,* 129 S. Ct. at 374. "In the Eighth Circuit, these four factors are known as the 'Dataphase' factors, based upon the 1981 en banc case, *Dataphase Sys., Inc. v. C L Sys.*, Inc., 640 F.2d 109, 113 (8th Cir.1981)." *Pinnacle Entertainment, Inc. v. Land Clearance for Redevelopment*, 2010 WL 2802129 (E.D.Mo. 2010). *See Watkins*, 346 F.3d at 844 ("The party seeking injunctive relief bears the burden of proving all the *Dataphase* factors.").

FACTUAL BACKGROUND

The Mississippi River and Tributaries Project (the "MR&T Project") was authorized by Congress through the Flood Control Act of May 15, 1928. *Story*, 732 F.2d at 1378; 45 Stat. 534. Congress established the MR&T Project after the Great Mississippi River Flood of 1927 to protect against other tragic floods while also enhancing navigation in the Mississippi River. *The Mississippi River & Tributaries Project: Controlling the Project Flood*, at 2 ("Project Flood Paper") (attached as Exhibit 2).

The MR&T Project represented a drastic change from prior engineering policy. *Id*. Before the tragic 1927 flood, flood-control systems were designed to withstand the last great flood of record. *Id*. The MR&T Project, in contrast, was designed to withstand and control the "Project Design Flood," a modeled flood of greater severity than the last great flood of record. *Id*. at 3–5. The current Project Design Flood was originally developed starting in 1954 and has

been repeatedly revisited since. *Id*.

The heart of the MR&T Project is a 3,787-mile levee system. *Id*. at 5. The Birds Point—New Madrid Floodway (the "Floodway") is part of the levee system's Northern Section, which is the "first key location" of the flood control system. *Id*. at 7. When flooding reaches a "critical level" at Cairo, Illinois, the Floodway is placed into operation by "artificially crevassing," or breaching, the frontline levee. *Id*. at 7; Walsh Decl.. All of the system's levees are designed on the assumption that the Floodway will be efficiently and timely utilized; if it is not utilized when necessary, the level of flood control in areas outside the Floodway will be inadequate. Walsh Decl. at ¶ 2. The area that encompasses the Floodway is subject to 80,892 acres of flowage easements acquired by the United States at Congress's direction. *Id*. at ¶ 14. Under those easements, the landowner released and held harmless the United States for any and all damages as a result of flooding. *Id*.

The Corps has responsibility for the MR&T Project, including the Floodway. *Id*. at ¶ 3. Responsibility for the decision to operate the Floodway is delegated to the President of the Mississippi River Commission ("MRC President"), who is the Division Commander of the Corps' Mississippi Valley Division, currently Maj. General Michael J. Walsh. *Id*. at ¶¶ 1, 3.

The Corps' 1986 Birds Point—New Madrid Floodway Operations Plan ("Operations Plan") sets forth steps for operating the Floodway. *Id*. at ¶¶ 3–4. In response to the current flood event, which is estimated to reach record heights, the Corps has begun to take initial steps under the Operations Plan to operate the Floodway. *Id*. at ¶¶ 4–13. Those steps include ordering barges loaded with explosives and personnel to depart for the frontline levee, where they will take up position near the Floodway. *Id.* at ¶ 4. If ordered, they will load explosive material into

pipes imbedded in the frontline levee, a process that will take approximately 15 hours. *Id*. at ¶ 5. Finally, artificial crevassing would occur on the MRC President's order. *Id*.

In taking the steps he has already ordered, and in contemplating further decisions, the MRC President has relied on National Weather Service ("NWS") forecasts, hydrographs of the areas subject to flooding, and consultations with his subordinates and the Corps' Headquarters. *Id. at* ¶ 6. Under the Operations Plans, flood stage at the Cairo gage is set at 40 feet. *Id*. at ¶ 7. The Project Design Flood is based on a 62.5 foot measurement at the Cairo gage, and operation of the Floodway is necessary before water reaches an elevation of 61 feet. *Id*. The current NWS forecast is that Cairo will reach an elevation of 60.5 feet on May 1—a historic record—and that water could remain at 60 feet for as long as 10 days. *Id*. at ¶¶ 7–8. Any delay in operating the Floodway after Cairo reaches an elevation of 59 feet could impact the Floodway's effectiveness. *Id*. at ¶ 8.

The Project Design Flood is based on river flows of 2,360,000 cubic feet per second ("cfs"). *Id*. at ¶ 9. Under current flood conditions, the river is flowing at approximately 2,300,000 cfs, a level of pressure that has never been experienced and that creates a high risk that weak spots in the MR&T Project system will be exposed. *Id*. Operating the Floodway will divert 550,000 cubic feet per second of floodwaters, approximately 1/4 of the total flow, into the Floodway, creating a safety valve that is a critical part of the MR&T Project's safety conditions. *Id*. at ¶ 9.

In deciding whether to take the final step to operate the Floodway, the MRC President will consider public safety and technical considerations, including the current conditions within and outside the Floodway and the fact that backwater flooding from the river is already

inundating thousands of acres in the Floodway's lower portion. *Id*. at ¶ 12. If the Floodway is operated when necessary, it will preserve the integrity of the MR&T Project and thereby protect a number of areas in several different states. *Id*. If it is not operated efficiently in a Project Design Flood scenario, significant damage will occur in parts of several states. *Id*. Areas subject to damage if the Floodway is not operated as intended include: Cape Girardeau, Missouri; Hickman, Kentucky; Paducah, Kentucky; Cairo, Illinois; Golconda, Illinois; Grand Tower, Illinois; and Reevesville, Illinois. *Id.* Based on that risk of catastrophic damage, the MRC President is ready to order operation of the Floodway "if and when it is absolutely essential to do so."

ARGUMENT

For the reasons discussed below, Missouri has failed to establish any of the four factors necessary to obtain a temporary restraining order and the TRO Motion should thus be denied.

A. Missouri has not demonstrated a likelihood of success on the merits.

Missouri's Complaint contains three counts. Count II, which alleges that the Operations Plan itself is unlawful under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, et seq., does not seem to be part of Missouri's basis for the TRO Motion. Indeed, the TRO Motion only refers to the Operations Plan to *support* Missouri's argument that it has a sufficient likelihood of prevailing on the merits of Count III of its Complaint. In any event, Misouri's challenge to the Corps' 1986 Operations Plan is plainly time barred under the six year statute of limitations in 28 U.S.C. § 2401(a). Because the TRO Motion does not address Count II of the Complaint, this brief will focus on Missouri's arguments under Counts I and III.

1. Missouri has no likelihood of success on Count I in the Complaint

In order to prevail on Count I, Missouri has the initial obligation of establishing subject matter jurisdiction in this Court. In order to do so, Missouri must show that there is some waiver of sovereign immunity that will allow the State to sue a component of the federal government. *Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986). It is black-letter law that waivers of sovereign immunity must be unequivocally expressed by Congress, may not be implied, and must be strictly construed in favor of the United States. *United States v. Testan*, 424 U.S. 392, 399 (1976); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686 (1983). Missouri alleges that such a waiver is provided by section 313(a) of the Clean Water Act, 33 U.S.C. 1323(a), which states in part as follows:

> (a) 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, and 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. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and © to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law . . . .

Section 511(a) of the Clean Water Act, 33 U.S.C. § 1371(a), provides a limitation on this

waiver of the United States' sovereign immunity, and states in relevant part that:

> This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter; [or] (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation . . . .

The plaining meaning of the statute provides a limitation on the federal facilities compliance provision in Section 1323(a) where compliance with state-law clean water act requirements would interfere with the Corps' authorities "to maintain navigation." This is consistent with the oft-cited principle that "a waiver of sovereign immunity must be strictly construed in favor of the sovereign." *Orff v. United States*, 125 S. Ct. 2606, 2610 (2005); *see, e.g., Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992).

Missouri's complaint alleges that the Corps' "breach of the frontline 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." Compl. ¶ 35. Although bereft of factual allegations to support such a claim in the complaint, *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009), to prevent this violation, Missouri seeks to bar the Corps from implementing the Birds Point – New Madrid Floodway operations plan with an injunction by this Court under state law. The BP-NMF is an essential and integral part of a federal flood control project under the Flood Control Act. The purpose of the Plan is to control flooding and, at least in part, to

maintain navigation. *See* Ex. 2, Project Flood Paper at *2;* [1/] Walsh Decl. at ¶ 13. Missouri's Count I, expressly seeking to enjoin the Corps from implementing the Plan will impermissibly "affect[ ] or impair[ ]" the Corps' authority to maintain navigation within the meaning of and in violation of 33 U.S.C. 1371(a). As noted by the Eighth Circuit, in a case seeking to enjoin the Corps' operations on the Missouri River, the application of state water pollution laws cannot be used to impair or affect the Corps' authority to maintain navigation. *In re Operation of Missouri River System Litigation*, 418 F.3d 915, 917 -918 (8th Cir. 2005). *Cf National Wildlife Federation v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1178 (9th Cir. 2004) (explaining that when state water law standards conflict with a Congressionally authorized dam project, the CWA does not require compliance with state water laws). *See also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155(1976) ("when two statutes are capable of coexistence, it is the duty of the courts ... to regard each as effective.")

There is no question that many of federal activities can be regulated by the CWA and, pursuant to section 313(a), by certain state clean water act laws and requirements.

[1/] The Project Flood Paper explains that "Following the Great Mississippi River Flood of 1927, the nation galvanized in its support for a comprehensive and unified system of public works within the lower Mississippi Valley that would provide enhanced protection from floods, while maintaining a mutually compatible and efficient Mississippi River channel for navigation." (emphasis added). *Id.* at 2. The paper further explains that Mississippi River and Tributaries project is designed to, among other things: " prevent disastrous overflows on developed alluvial lands;" use "floodways to safely divert excess flows past critical reaches so that the levee system will not be unduly stressed;" and include "channel improvements and stabilization features to protect the integrity of flood control measures and to ensure proper alignment and depth of the navigation channel." *Id.*

The question in this case, however, is whether Missouri can require the Corps to always comply with the state water pollution laws notwithstanding that such state regulation will stop an emergency implementation of a federal flood control project whose purpose is, at least in part, to maintain navigation. *See* Walsh Decl. at ¶ 13. Section 1371(a) shows that Congress clearly and explicitly intended to prohibit such a result.

Simply put, Missouri seeks to use the Missouri Clean Water Act and the general waiver of sovereign immunity in the federal CWA, section 313(a), to force the Corps to abandon duties under the FCA. Because 33 U.S.C. 1371(a)(2)(A) prohibits the State's attempt, Missouri cannot demonstrate a probability, or even a possibility, of success on the merits of Count I.

2. Missouri has no likelihood of success on the merits of Count III in the Complaint.

Similarly, Missouri has not demonstrated a likelihood of success on Count III, which alleges that the Corps' "actions in implementing the" Operation Plan are arbitrary and capricious under the APA. "Whether an agency's action is arbitrary and capricious depends on whether the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1121 (8th Cir. 1999) (internal quotation omitted); *see also Siebrasse v. U.S. Dep't of Agric.*, 418 F.3d 847, 851 (8th Cir. 2005).

Judicial review of agency action is precluded where "agency action is committed to agency discretion by law," in which case the APA does not apply. 5 U.S.C. § 701(a)(2). Thus, review is precluded "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Where "no law fetters the exercise of administrative discretion, the courts have no standard against which to measure the lawfulness of agency action" and the court thus lacks jurisdiction because the APA is inapposite. *Story v. Marsh*, 732 F.2d 1375, 1379 (8th Cir. 1984) (quoting *City of Santa Clara, Cal. v. Andrus*, 572 F.2d 660, 666 (9th Cir. 1978)).

In a previous case seeking to enjoin the Corps from undertaking artificial crevassing based on an earlier version of this Operation Plan, the Eighth Circuit applied the *Overton Park* test and found that "Section 204 of the Flood Control Act of 1965 is an example of a broad delegation of authority" to the Corps. *Story*, 732 F.2d at 1380. After reviewing the legislative history, the Eighth Circuit found that "[i]t is clear from these excerpts that Congress authorized the raising of the levees *and the artificial breaching of the levees* at any point when the water reached 58 feet on the Cairo gauge with a prediction that the water might exceed 60 feet." *Id.* at 1380–81. Because the Flood Control Act of 1965 "provided no additional standards for determining whether and where to crevasse the levee," a "very broad" delegation of authority that "requires the Corps to exercise considerable expertise in a highly technical area," "the courts have little, if any standards against which to assess the agency decision, thus rendering the substance of the agency action largely unreviewable." *Id.* at 1381.

Although *Story* was decided nearly 30 years ago and a new Operations Plan was issued in 1986, the Corps' delegated discretionary authority as delegated by the Flood Control Act of 1965 is unchanged. As Missouri itself recognizes, the Operations Plan "gives the Corps' Memphis district commander and the President of the Mississippi River Commission the discretion to implement the plan." Compl. ¶ 44. And, as the *Story* court recognized, that delegation of discretion leaves no basis for judicial review under § 701 of the APA. Thus, Missouri has no likelihood of success on its APA claim because review under the APA is inapplicable to this exercise of discretion.

Additionally, Missouri has absolutely no likelihood of prevailing under APA claim because it has failed to identify any final agency action subject to suit under the APA. Judicial review of agency action under the APA is limited to "final agency action." 5 U.S.C. § 704. Two conditions must be satisfied for agency action to be "final." First, the action "must mark the 'consummation' of the agency's decisionmaking process," and not be "of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Second, the action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* (citations omitted).

With respect to implementation of the Plan, the Corps has not yet decided to undertake the single action challenged in the Complaint: The decision to undertake floodway operation through artificial crevassing. As discussed in the Statement of Facts, *supra*, there are still additional preparatory steps necessary before operating the Floodway. There is a possibility that the Corps will not operate the floodway and, consequently, the decisionmaking process has not reached it consummation, nor have any rights been determined. Because Missouri has not

satisfied its obligation under the APA to identify final agency action, it has no likelihood of success on the merits of its APA claim under the current facts.[2/]

Finally, even if Missouri could bring an APA challenge to the still as yet un-made decision to operate the Floodway, it has failed to make any case that such a decision would be arbitrary and capricious. The sole argument in the TRO Motion is that the Operations Plan provides that the Floodway shall be operated only if "absolutely essential," and that the "Corps' decision to explode the levee without considering other alternatives is arbitrary and capricious and is an abuse of discretion." Pls.' Br. at 4–5. This argument ignores the fact that the MRC President has not yet ordered operation of the Floodway and will not order operation until a time "when it is absolutely essential to do so." Walsh Decl. at ¶ 13. And even if the MRC President does ultimately order Floodway operations, he has clearly considered at least one alternative: Not operating the Floodway. The final decision to operate the Floodway, if undertaken, will be based on extensive technical and scientific evidence—such as weather forecasts, hydrology projections, and structural engineering analyses—to which the Corps has applied its considered technical and scientific judgment based on the Operations Plan. *Id*. at ¶¶ 2–12. Missouri's allegation that this decision would be arbitrary and capricious is completely without merit.

[2/] Nor is it entirely clear that Missouri even has standing to assert this claim. The interests it identifies—such as economic harm to its residents—belong to its citizens, not to the State of Missouri. Missouri does not explain how it has standing to vicariously assert those rights. *See State of Iowa ex rel. Miller v. Block*, 771 F.2d 347, 354–355 (8th Cir.1985) (explaining that although some courts have in the past allow state parens patriae suits—in which the state as sovereign bases its standing on its citizens' injuries—against the federal government, the most "well-reasoned discussions of this type of suit disallow its use against the federal government ...") (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n. 16 (1982) ("A state does not have standing as parens patriae to bring an action against the Federal Government.") (citation omitted)). *South Dakota v. U.S. Dept. of Interior,* 2011 WL 1303022, 8 (D.S.D. 2011).

B. Missouri has not demonstrated it will suffer irreparable harm without a temporary restraining order.

As a threshold issue, Missouri cannot demonstrate that it will suffer irreparable harm in the absence of a temporary restraining order, because the Corps has not yet actually decided to operate the Floodway and may never decide to operate the Floodway during this flood event—*see* Part A.2., *supra*. Thus the need for a temporary restraining order to enjoin operation of the Floodway is entirely conjectural. *See Wood v. Detroit Diesel Corp.*, 213 Fed. Appx. 463, 472 (6th Cir. 2007) (analyzing whether a party moving for a preliminary injunction had demonstrated "*imminent* irreparable harm") (emphasis added).

But even if the decision to operate the Floodway were certain, Missouri still has failed to demonstrate that it would suffer irreparable harm from that decision. Missouri must demonstrate that irreparable harm is likely, not possible. *See Winter*, 129 S.Ct. At 374. Missouri's primary argument is that Mississippi and New Madrid Counties are "two of the poorest counties in Missouri" and that their residents would be further economically disadvantaged by a flood. Pls.' Br. at 3. It is not clear how an economic injury to a subset of Missouri's residents would cause "irreparable harm to the movant," Missouri itself, as required by the *Dataphase* analysis. Missouri's legal interests are not co-extensive with its citizens' legal interests and it has made no argument establishing why it can obtain a preliminary injunction based on a prospective economic harm affecting its citizens without making any argument that the State itself will be affected.

Nor is it apparent that the operation of the Floodway will actually irreparably harm any of those residents' legally protected interests. The United States has acquired flowage easements that hold it harmless in the event of flooding, and current landowners took their land subject to

those easements. *See* Walsh Decl. at ¶ 13. But even if some individuals would suffer legally-protected economic harm from the Floodway's operation, those injuries are not necessary irreparable because they may be able to seek recovery for those injuries against the United States. *See Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1507 (D.C. Cir. 1995) (holding that "in the absence of special circumstances . . . recoverable economic losses are not considered irreparable").

Missouri's only remaining argument for irreparable harm is based on the possibility that contaminants may be released from farms in the Floodway if the Floodway is utilized, and that those contaminants "will certainly have harmful effects on aquatic life and the sustainability of the impacted waterways, although there is no way to judge the breadth and depth of those effects without further information." Pls.' Br. at 4. Missouri has submitted no evidence in support of this "certain[]" harmful effect of the release of contaminants. Instead, Missouri's proffered affidavit in support of the TRO Motion merely notes that the chemicals referenced and sediment are both contaminants within the meaning of Missouri's Clean Water Act. Affidavit of Davis Minton ("Minton Decl.") at ¶¶ 13–14. Missouri's claim that operation of the Floodway will cause it irreparable harm is entirely unsupported.

C. Missouri has not demonstrated that the balance of equities tips favor of granting a temporary restraining order.

Even if Missouri has established that is will suffer an irreparable harm, the harms it alleges do not outweigh the harms that will result from not operating the Floodway if necessary. "More than 200 residents" reside in the Floodway. Minton Decl. at ¶ 9. Missouri claims that "[t]here is no similar certain injury that will befall other parties" if the Floodway is not operated.

Pls.' Br. at 4. But that is untrue. As discussed above—*see* Statement of Facts, *supra*—a failure to efficiently operate the Floodway *when necessary* will compromise the MR&T Project's ability to provide effective flood control. The MRC President thus is prepared to operate the Floodway "if and when it is absolutely essential to do so." If operation of the Floodway is necessary but is not undertaken, the resultant flooding will affect a vast swath of the United States, damaging multiple cities in at least three states. Walsh Decl. at ¶ 13.[3/] The population of the affected area drastically outweighs the population of the Floodway. Further, the residents of the Floodway took their property subject to flowage easements—*id.* at 14—whereas the residents of the large area that would be affected by region-wide flooding were not similarly on notice. And in preparation for the possibility of operation, evacuation has begun, *id.* at ¶ 12, which will minimize the risk of harm to people in the Floodway area. Furthermore, even if the Corps takes no action to operate the Floodway through artificial crevassing, there is a possibility that these record floodwaters will cause natural crevassing out of the Corps' control, which cause the same harms of which Missouri complaints, but in a far less controlled and less predictable manner. Allowing the Corps to exercise its congressionally-delegated discretion is the best way to minimize harms to all parties who are threatened by the record flooding in the MR&T Project area. The balance of equities strongly favors denying Missouri's TRO Motion.

D. Missouri has not demonstrated that a temporary restraining order is in the public interest.

Missouri argues that "[t]he public interest if evident. The public interest is to avoid polluting Missouri waters and flooding the homes and ruining the livelihoods of Missourians on

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[3/] The United States has been contacted by representatives of states that may be harmed if the TRO is granted and they have informed us that they intend to intervene.

130,000 acres in the Bootheel." That is the entirety of Missouri's argument on the public interest, but the public interest implicated by this case is far larger than that. As discussed in the preceding section, a failure to operate the Floodway when necessary could devastate a massive area spreading over multiple states. It is self-evident that the economic effects of such a disaster far outweigh the effects on the Floodway's residents. Further, as discussed in Section B., *supra*, Missouri has presented absolutely no evidence to establish the pollution that will allegedly result from operating the Floodway.

Congress has made the public interest very clear by establishing the MR&T Project to avoid tragic disasters like the 1927 flood. Congress by purchasing easements and providing a floodway designed to be artificially crevassed has balanced the public interests of flooding in a controlled manner on easement area rather than subjecting the areas that are not protected to additional flooding that would result. *See Story*. Congress has already made the public interest balance that using the floodway is in the best interests of the public. The Court should "give great weight to the fact that Congress already declared the public's interest . . . ." *In re: Sac & Fox Tribe of the Mississippi in Iowa*, 340 F.3d 749, 760 (8th Cir. 2003) (citing *United States v. Oakland Cannabis Buyers' Coop*., 532 U.S. 483, 497–98 (2001) ("A district court cannot, for example, override Congress' policy choice, articulated in a statute . . . "). Congress invested the Corps with discretion to operate the MR&T Project as necessary to fulfill that goal. In doing so, it benefits the entire United States, not just the State of Missouri and its residents. Stripping the Corps of the discretion necessary to operate the Floodway—in contravention of congressional intent and at the risk of causing another tragic disaster—is patently contrary to the public interest.

CONCLUSION

Because Missouri has failed to carry the high burden necessary to obtain the extraordinary relief of a preliminary injunction, the Corps respectfully requests that the Court deny Missouri's Motion for Temporary Restraining Order.

Respectfully submitted,

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ATTORNEYS FOR FEDERAL DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2011, the foregoing *Response to Memorandum in Support for Motion for Temporary Restraining Order* was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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