UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

The County of Madison, State of Illinois; The County of St. Clair, State of Illinois; The County of Monroe, State of Illinois; The Wood River Drainage and Levee District; The Metro-East Sanitary District; The Prairie DuPont Levee and Sanitary District; The Fish Lake Drainage and Levee District; The Southwestern Illinois Flood Prevention District Council; The City of Alton, Illinois; The Village of Caseyville, Illinois; The Village of Dupo, Illinois; The Village of East Carondelet, Illinois; The City of Granite City, Illinois; The City of Madison, Illinois; The Village of Pontoon Beach, Illinois; The Village of Sauget, Illinois; The City of Venice, Illinois; The Village of Alorton, Illinois; The City of Centreville, Illinois; The Village of East Alton, Illinois; The City of East St. Louis, Illinois; The Village of Fairmont City, Illinois; The Village of Glen Carbon, Illinois; The Village of Roxana, Illinois; James Pennekamp; Kevin Riggs; And The Leadership Council Southwestern Illinois,	)	**Case No. 3:10-cv-00919-JPG-DGW**
Plaintiffs,	)	
vs.	)	
The Federal Emergency Management Agency; The United States Department of Homeland Security; and W. Craig Fugate in his Official Capacity as Administrator of The Federal Emergency Management Agency,	)	
Defendants.	)	

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs respectfully submit this supplemental brief in support of their motion for preliminary injunction.

Introduction

Since the parties completed their briefing on FEMA's motion to dismiss, and plaintiffs' motion for preliminary injunction, there have been two significant developments in the case:

A. FEMA has filed the administrative record that purports to justify its decision to de-accredit the levee systems. This record conclusively proves that plaintiffs are correct on the merits; there is **no** evidence, let alone substantial evidence, to support FEMA's decision.

B. FEMA has announced that it intends to draw new maps, reflecting a new policy for dealing with lands protected by levees that are not accredited. This will significantly delay the publication of final FIRMs, during which time plaintiffs will sustain irreparable harm from FEMA's wholly unjustified announcement that the levee systems are inadequate.

FEMA would like to portray the case as limited to the FIRMs. It is not so limited and never has been. It is primarily about FEMA's arbitrary and wholly unsupported decision to de-accredit the levee systems. It is that decision that is causing irreparable harm to plaintiffs by effectively foreclosing development in the American Bottoms.

A case is not moot unless the Court can provide no meaningful relief to the plaintiff. Here, a declaratory judgment that FEMA has presented no evidence that the

levee systems are inadequate will end the de facto freeze on economic development that FEMA's contrary announcement has caused. That is meaningful relief. An injunction prohibiting FEMA from de-accrediting the levee systems without first complying with required notice and consultation should prevent FEMA from making another irrational decision. That is meaningful relief.

Plaintiffs believe that 42 U.S.C. § 4104(g) authorizes judicial review of FEMA's de-accreditation decision because plaintiffs filed suit within 60 days of FEMA's final decision on their administrative appeal. If the Court agrees, sovereign immunity is no bar to the suit because § 4104(g) is the sovereign's consent to be sued.

If the Court agrees with FEMA that the trigger date for review under § 4104(g) is the publication of the final FIRMs, sovereign immunity is still no bar to plaintiffs' constitutional claims. The Seventh Circuit has squarely held that due process requires that a party have meaningful judicial review of constitutional claims. Postponing review of such claims for years while an agency stubbornly clings to an indefensible position is not meaningful.

At least as it relates to de-accreditation, this case is ripe for review. FEMA has made it clear that it does not believe that the levee systems meet the requirements of 44 C.F.R. § 65.10, the relevant regulation, and it has filed an administrative record which it claims – erroneously – supports that decision. FEMA has made it clear that it will not change its mind and it has refused even to discuss the topic with plaintiffs. Further delay will only cause further injury to plaintiffs.

Argument

I. The Case Is Not Moot.

A case is moot when the Court can award no meaningful relief to the plaintiff. Here, the Court can enter declaratory relief that FEMA's de-accreditation of the levee systems is unsupported by substantial evidence. It can enjoin FEMA from future attempts to de-accredit the levee systems unless FEMA complies with the notice and consultation requirements of the statute and FEMA's regulation. That will redress the irreparable injury that the communities are currently sustaining.

A case is only moot "'if there is no possible relief which the court could order that would benefit the party seeking it.'" In re Vlasek, 325 F.3d 955, 961 (7th Cir. 2003, quoting In re Envirodyne Indus., Inc., 29 F.3d 301, 303 (7th Cir. 1994). So long as a court "can fashion *some* form of meaningful relief," the case is not moot. Church of Scientology v. United States, 506 U.S. 9, 12-13 (1992) (emphasis original). Accord, Laskowski v. Spellings, 443 F.3d 930, 934 (7th Cir. 2006), vacated on other grounds, 551 U.S. 1160 (2007) ("meaningful relief . . . is all the relief that need be possible to avert a finding of mootness") (internal punctuation omitted). The party asserting mootness has the burden of proof. Dorel Juvenile Group, Inc. v. Dimartinis, 495 F.3d 500, 503 (7th Cir. 2007).

If FEMA does formally withdraw the proposed FIRMs, or replaces them with some other FIRMs, that portion of this action challenging the proposed FIRMs would indeed be moot. That portion of the lawsuit challenging FEMA's decision to de-accredit the levee systems, however, would not be moot. FEMA has made it crystal clear that it will not reconsider that decision unless ordered by a court. Sterman Decl. ¶ 7.

At the telephonic status conference on June 22, 2011, when the Court suggested that the parties explore "unwinding the clock," FEMA stated that it would treat the levee systems and the American Bottoms communities in accordance with a new policy. FEMA suggested that this new policy would end the harm that plaintiffs are suffering, because the area would then be governed by the pre-existing FIRMs, which show the levee systems as accredited.

There are two fundamental problems with this suggestion. First, the cause of the economic freeze was FEMA's public announcement that the levee systems did not meet the requirements of § 65.10. The only way to redress that harm is an equally public announcement that the levee systems are at least minimally adequate and FEMA has no evidence to the contrary. FEMA has made it perfectly clear that it will never voluntarily do so.

Second, the actual FEMA policy is quite different from the policy represented to the Court. Since the conference, plaintiffs' counsel has confirmed with FEMA's counsel that the new policy is described in an FAQ document published on FEMA's website and dated March 10, 2011. See Wilson Decl. ¶ 15; Ex A attached. The plain terms of that FAQ state that the new policy applies **only** to "levees that do not meet the criteria for accreditation" and "levees that are not currently accredited." Ex. A at 1-2.

So the new FEMA position is actually much harsher than its original position in 2007. Then, FEMA announced that the levee systems **would be** de-accredited on new FIRMs which would nonetheless be subject to administrative appeal and judicial review. Now, the policy is that the levee systems are **currently** de-accredited and will remain so

pending the preparation of new FIRMs. FEMA's actual policy is the polar opposite of what it told the Court.

The uncontested evidence that plaintiffs have submitted in response to FEMA's motion to dismiss establishes that the de-accreditation decision has caused and is causing plaintiffs irreparable injury. For example, the Sauget declaration establishes that "the larger cause for the economic standstill" in the American Bottoms is "the actions of FEMA in de-accrediting the levees." Sauget Decl. ¶ 6. Mr. Sauget explains why:

- Developers assume that FEMA knows what it is doing and it has therefore "created doubts about the effectiveness of our levees." Id.
- The entities necessary for development to proceed are "reluctant to work with developers when there is doubt about the integrity of the levees." Id.
- Unless rescinded, the de-accreditation will eventually lead to "mandatory flood insurance" and "onerous new building codes," and the "uncertainty that FEMA has created" has had a devastating effect on development. Id. ¶ 7.

Plaintiffs have identified two specific developments that were either canceled or put on hold as a direct result of the de-accreditation. Mr. Sauget's Discovery Business Park "is presently on hold" and the cause of that is the "de-accreditation of the levees." Sauget Decl. ¶¶ 4; 6. Opus Northwest refused to close on the proposed Opus Park 600 property due to "FEMA's de-accreditation and its consequences, as well as the lack of clarity about FEMA's positions." Langa Decl. ¶ 6. Opus made that decision in the fall of 2007, long before FEMA published its preliminary FIRMs.

To date, plaintiffs have not been permitted to conduct discovery. They are aware of one other specific warehouse project, by Novartis, that was abandoned immediately after the de-accreditation announcement. Wilson Decl. ¶ 16. With the aid of discovery, plaintiffs are confident they can find other examples of development that has been postponed or canceled as a direct result of FEMA's decision to de-accredit the levee systems.

So the principal cause of the economic injury that plaintiffs are sustaining is the de-accreditation decision. The Court can redress that injury in two ways:

A. A declaratory judgment that FEMA has no substantial evidence to support its de-accreditation decision.

C. An injunction against FEMA prohibiting any future effort to de-accredit the levee systems unless it complies with the notice and consultation requirements of 42 U.S.C. § 4107 and 44 C.F.R. Part 66.

The declaratory judgment will reassure nervous developers that the levee systems are sound and will protect their investment in the event of a flood. The injunctive relief will reassure everyone that FEMA will not again de-accredit the levee systems without having some legitimate basis for doing so. That is meaningful relief that will redress the irreparable injury that FEMA's irresponsible conduct has caused the plaintiffs.

II. If Plaintiffs Cannot Obtain Immediate Review Of Their Administrative Appeal, It Is Not An Adequate Remedy And Sovereign Immunity Cannot Bar Their Constitutional Claims.

Plaintiffs believe that the plain terms of 42 U.S.C. § 4104(g) authorized the Court to review FEMA's decision to de-accredit the levee systems. FEMA concedes that

§ 4104(g) constitutes the sovereign's consent to be sued. The only disagreement is on the timing of the suit.

Plaintiffs believe that § 4104(g) authorizes suit within 60 days of FEMA's "final determination . . . upon administrative appeal." FEMA contends that the statute only allows judicial review after FEMA has published final FIRMs. If FEMA is correct about the meaning of the statute, § 4104(g) violates due process because it does not provide for meaningful judicial review.

It is now crystal clear that FEMA has **no** evidence that the levee systems are deficient in any way. The sole basis on which FEMA has claimed that the levee systems do not satisfy § 65.10 is an alleged 2007 study by the Corps of Engineers. Wilson Decl. ¶ 6. The administrative record that FEMA has filed does not include such a study. Id. ¶ 8. Neither FEMA nor the Corps has produced such a study in response to numerous FOIA requests. Id. ¶ 9. The 2007 Corps study does not exist.

The only part of the administrative record suggesting that the levee systems are in any way inadequate is a PowerPoint presentation purporting to summarize the nonexistent 2007 study.[1] Wilson Decl. ¶ 10. The PowerPoint presentation is no evidence at all:

- It is hearsay on hearsay and there is neither "extrinsic corroborating evidence or indicia of reliability showing the statement to be inherently reliable." United States v. Perkins, 8 Fed. Appx. 191, 193 (4th Cir. 2001).

[1] The administrative record also includes flood insurance studies for each of the three counties that assert that the levee systems "do not meet the requirements" of 44 CFR 65.10 but neither explain why nor support that assertion with any evidence whatsoever. Wilson Decl. ¶ 11.

- No one knows the qualifications of the author of either the nonexistent 2007 study or the PowerPoint presentation or the methodology they followed.
- The PowerPoint presentation says only that the alleged deficiencies "reduce[] confidence" in the levee systems' ability to withstand a flood, not that they are inadequate or do not satisfy § 65.10. Wilson Decl. ¶ 10.
- The Corps' "confidence" is "reduced" only if the levee districts do not engage in standard flood-fighting techniques, which is a normal part of their operations. Indeed, the Corps finds the levee that it owns to be satisfactory if operated in accordance with such techniques. Wilson Decl. ¶ 10.
- The subject of flood fighting is not only nearly universal in levee operations plans, but it is also a subject that is not mentioned in the standards at issue here, namely those found in 44 CFR 65.10. In addition, in 2007, FEMA had no other policy regarding consideration of flood fighting in evaluating levees.
- The administrative record does not refer to any of the many Corps studies referenced in plaintiffs' administrative appeals finding that the levee systems are either acceptable or minimally acceptable. Wilson Decl. ¶ 14.

It is a plain violation of due process for an administrative agency to make a decision that flies in the face of reliable evidence based on no evidence at all:

> [T]o say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and

> serious impair the security inherent in our judicial safeguards. . . . Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority.

St. Joseph Stock Yards Co. v United States, 298 U.S. 38, 52 (9136) Accord, Gamble v. Eau Claire County, 5 F.3d 285, 287 (7th Cir. 1993) ("governmental power that lack[s] a rational basis . . . violate[s] due process even if there is no procedural irregularity").

FEMA acknowledges, as it must, that sovereign immunity does not protect it against claims of constitutional violations. But it claims that compliance with § 4104(g) is a statutory prerequisite to plaintiffs' right to vindicate their constitutional claims. FEMA is wrong for two reasons.

First, the Seventh Circuit has flatly rejected the notion that sovereign immunity precludes a suit for injunctive relief to end a constitutional violation. "[B]ecause Marozsan demands constitutional Veterans' Administration procedures – not merely money from the Treasury – **no aspect of sovereign immunity can bar his claim**." Marozsan v. United States, 852 F.2d 1469, 1477 (7th Cir. 1988) (emphasis added). Accord, Dugan v. Rank, 372 U.S. 609, 621-22 (1963) ("officer's action can be made the basis of a suit for specific relief against the officer" if "the powers themselves or the manner in which they are exercised are constitutionally void"); Jarecki v. United States, 590 F.2d 670, 675 (7th Cir. 1979) ("sovereign immunity is not a defense for federal officials who have acted beyond statutory powers").

Second, as construed by FEMA, § 4104(g) does not provide meaningful judicial review because it allows FEMA to continue violating plaintiffs' due process rights literally for years. To repeat, the source of the irreparable harm is FEMA's public

announcement that it was de-accrediting the levee systems. FEMA first made that announcement in August 2007, nearly four years ago. Since it has to rewrite that regulation and possibly the statute to accommodate its new policy, it will likely be years before FEMA publishes new FIRMs.

At the absolute minimum, due process requires that any statutory review of agency action must provide for "meaningful judicial review." McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 496 (1991). When a party is sustaining the kind of irreparable injury that plaintiffs here are, justice delayed is justice denied. As FEMA's own authority states:

> [A] statute that totally precluded judicial review for constitutional claims would clearly raise serious due process issues. Along the same lines, there may well be limits as to how severely Congress can restrict the route to judicial review of constitutional challenges when it keeps that route partially open.

American Coalition for Competitive Trade, v. Clinton, 128 F.3d 761, 765-66 (D.C. Cir. 1997) (citations omitted).

III. Plaintiffs' Challenge To the De-Accreditation Decision Is Ripe.

FEMA's discussion of ripeness continues to pretend that this case is only about FIRMs. It is not. It is also about FEMA's decision to de-accredit the levee systems. That is a final decision. FEMA has made it clear that it will not change its mind; it will not receive contrary information; and it will not even discuss the topic.

Any further delay in reviewing the de-accreditation decision serves no purpose whatever. FEMA has filed its administrative record and the Court can decide for itself whether that record supports FEMA's decision. All that delay

will accomplish is further irreparable injury in the form of lost economic opportunity in the American Bottoms.

Conclusion

The administrative record FEMA has filed makes it crystal clear that there is no evidentiary basis whatever for FEMA's decision to de-accredit the levee systems. The Corps studies to which plaintiffs referred in their administrative appeal all found that the levee systems were in at least minimally acceptable condition. FEMA's initial decision to de-accredit the levee systems and its stubborn refusal even to consider all of the contrary evidence is the essence of an arbitrary and capricious decision.

It is uncontested that FEMA's decision has stifled any development in the American Bottoms, causing plaintiffs irreparable harm. Plaintiffs are entitled to declaratory relief that the levee systems are adequate and a preliminary injunction prohibiting FEMA from finding otherwise unless and until it complies with its consultation obligations.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2011, the foregoing document was filed with the Court and served by electronic mail, on all attorneys of record as follows:

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