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;	**)**	**Case No. 3:10-cv-00919-JPG-DGW**
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,	**)**	
	)	
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.	**)**	

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Plaintiffs respectfully submit this memorandum in opposition to the motion to dismiss filed by the defendants ("the government").

Introduction

The Federal Emergency Management Agency (FEMA) administers the National Flood Insurance program. Part of its mission is to prepare and periodically revise Flood Insurance Rate Maps (FIRMs), which are supposed to depict the extent of flooding in the event of a 100-year flood – i.e., a flood with a 1% chance of occurring in any given year.

In August 2007, FEMA announced that it was de-accrediting the levees that protect the American Bottoms – the flood plain of the Mississippi River in Madison, Monroe and St. Clair Counties, Illinois. FEMA concluded that the levee systems do not meet the agency's standards for protection from the 100-year flood. The sole basis for that determination is an alleged 2007 study (the 2007 study) by the U.S. Army Corps of Engineers (Corps or USACE), which FEMA has repeatedly refused to produce.

In preparing new FIRMs for the area, FEMA assumed that the levees did not exist at all. Because of the devastating consequences such a ruling would have for the entire American Bottoms area, plaintiffs sued FEMA, its administrator and its parent to enjoin publication of the new FIRMs.

The National Flood Insurance Act (NFIA) allows affected communities to appeal an adverse FEMA decision to the agency, provided that the appeal is based on scientific or technical issues, such as the suitability of a levee system. The NFIA allows judicial

review of FEMA's decision on the administrative appeal, provided suit is filed with 60 days of FEMA's "final determination," and Count I of the complaint seeks precisely that.

FEMA's motion to dismiss asserts that Count I is premature. FEMA argues that the trigger for the 60 days is the publication of the final FIRMs, rather than the determination of the administrative appeal. 42 U.S.C. § 4104(g) requires suit to be filed within 60 days of the "final determination by the Secretary upon administrative appeal," which occurred on September 20, 2010. So the suit is timely.

Counts II through VI allege that FEMA's de-accreditation of the levees violates due process and equal protection, and seek to enjoin FEMA from promulgating the new FIRMs. The government claims that it is entitled to sovereign immunity from such claims. Both the Supreme Court and the Seventh Circuit have recognized a constitutional exception to sovereign immunity when the only relief sought is a prohibitory injunction.

The government also claims that plaintiffs' claims are not ripe for resolution, because FEMA has not yet issued final FIRMs. The Supreme Court has held that pre-enforcement claims are ripe for review if the record is sufficiently developed and the plaintiff will sustain hardship if no review is possible.

Here, the only real issue is whether the 2007 Corp study actually exists and, if so, whether it is vulnerable to the criticisms plaintiffs have alleged. Moreover, FEMA's decision to de-accredit the levees and the resulting uncertainty about both the quality of flood protection in the American Bottoms and the associated economic costs has virtually ended economic growth in the area. Finally, FEMA has made its mind up on the de-accreditation issue and it will not consider contrary evidence. Thus, plaintiffs' claims are ripe for review.

Factual Background

The American Bottoms is home to more than 150,000 people and more than four thousand businesses employing more than 50,000 people. It is protected from the floodwaters by five levee systems owned by the four plaintiff levee districts and the Corps.

The Corps designed and constructed all five of the current levee systems in the 1940's and 1950's after Congress authorized them in the 1930's. The design protects the area from a flood that reaches 52 feet on the St. Louis Gage, plus an extra two feet of freeboard. A 52 foot flood has an approximately 0.2% chance of occurring in a given year – i.e., a 500 year flood. By comparison, the great flood of 1993, a 300 year flood, reached 49.8 feet on the St. Louis Gage, the highest on record.

The levee systems have served the American Bottoms well. There has never been a structural or design failure that permitted flooding. The levee systems withstood the 1993 flood and, according to the Corps, allowed no material damage to the areas that they protect. The Corps evaluates the levee systems every year for structural soundness. For every year since 1995, it has rated the systems as acceptable or minimally acceptable.

FEMA is supposed to assess the quality of a levee system according to the criteria in 44 C.F.R. § 65.10. In late 2006 or early 2007, FEMA asked the Corps to undertake an assessment of the levee systems to determine if they would likely comply with § 65.10. According to FEMA, the Corps concluded that they may not. Based solely on the 2007 study, FEMA announced in August 2007 that it would de-accredit the levee systems and it gave formal notice that it would do so in October 2007.

The very existence of the 2007 study is in considerable doubt. Although the NFIA and its implementing regulations required FEMA to share a copy of that study with the local communities, FEMA has never done so. The communities have made repeated requests for the 2007 study under the Freedom of Information Act (FOIA) to both FEMA and the Corps. Neither has ever produced a copy of this alleged study.

Plaintiffs' principal source of information about the 2007 study is a PowerPoint® presentation produced by FEMA purporting to summarize the 2007 study's conclusions. Based on the PowerPoint® and the small amount of other information FEMA has produced, plaintiffs believe that the 2007 study, if it exists at all, is so scientifically and technically flawed that it is worthless. Specifically:

A. The Corps did not assess the levee systems against the criteria of § 65.10. Instead, the Corps assessed the reliability of protection from a 500-year flood, a standard that is more stringent than § 65.10. It also used factors of safety that exceed any FEMA requirements.

B. Section 65.10 requires the levee to have three feet of freeboard on top of the 100-year flood level. Misinterpreting § 65.10, the Corps has consistently assumed that a 100-year flood would be three feet higher than it actually would be for purposes of assessing the amount of water seeping under the levee systems (underseepage). That extra three feet of water elevation would directly and negatively affect the 2007 study's estimates of underseepage.

C. The levee systems have numerous relief wells that function adequately to control underseepage. The Corps has consistently assumed either that the

wells do not function, solely because they have exceeded their design life. By that logic, the U.S. Air Force has no aerial refueling capability because the modified Boeing 707s it uses have exceeded their design life.

D. The 2007 study assessed the quality of the levee system on the assumption that the levee districts would not use standard flood fighting techniques to protect the levee system during periods of high water. Nothing in § 65.10 requires that assumption. Flood fighting techniques are standard practice and the Corps itself uses them to manage and limit underseepage.

E. The 2007 study treated the Chain of Rocks levee owned by the Corps quite differently than the other four levees. Underseepage issues for the Corps-owned levee were essentially the same as for the other four; yet the 2007 study anticipated no problems with the Corps-owned levee, assuming standard flood fighting techniques are employed.

Since August 2007, when FEMA announced its de-accreditation decision, the local communities have done their level best to explain to FEMA why its decision is wrong. FEMA has refused even to listen. Les Sterman, chief of construction for the Southwestern Illinois Flood Prevention District Council, has attended "virtually every one of the meetings" between FEMA and the local communities. Sterman Decl. ¶ 5:

> FEMA has stated on a number of occasions in a general fashion that it would accept information regarding the levees. However, when asked directly about accepting information seeking to challenge the de-accreditation decision, the agency's representatives have clearly stated that any new information would not change their decision.

Id. ¶ 7. FEMA officials also told Mr. Sterman that "they had no choice except to de-accredit the levees, no matter what information was received from any other party." Id. ¶ 14.

In support of the government's motion to dismiss, FEMA submitted a declaration from one David Bascom, a program specialist at FEMA. Mr. Bascom asserts, in conclusory terms, that FEMA "is willing to accept" additional information from plaintiffs and will modify the FIRMs if such information "demonstrates to FEMA's satisfaction" that the levee system complies with § 65.10. Bascom Decl. ¶ 9.

Mr. Bascom has not been present for any of the conversations with the local communities. Sterman Decl. ¶ 5. Mr. Bascom is sufficiently unfamiliar with Southern Illinois that he thinks a modification in the proposed FIRM for Highland, Illinois, some 25 miles east of the American Bottoms, is somehow relevant to this lawsuit.

The Bascom declaration is equally notable for what it does not say. It does not say that Mr. Bascom has the authority to re-accredit the levee system. It does not say what "information" might lead FEMA to make such a decision. For over three years, the local communities have been trying to explain to FEMA that the levee systems have adequately protected the area and FEMA has refused to listen.

FEMA has been no more willing to communicate with the local communities on why it de-accredited the levee systems. It never consulted with them prior to that decision. Sterman Decl. ¶ 13. It has never "produced any data, analysis or studies that supported the de-accreditation decision. Id. ¶ 15. Since this lawsuit was filed, FEMA has refused to discuss the matter outside of the lawsuit. Id. ¶ 21.

FEMA's decision to de-accredit the levee systems has had a devastating economic impact on the American Bottoms. Its proposed FIRMs establish base flood elevations (BFEs) on the assumption that the levee systems do not exist at all, so that the entire area is designated as a flood hazard area. That designation will require every person or entity with a loan from a federally regulated lender secured by land in the area to purchase expensive flood insurance. It will also require local communities to enact onerous land use restrictions that will drive up construction costs.

The prospect of these increased costs has paralyzed economic development in the American Bottoms. Other parts of the Metro East area have begun to recover from the recession, but the American Bottoms have not. Sauget Decl. ¶ 5. Richard Sauget, the chairman of the St. Clair County Building Commission and a prominent local developer, attributes the continuing malaise directly to uncertainty caused by FEMA's decision to de-accredit the levee system. Id. ¶¶ 6-7.

Argument

I. Count I States A Cause Of Action Because The NFIA Expressly Authorizes Judicial Review Of FEMA's Denial Of The Administrative Appeal.

While the government couches its challenges to Count I in terms of sovereign immunity, Br. at 12, the case actually turns on the meaning of 42 U.S.C. § 4104(g). Both sides agree that § 4104(g) authorizes judicial review of FEMA's denial of the plaintiff municipalities' administrative appeal. The sole issue is timing. The government claims that review is appropriate only after FEMA publishes final FIRMs. Br. at 12. Section 41204(g) in fact required plaintiffs to sue within 60 days after a final ruling on the appeal,

a proposition borne out by both the plain language of the statute and its legislative history.

Section 4104(b) authorizes a limited administrative appeal of FEMA's preliminary maps. Section 4104(g) allows for judicial review at the behest of "[a]ny appellant aggrieved by any final determination of the Director **upon administrative appeal**, as provided by this section . . . ," provided suit is filed "not more than sixty days after receipt of notice of such determination." (emphasis added). Under the plain text of the statute, it is the notice of the determination of the administrative appeal that triggers the 60 day window for judicial review, not the final determination of the FIRMs.

The legislative history confirms this reading of the statute. Senate Report 93-583 recites:

> Individual landowners who have exhausted their administrative remedies under this section may also appeal to the court, but any appeal must be taken within 60 days after the community is given formal notice of the Secretary's determination.

S.Rep. 93-583, reprinted in 1973 U.S.C.C.A.N. 3217, 3231. The only "determination" that language could refer to is the "determination" of the "administrative remedies."

The legislative history also explains why Congress chose resolution of the administrative appeal as the trigger date. Section 4104 was a product of a "compromise worked out by the primary interested parties" to "provide an equitable balancing of all of the interests involved." S.Rep. 93-583, reprinted in 1973 U.S.C.C.A.N. 3217, 3230. While Congress wanted to protect "the interests of those affected," it also wanted to avoid "the pitfall of permitting those unnecessary delays . . . which would make the flood insurance program unworkable." City of Biloxi v. Giuffrida, 608 F. Supp. 927, 929 (S.D.

Miss. 1985). Expedited judicial review as soon as the administrative appeal is resolved would serve that purpose.

Caselaw confirms that the statute means what it says. "Once FEMA resolves the administrative appeal, any appellant aggrieved by its final determination has 60 days to appeal . . . ." Columbia Venture LLC v. S.C. Wildlife Federation, 562 F.3d 290, 292 (4th Cir. 2009).

On September 15, 2010, FEMA notified local communities that it intended to issue "appeal and protest resolutions this month for communities in Madison, St. Clair, St. Charles, and St. Louis Counties." Ex. A (9-15-10 letter to Caseyville). On September 20, 2010, FEMA advised the communities that:

> Based on the appeal/protest package received, FEMA will not revise the data depicted on the preliminary DFIRM for Madison County, Illinois. This letter hereby resolves the appeals/protests for your community.

Compl. Ex. 27 at 3. The Bascom declaration in support of the government's motion to dismiss correctly states that FEMA issued the September 20 letters in response to the appeals submitted by the communities. Bascom Decl. ¶ 8. So the deadline for filing the complaint was November 19, 2010.

If the Court should agree with the government that the administrative appeal is premature, it should stay proceedings on Count I until FEMA publishes final FIRMs, which the Bascom declaration asserts will occur in August 2011. Bascom Decl. ¶ 11. For the reasons set forth in Points II and III, the constitutional claims in Counts II through VI are both within this Court's jurisdiction and ripe for review. Dismissing Count I, only to have it repled in a few months, would be a wholly unnecessary waste of time.

II. Counts II Through VI State A Cause Of Action, Because Sovereign Immunity Does Not Bar A Claim For Injunctive Relief Based On Constitutional Violations.

The government claims that it has sovereign immunity, even from the five counts in the complaint alleging that FEMA's actions violate due process and equal protection. Br. at 10-11. The Supreme Court and the Seventh Circuit have held that sovereign immunity in no way bars suits for injunctive relief against constitutional violations.

The Supreme Court has recognized a "'constitutional exception to the doctrin of sovereign immunity.'" Malone v. Bowdoin, 369 U.S. 643, 647-48 (1962), quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 696 (1949):

> An extremely important and well-established exception to the principle of sovereign immunity is that suits against government officers are not barred. The Supreme Court has long allowed suits against officers who are allegedly acting in excess of their legal authority or pursuant to an unconstitutional statute.

E. Chemerinsky, Federal Jurisdiction (5th Ed. 2007) at 633.

It is equally clear that this exception applies to administrative agencies whose actions violate the Constitution:

> It is hard to see how the Court would insist on the right to review the constitutionality of legislation, but hold immune from review all unconstitutional administrative actions taken pursuant to that legislation. . . .
>
> . . . . If the courts are disabled from requiring administrative officials to act constitutionally, it is difficult to see who would perform that function.

Marozsan v. United States, 852 F.2d 1469, 1476-77 (7th Cir. en banc 1988).

Marozsan involved a claim for benefit from the Veterans' Administration. Marozsan claimed that the procedures the VA used to decide disability claims violated due process, specifically a quota system that "arbitrarily limits the number of benefits claims granted." 852 F.2d at 1471.

The Seventh Circuit squarely held that "no aspect of sovereign immunity can bar his claim." 852 F.2d at 1477:

> We are asked here to consider allegedly unlawful government action, not simply a request for money. It is axiomatic that Congress may not act unconstitutionally, nor may it delegate authority to executive agencies to do so. Furthermore, Congress cannot insist that the executive be immune from judicial review requiring it to act in a constitutional manner. It is the essential function of the judiciary to review and enjoin such illegal action. . . . Since the Administrator lacks sovereign authority to contravene the Constitution, he cannot assert sovereign immunity from liability for such acts.

Id.

The government's view of sovereign immunity would allow FEMA, and any other executive agency, carte blanche to violate fundamental constitutional rights at will. Suppose that FEMA decertified the levees for the purpose of discriminating against minority residents of the American Bottoms.[1] Under the government's theory, the victims of that outrage could not obtain injunctive relief to end it:

> Surely if the V.A. could deny hearings and impose arbitrary quotas without judicial review, as is alleged here, it could also grant benefits only to those veterans born on July 4th or only to white veterans. A statute which precludes review of such obviously unconstitutional decisions must be just as unconstitutional as the underlying action of the Administrator.

Marozsan, 852 F.2d at 1478, citing Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987).

Bartlett contains the most extensive discussion of the issue. In that case, the decedent was a Christian Scientist. After receiving a terminal diagnosis, she received care at two hospices: one run by the Christian Scientists and one not. The Secretary of HHS denied Medicare reimbursement for the second hospice because it was not affiliated with the Christian Science church. The decedent's executrix claimed that this violated the free exercise clause of the First Amendment.

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[1] Plaintiffs do not suggest that such was FEMA's real motive.

The government argued that the relevant statute prohibited judicial review. The D.C. Circuit found that, even assuming the statute were susceptible to that reading, it would violate due process to "foreclose all judicial review." 816 F.2d at 703:

> In our view, a statutory provision precluding all judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right. We have little doubt that such a limitation on the jurisdiction of both state and federal courts to review the constitutionality of federal legislation would be an unconstitutional infringement of due process.

Id. (emphasis original) (internal punctuation omitted).

Similarly, the government argued that sovereign immunity precluded the action. Again, the majority disagreed: if "the Supreme Court will not uphold a statutory infringement of constitutional rights under the guise of a jurisdictional statute, it is equally clear that the Court would not allow such a result under the guise of sovereign immunity." 816 F.2d at 703 (internal punctuation omitted):

> The dissent's sovereign immunity theory in effect concludes that the doctrine of sovereign immunity trumps every other aspect of the Constitution. . . . Congress would have the power to enact, for example, a welfare law authorizing benefits to be available to white claimants only. . . . We have difficulty understanding how such a law could ever be thought to be beyond judicial scrutiny because of sovereign immunity.

Id. at 711.

The dissent argued that sovereign immunity precluded the suit, but only because it was a "suit[] for benefits" instead of "government enforcement actions," like the one the plaintiffs are facing. 816 F.2d at 723 (Bork, J., dissenting). The dissent thought it "utterly clear" that a different rule applies when the government "takes affirmative action against an individual," as FEMA did here. Id.

In McWaters v. Federal Emergency Mgmt. Agency, 436 F. Supp. 2d 802 (E.D. La. 2006), the Court applied these principles in rejecting FEMA's claim that it was immune from injunctive relief for constitutional violations. McWaters raised several due process challenges to FEMA's handling of the aftermath of Hurricane Katrina. Relying on many of the cases cited in the instant motion, FEMA argued that it had sovereign immunity from these claims. 436 F. Supp. 2d at 812.

The Court flatly rejected the argument: FEMA is "not immune from all judicial review." 436 F. Supp. 2d at 812 (emphasis original). Quoting Marozsan, the Court held that, "'to preserve its constitutionality, we must construe" the statute "to allow substantial constitutional challenges.'" Id. at 814 (emphasis original). Quoting Bartlett, the Court held that the:

> sovereign immunity claim fails because to hold otherwise would be to create the possibility that Congress could act unconstitutionally and then attempt to shield its action from review by virtue of sovereign immunity.

Id. (emphasis supplied by the Court). Accord, Giuffrida, 608 F. Supp. at 929-30 (resolving constitutional challenge to § 4104 on the merits).

These cases are directly in point. Counts II through VI of the complaint all allege constitutional violations of due process and equal protection. As redress, the complaint seeks injunctive and declaratory relief against FEMA. Notably, the government does not suggest any infirmity in these counts on the merits.

Most of the government's cases simply stand for broad, general propositions about the government's sovereign immunity. Br. at 10-11. None of these cases directly discusses the constitutional exception to sovereign immunity and the government has taken badly out of context the few that even touch upon the issue.

For example, the government cites United Tribe of Shawnee Indians v. United States, 253 F.3d 543 (10th Cir. 2001), for the proposition that sovereign immunity "bars not only actions seeking money damages but also those seeking injunctive relief." Br. at 10. The opinion does so state. But it did so only because it concluded that the Tribe could not satisfy Larson's "exception to sovereign immunity under the ultra vires doctrine." 253 F.3d at 547.

Similarly, the government claims that sovereign immunity bars claims "'arising from some violation of rights conferred upon the citizen by the Constitution.'" Br. at 10, quoting Lynch v. United States, 292 U.S. 571, 582 (1934). While the government has accurately quoted that dictum in Lynch:

> a careful reading of Lynch makes it plain that Justice Brandeis not only did not rely on a finding of sovereign immunity but, on the contrary, engaged in artful interpretation of legislative intent to avoid a conclusion that Congress had invoked immunity to shield its actions from judicial review. . . .
>
> . . . . Thus, when the smoke clears in Lynch, the sovereign immunity claim fails . . . .

Bartlett, 816 F.2d at 708.

Moreover, Lynch was decided a good 15 years before Larson. As Malone recognized, before Larson, complete reconciliation of the Court's precedents "would be a Procrustean task" made unnecessary by Larson's "informed and carefully considered choice between the seemingly conflicting precedents." 369 U.S. at 646. And Larson unquestionably does recognize a "constitutional exception to the doctrine of sovereign immunity." 337 U.S. at 696.

Finally, the Seventh Circuit has rejected the government's interpretation of Lynch. Judge Easterbrook's dissent in Marozsan cited Lynch for precisely the

proposition the government now urges. 852 F.2d at 1497 n.6 (Easterbrook, J., dissenting). As previously explained, however, the majority held that the government "cannot assert sovereign immunity from liability" for violating the Constitution. 852 F.2d at 1477.

The government argues that counterclaims "'based directly on Fifth Amendment violations are likewise barred under the doctrine of sovereign immunity.'" Br. at 10-11, quoting United States v. Timmons, 672 F.2d 1373, 1380 (11th Cir. 1982). The government does not disclose the nature of the counterclaims in Timmons: defendants sought "either a reconveyance of the property or damages." 672 F.2d at 1376 n.4. Here, plaintiffs seek only a prohibitory injunction against the implementation of FEMA's maps.

Finally, the government cites Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1 (2000), for the proposition that the statute under review barred jurisdiction "irrespective of whether the individual challenges the agency's denial on evidentiary, rule-related, statutory, constitutional, or other legal grounds." 529 U.S. at 10. That case and the two cases it discusses have nothing to do with sovereign immunity, just the statutory method under which nursing homes could challenge Medicare regulations. 529 U.S. at 5 ("the statutory provision at issue, § 405(h), as incorporated by § 1395ii, bars federal-question jurisdiction here").

The constitutional exception to sovereign immunity permits plaintiffs to seek injunctive relief prohibiting FEMA from finalizing its FIRMs. Thus, the Court has subject matter jurisdiction over Counts II through VI.

III. Plaintiffs' Claims Are Ripe For Judicial Resolution.

Point II-B of the government's brief asserts that none of plaintiffs' claims are ripe for adjudication, because FEMA has not yet issued final FIRMs. In requiring plaintiffs to file their administrative challenge within 60 days of the denial of the administrative appeal, Congress has decreed otherwise. Moreover, federal courts have expressly authorized pre-enforcement challenges when the plaintiff is sustaining hardship and the record is sufficient for meaningful judicial review.

Assuming the plaintiff has standing, which is not an issue here, "[r]ipeness is a prudential question." American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 327 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986), citing Buckley v. Valeo, 424 U.S. 1, 117 (1976) ("this is a question of ripeness, rather than lack of case or controversy under Art. III"). Accord, Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 81 (1978) ("prudential considerations embodied in the ripeness doctrine also argue strongly for a prompt resolution").

It logically follows that when Congress authorizes review of specific agency action, there is no ripeness barrier. Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 808 (2003) (regulation may not be ripe "[a]bsent a statutory provision providing for immediate judicial review") (internal punctuation omitted). Here, Congress not only authorized immediate judicial review; as explained in Point I, it mandated that local communities must act within 60 days of "final determination of the Director upon administrative appeal." 42 U.S.C. § 4104(g).

The constitutional claims are also ripe for judicial review. A party can seek pre-enforcement review of agency action if it can demonstrate "hardship to the plaintiff of

denying" such review; and "the fitness of the issues for judicial review." Smith v. Wisconsin Dep't of Agric., 23 F.3d 1134, 1141 (7th Cir. 1994). Accord, Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S. 99, 105 (1977). The latter inquiry is basically "whether the relevant issues are sufficiently focused so as to permit judicial resolution without further factual development," Triple G Landfills, Inc. v. Board of Comm'rs, 977 F.2d 287, 289 (7th Cir. 1992), or whether there is something to be gained by waiting. Hudnut, 771 F.2d at 327.

There are two kinds of Rule 12(b)(1) motions: facial and factual. A facial challenge "does not look beyond the allegations in the complaint, which are taken as true for purposes of the motion." Apex Digital, Inc. v. Sears, Roebuck & Co., 572 F.3d 440, 444 (7th Cir. 2009). In a factual challenge, "the district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." Id. (internal punctuation omitted).

Here, the government has submitted a declaration in support of its motion, so the challenge is factual. Since plaintiffs have the burden of proof on that issue, Apex, 572 F.3d at 444, they necessarily have the right to proffer evidence to sustain it. Hemmings v. Barian, 822 F.2d 688, 693 (7th Cir. 1987) ("correct response" to factual 12(b)(1) motion "is to put the plaintiff to his proof – to make him submit an affidavit").

In the Seventh Circuit, a party may satisfy the hardship requirement in one of two ways:

> by demonstrating either that: (1) enforcement is certain, only delayed; or (2) even though enforcement is not certain, the mere threat of future enforcement has a

> present concrete effect on [the plaintiff's] day-to-day affairs and irremediably adverse consequences would flow from a later challenge.

Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County, 325 F.3d 879, 882 (7th Cir. 2003) (citations and internal punctuation omitted).

Here, plaintiffs easily satisfy both tests. First, despite the self-serving declaration the government submitted, it is clear that FEMA has no intention of revisiting its decision to de-accredit the levees. Mr. Sterman has attended "virtually every one of the meetings" between FEMA and the local communities. Sterman Decl. ¶ 5:

> FEMA has stated on a number of occasions in a general fashion that it would accept information regarding the levees. However, when asked directly about accepting information seeking to challenge the de-accreditation decision, the agency's representatives have clearly stated that any new information would not change their decision.

Id. ¶ 7. FEMA officials also told Mr. Sterman that "they had no choice except to de-accredit the levees, no matter what information was received from any other party." Id. ¶ 14.

Specifically, at a meeting on April 6, 2009, Mr. Sterman and other representatives of the local communities "made a direct request to the FEMA representatives to allow the Metro East levee districts to provide certification information." Sterman Decl. ¶ 18:

> The FEMA representatives told us that they could not consider any additional information because they already had information in hand from USACE that suggested that local levee systems might not meet FEMA standards, and with that foreknowledge by FEMA and the Corps the agency had no choice but to de-accredit the area levee system.

Id. FEMA's headquarters representative, Doug Bellomo "said at one point that we would have to agree to disagree on this point." Id.

FEMA officials began a two-day meeting with the local communities on December 15, 2009. "FEMA at the outset limited any discussion at the meeting to flood

insurance post de-accreditation." Sterman Decl. ¶ 19. FEMA was either unable or unwilling "to discuss the basis for the de-accreditation decision." Id.

Moreover, FEMA has completely stonewalled the communities on the basis for its de-accreditation decision. 42 U.S.C. § 4107 specifically requires FEMA to "fully inform[] local officials" about proposed FIRM revisions. Notwithstanding the statutory command, FEMA:

- Gave "no warning or notice of the de-accreditation decision to any local official" before the August 15, 2007 meeting at which the decision was announced. Sterman Decl. ¶¶ 8-9.
- Failed to "notify local officials of the initiation or progress of any USACE studies or investigations relating to the FEMA flood insurance remapping" before issuing formal de-accreditation notices on October 5, 2007. Id. ¶ 13.
- "While FEMA has said that it has" studies supporting its decision, "it has never given them to us." Id. ¶ 15. Nor has FEMA "produced any data, analysis or studies that supported the de-accreditation decision." Id.

On September 23, 2010, Mr. Sterman complained to FEMA that it was providing less favorable treatment to Illinois communities than to Missouri ones. Sterman Decl. ¶ 20 and Ex. C. Over three months later, FEMA responded that, since the Council had joined in this lawsuit, "FEMA is unable to respond to your request outside of the referenced lawsuit." Sterman Decl. ¶ 21 and Ex. D.

The government cites a conclusory declaration by Mr. Bascom's that FEMA will accept additional "information" and will modify the FIRMs if that "information"

demonstrates the soundness of the levee systems "to FEMA's satisfaction." Bascom Decl. ¶ 9. That declaration is more notable for what it does not say than what it does.

For example, the declaration does not recite that Mr. Bascom has participated in any of the meetings between FEMA and the communities and to our belief he has not. Sterman Decl. ¶ 5. It does not recite that Ms. Bascom has any authority to re-accredit the levee systems. Nor does it explain what "information" might satisfy FEMA of the soundness of the levee systems. Might it be "information" that the 2007 study is so badly flawed that it is worthless? Might it be "information" that the annual Corps evaluation of the systems has rated them acceptable or minimally acceptable for the last 15 years? The local communities have been trying to explain this to FEMA for the last three years and FEMA has refused to listen.

This self-serving, conclusory declaration cannot trump well over three years of misconduct. A defendant's promise to go and sin no more is insufficient to moot a claim for prospective relief. Kikumura v. Turner, 28 F.3d 592, 597 (7th Cir. 1994), cert. denied, 514 U.S. 1005 (1995). The same principle dictates that this case is ripe for review. Hartford Cas. Ins. Co. v. Borg-Warner Corp., 913 F.2d 419, 424 (7th Cir. 1990) (ripeness and mootness are "manifestations of the same concept").[2]

Second, the pendency of FEMA's proposed maps has had and will continue to have a devastating economic impact on the American Bottoms. If the proposed FIRMs ever go into effect, every person or entity with a loan from a federally regulated bank secured by real property in the area must purchase flood insurance. 42 U.S.C.

[2] FEMA's alleged willingness to redraw a FIRM covering Highland, Illinois, 25 miles east of the American Bottoms, sheds no light on its willingness to re-accredit the levee systems.

§ 4102a(e). The local communities have six months to enact onerous building requirements, such as elevating all new structures above the BFE through the use of stilts or buttes. 44 C.F.R. § 60.3.

The prospect of incurring these enormous costs has effectively killed economic development in the American Bottoms. Richard Sauget is the chairman of the St. Clair County Building Commission and a prominent businessman in the community. Sauget Decl. ¶ 1. Except for a few small projects, "development in the Bottoms is at a standstill." Id. ¶ 4.

While the economy has played a role in this standstill, Mr. Sauget believes that its "larger cause" is FEMA's de-accreditation of the levees. Sauget Decl. ¶ 6. The proof is that an economic turnaround is beginning elsewhere in Metro East, id. ¶ 5, "we face continued standstill with our other projects in the American Bottoms" and "the same will hold true for all other substantial development in the American Bottoms." Id. ¶ 9.

The de-accreditation decision and related FIRM redrawing has created tremendous uncertainty among developers. First, developers assume that FEMA's decision was the "responsible action of a federal agency" and that "doubts about the effectiveness of our levees" are well-founded. Sauget Decl. ¶ 6. While plaintiffs confidently expect to prove that those assumptions are wrong, FEMA's decision has caused "a large amount of uncertainty" and made banks, insurance companies and prospective tenants reluctant to deal with developers. Id.

The second source of uncertainty is the requirement of flood insurance and the onerous new building restrictions after FEMA's maps take effect. It is precisely because

we "do not know" what additional costs those requirements will impose that they have the potential to make a project "economically questionable." Sauget Decl. ¶ 7.

Mr. Sauget partnered with a St. Louis contractor to develop Discovery Business Park near Dupo. Sauget Decl. ¶ 3. They secured options on the property, a new highway interchange, and most of the preliminary engineering is complete. Id. FEMA's announcement brought that development and its badly needed jobs to a halt. Id. ¶¶ 3-4. Until the uncertainty that FEMA has created is resolved, "we cannot and will not move forward with Discovery Business Park." Id. ¶ 9.

Similarly, in 2006 and 2007, Opus Northwest proposed to develop a 3.5 million square foot distribution center in the American Bottoms. Langa Decl. ¶ 3. Opus had satisfied virtually all contingencies in the contract to purchase the land; it had obtained necessary zoning; preliminary engineering work for streets and utilities was nearly complete; and Opus was obtaining the necessary permits. Id. ¶ 4.

Then FEMA announced it was de-accrediting the levees. Opus investigated the issue and decided not to close. "FEMA de-accreditation and its consequences, as well as the lack of reliable clarity about FEMA's position, made the deal uneconomic." Langa Decl. ¶ 6.[3]

So it is crystal clear, both in general terms and in concrete examples, that FEMA's decision to de-accredit the levees and rewrite the FIRMs is causing devastating economic effects to the residents and communities of the American Bottoms. An Opus distribution center once lost cannot be recovered. The effects of FEMA's decision have been "felt in

[3] Plaintiffs believe that Novartis canceled a similar proposed development due to concerns about the expense of flood insurance. Since plaintiffs have not yet been permitted to conduct discovery, they cannot now supply admissible evidence to prove this proposition.

a concrete way by the challenging parties," Abbott Laboratories, 387 U.S. at 148-49, and hence the case is ripe for review.

On this record, Triple G is in point. Triple G purchased land in Fountain County on which it hoped to build a landfill, and spent $175,000 on site development and engineering work. In response, the County passed an ordinance requiring Triple G to obtain a county permit as well as a state permit. The ordinance effectively prohibited any development of the site as a landfill and Triple G sued.

The County argued that the case was not ripe because Triple G had not yet obtained a state permit and might not do so. The Seventh Circuit disagreed. Triple G's "investment demonstrates that Triple G has a direct, tangible and not merely a hypothetical interest in the subject matter of this action." 977 F.2d at 289:

> There is always the chance that [the state] will turn down Triple G's permit application, but that contingency, in and of itself, is not sufficient to defeat ripeness, particularly in light of the substantial practical effect the ordinance currently has on Triple G's long term plans. . . . [T]his case is ripe for our review, and Triple G has standing to bring it for essentially the same reasons.

Id. at 290-91.

As for fitness for judicial review, this case is likely to turn on the alleged 2007 Corps study – the sole factual basis for FEMA's de-accreditation decision. Either that study exists or it does not. If it does exist, it is either subject to the criticisms that plaintiffs have raised or it is not. The answers to these questions rest on historical facts, not on what might come to pass in the future. Thus, "further factual development" is unnecessary for judicial review, Triple G, 977 F.2d at 289, and "[w]e gain nothing by waiting" until FEMA issues its final determination on the FIRMs. Hudnut, 771 F.2d at 327.

Conclusion

For these reasons, plaintiffs respectfully pray that the Court deny the government's motion to dismiss. If the Court does decide that the administrative appeal is premature, plaintiffs respectfully pray that the Court stay proceedings on Count I pending a final determination by FEMA on the FIRMs.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2011, the foregoing document was submitted as a proposed document to DGWpd@ilsd.uscourts.gov and served by electronic mail, on all attorneys of record as follows:

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s/ Harry B. Wilson

U.S. Department of Homeland Security
FEMA Region V
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FEMA

September 15, 2010

The Honorable George Chance
Mayor, Village of Caseyville
909 South Main Street
Caseyville, Illinois 62232

Dear Mayor Chance:

On July 22, 2009, FEMA aligned the flood mapping processes for Metro St. Louis by issuing concurrent appeal periods for Madison, Monroe, and St. Clair Counties, Illinois, and for the City of St. Louis and St. Louis and St. Charles Counties, Missouri. Since then, FEMA has worked closely with impacted communities to address concerns regarding the proposed maps and FEMA flood mapping process. The City of St. Louis submitted no appeals to the proposed maps and is prepared to move forward in the mapping process to ensure that their residents are provided the most up to date flood risk information. Consequently, FEMA is moving forward with the new flood maps for the City of St. Louis, with a targeted effective date early in 2011.

FEMA is reviewing the appeals and protests received for St. Louis and St. Charles Counties concurrently with the findings of a mapping study recently completed by the Missouri State Emergency Management Agency (SEMA). FEMA anticipates issuing revised preliminary Flood Insurance Rate Maps (FIRM) for St. Louis and St. Charles Counties on September 30, 2010 that include changes resulting from data received during the appeal period, and data from the SEMA mapping project. FEMA and SEMA anticipate community meetings during the last week of October, 2010 to discuss the changed preliminary flood maps. FEMA plans to initiate an appeal period for streams with new or revised Base Flood Elevations in early November, 2010.

FEMA recognizes the importance of keeping the maps aligned for Metro St. Louis communities and is proceeding accordingly for the map updates in Madison, Monroe, St. Clair, St. Charles, and St. Louis Counties. During the month of September, FEMA will issue appeal resolution letters for communities within Madison, St. Clair, St. Charles, and St. Louis Counties. The resolution letters will inform communities of FEMA technical findings and the path forward. This will include information about the independent Scientific Resolution Panel (SRP) process (defined below), which will be available to communities as part of the ongoing study.

To supplement the process referenced above, FEMA is making available the SRP to review and resolve conflicting technical data, which will consist of up to five independent and neutral experts on hydrology, hydraulics, mapping and other pertinent sciences. As of the initiation date of the SRP process (scheduled for November 1, 2010), a community that has gone through the statutory appeal process, is dissatisfied with FEMA's appeal resolution, and has not had a Letter of Final Determination (LFD) issued for the new maps may request their appeal be brought into the SRP process. Based on the submitted data, the

EXHIBIT A

SRP will deliberate and render a written decision outlining their findings. The determination of the SRP will become the recommendation to the FEMA Administrator for resolution; and will not be subject to further staff review within FEMA.

Following the issuance of appeal and protest resolutions this month for communities in Madison, St. Clair, St. Charles, and St. Louis Counties, FEMA will reach out to your community to address questions or concerns regarding the mapping process and to work with you to inform citizens of the implications and responsibilities that accompany the issuance of new flood maps. At this time, FEMA anticipates issuance of LFDs for Madison, Monroe, St. Clair, St. Charles, and St. Louis Counties in June, 2011. LFD issuance serves to finalize the new maps and initiate a 6-month time period for your community to adopt or show evidence of adoption of the appropriate floodplain management regulations pursuant to the NFIP regulations, prior to the effective date of the new maps. The effective date of the new maps is currently scheduled for December, 2011, six additional months from the date of LFD issuance.

I hope this information is helpful to you. If you need additional information or assistance, please contact Suzanne Vermeer of my staff by telephone at (312) 408-5245 or by email at suzanne.vermeer@dhs.gov.

Sincerely,

Norbert F. Schwartz
Mitigation Division Director
FEMA, Region V

cc: Paul Osman, State NFIP Coordinator, Illinois Department of Natural Resources
John Bishop, Project Manager, Illinois Map Modernization Project

[redacted]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

The County of Madison, State of Illinois, et al.	)	
Plaintiffs,	)	
vs.	)	Case No: 3:10-CV-00919-JPG-DGW
The Federal Emergency Management Agency, et al.	)	
Defendants.	)	

DECLARATION OF RICHARD A. SAUGET

I, Rich Sauget, do declare:

1. I live and work in Sauget, Illinois, which is the American Bottoms area of St. Clair County, and which is protected by the Metro-East Levees Systems. I have been in the real estate development business for about 40 years. I am the president of East County Enterprises, Inc., a real estate development and management company that focuses on the Metro-East area with a primary emphasis on American Bottoms area. I am Chairman of the Board of Touchette Regional Hospital and a member of the Kenneth Hall Regional Hospital Board of Directors. I assisted in the development of Archview Economic Development Corporation, which provides resources for the enhancement of the quality of life for the residents of Sauget, Alorton, Cahokia, Centreville and Dupo. I also have served as the Chairman of the St. Clair County Building Commission for 27 years, and I am a member of the Regional Chamber and Growth Association, the Regional Business Council, and the Lambert Airport Board. I am also the Managing Partner of the Gateway Grizzlies baseball team.

2. I am very familiar with issues surrounding development in the American Bottoms area. Among the developments in which I have had a role in that area recently are the 700 acre Sauget Business Park, the Stadium Office Complex, and Collinsville Properties. All of these properties have areas still available for development. In earlier years, I have been involved many other such developments.

3. More recently, my company joined with Clayco Inc., a large St. Louis based developer, to develop what we call the Discovery Business Park near Dupo, Illinois, in the American Bottoms area. We already have options with landowners at this location to proceed with the first phase of the project which will entail approximately 1,600 acres with development of light industrial, manufacturing and distribution centers. Phases 2 and 3 of this development will be of similar size, involving 20-30 million square feet of buildings. We anticipate that this development will be a major job creation center, which this area badly needs. We are far enough along with Discovery Business Park to have spent about $2 million in preliminary costs. Most of the preliminary engineering is completed, and a new interstate highway interchange to allow better access is already approved.

4. However, the entire Discovery Business Park plan is presently on hold. Development in our other projects in the Bottoms is also at a standstill, and it is my observation that all development in the Bottoms is at a standstill except for a very few small projects.

5. Certainly the current economic downturn has played a role in this standstill. However, that is only part of the problem. This is because, first, we are beginning to see an economic turn-around in areas of the Metro-East that are above the

American Bottoms. For example, I am involved with new projects that are now going forward around Mid-America Airport. Second, as a developer myself and as Chairman of the county Building Commission, I know that many developers will move projects such as these during an economic downtown to take advantage of the lower costs and interest rates available in such times.

6. The other and larger cause for the economic standstill in the Bottoms is the actions of FEMA in de-accrediting the levees protecting the Bottoms. This has created a large amount of uncertainty for us and for others. In the first place, FEMA's action in de-accrediting the levees is presumably and is certainly perceived to be the responsible action of a federal agency with regulatory power in this area. FEMA has thus created doubts about the effectiveness of our levees, which are supposed to protect from a 500 year flood. This uncertainty is of great importance in the field of development. Completing projects such as the Discovery Business Park requires obtaining approvals from a large number of public and private bodies, such as banks, insurance companies, prospective tenants, municipalities, road and transportation departments, environmental agencies and the like. In my experience, these kinds of bodies will be reluctant to work with developers when there is doubt about the integrity of the levees protecting the area.

7. Just as importantly is the uncertainty that FEMA has created with the prospect mandatory flood insurance and onerous new building codes. We do not know now what the cost of flood insurance will do to the overall costs of our project, and that in turn places doubts on things such as financing and what to charge tenants. I understand also that de-accreditation will lead to mandatory changes in land use controls.

We don't know what those changes will cost, and how those costs will impact the viability of the project. For example, a requirement to build all structures on elevated areas could impact costs greatly, and has the potential to make the entire project economically questionable.

8. I would also observe based on a lifetime living in Sauget in the American Bottoms that many of my neighbors in neighboring cities and villages are of lesser economic means, and I doubt that they could absorb the costs of mandatory insurance and compliance with new building costs.

9. For these reasons, we cannot and will not move forward with Discovery Business Park, and we face continued standstill with our other projects in the American Bottoms. Based on my experience and other positions, I believe the same will hold true for all other substantial development in the American Bottoms.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on Feb 2, 2011.

Richard A. Sauget

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

The County of Madison, State of Illinois, et al.	)	
Plaintiffs,	)	
vs.	)	Case No: 3:10-CV-00919-JPG-DGW
The Federal Emergency Management Agency, et al.	)	
Defendants.	)	

DECLARATION OF LES STERMAN

I, Les Sterman, declare as follows:

1. I am and have been since July, 2009, the Chief Supervisor of Construction and the Works for the Southwestern Illinois Flood Prevention District Council ("the District Council"). The District Council was created pursuant to the Illinois Flood Prevention District Act, 70 ILCS 750/1, and an intergovernmental agreement between Madison, Monroe and St. Clair Counties in Illinois. The affairs of the District Council are managed by a board of directors appointed by the Chairman of the County Boards of Madison, Monroe and St. Clair Counties. Those board members have engaged me as the chief employee. The District Council has numerous powers relating to the improvement of flood protection systems within Madison, Monroe and St. Clair Counties, including monitoring and engaging in dialogue with the State and Federal agencies regulating those levees, which include the Federal Emergency Management Agency (FEMA) and the US Army Corps of Engineers (USACE).

2. Before coming to the District Council, I was the Executive Director of the East-West Gateway Council of Governments-St. Louis, Missouri. That entity was and is designated by state and local governments as the metropolitan planning organization for the Bi-State area. Its board of directors is comprised of the chief elected officials of the above three Illinois counties and five counties in Missouri, all comprising the St. Louis metropolitan area.

3. My education and work experience over a forty year period is in civil engineering and urban planning. I graduated from Rensselaer Polytechnic Institute with a Bachelor of Science in Civil Engineering and a Masters in Urban and Environmental Studies in 1971.

4. Since August 2007 and until the present, I have served in a support and liaison role relating to levee issues for the elected and appointed officials of Madison, Monroe and St. Clair Counties, for the communities in those counties in the American Bottom Areas, and, as well, for the four levee districts in the area. Those districts, whose levees protect the American Bottoms area from flooding on the Mississippi River, are the Wood River Drainage and Levee District, the Metro East Sanitary District, the Prairie duPont Levee and Sanitary District and the Fish Lake Drainage and Levee District. Since August 2007, I have engaged in extensive meetings, correspondence, and dialogues relating to the Metro East Levee systems with community officials, with elected officials, with officials from USACE, and, on a limited basis, with officials from FEMA.

5. I have read the Declaration of David Bascom, a FEMA Program Specialist, that is attached as Exhibit 1 to FEMA's Consolidated Motion to Dismiss and Opposition to Plaintiff's motion for Preliminary Injunction (Document 26-1). Although I

have attended virtually every one of the meetings involving community officials and regarding the Metro East Levee systems and FEMA or involving FEMA's decision to de-accredit these levees since that was first announced in August 2007, I am unfamiliar with Mr. Bascom.

6. In his Declaration, Mr. Bascom makes the statement in paragraph 9 that: "In addition, though the statutorily prescribed appeal period concluded on October 20, 2009, FEMA is willing to accept from Plaintiff's any data and documentation pertaining to the adequacy of the American Bottoms Levee Systems. If any such information is submitted prior to the LFD that demonstrates to FEMA's satisfaction that the levee system(s) comply with the requirements of 44 CFR §6510, the preliminary DFIRMs will be accordingly modified."

7. This statement is misleading. Likewise, similar statements from FEMA contained in the September 20, 2010 appeal resolution letters to the Administrative Appeal Plaintiffs (see Exhs. 21-30 to the Complaint) are misleading. It is accurate that FEMA has stated on a number of occasions in a general fashion that it would accept information regarding the levees. However, when asked directly about accepting information seeking to challenge the de-accreditation decision, the agency's representatives have clearly stated that any new information would not change their decision. It has furthermore kept secret the information it says it has to support the decision. At two meetings that I attended between FEMA and local communities in the last two years, FEMA has rejected any further reconsideration of its stated intent to de-accredit the Metro-East Levee Systems, and the agency's representative would not even

entertain a discussion of the subject. And more recently, FEMA has totally refused to communicate with me about the levees because of the pendency of this lawsuit.

8. FEMA first announced its decision to de-accredit the Metro-East Levees at a "levee summit" meeting with local community leaders on August 15, 2007. The bases for this decision, according to FEMA, were "studies completed" by USACE. While I was not at this meeting, members of my staff were, and I have photographs as well as a PowerPoint referenced by FEMA. A copy of the relevant page of the PowerPoint referenced by FEMA is attached as Exhibit A. The same PowerPoint noted that: "[A]ll Illinois levees in the St. Louis District have an acceptable or minimally acceptable rating." See Exhibit B hereto. As an engineer who has worked with levee issues for a number of years, I am familiar with the standards employed by USACE in its inspections under Public Law 84-99, and with the 44 C.F.R. 65.10 standards employed by FEMA. The USACE standards are more stringent and exacting.

9. This "levee summit" meeting was not initiated by FEMA. Rather, it was called at the request of U.S. Rep. Jerry Costello. FEMA had given no warning or notice of the de-accreditation issue to any local official prior to this meeting. Nor had FEMA consulted with local elected officials or community leaders prior to this meeting. Nor had FEMA given any notice of the conduct of "studies"; nor had it allowed the communities or interested persons the opportunity to bring relevant data on the question to FEMA's attention.

10. Shortly after this "levee summit", Congressman Costello and the county board chairmen asked the East-West Gateway Council of Government, which I headed at the time, to assume the liaison and support role that I reference above.

11. On October 5, 2007, FEMA sent a letter to local officials and elected officials notifying them that the Metro East Levee Systems, while currently accredited, would be de-accredited. An exemplar of this letter is Exhibit 7 to the Complaint. The basis for this decision was cited as the receipt of information from USACE. The result, according to the letter, was that the levees "will be de-accredited and therefore will not be shown on the future DFIRM as providing protection from the base flood."

12. The physical result of the "studies completed" referenced in paragraph 8 above and the de-accreditation decision announced at the "levee summit" and in the Oct. 5, 2007 letters is a modification of the base flood elevations (BFEs) in the American Bottoms. The modification occurs because the current FIRMs show the landward side of the levees as largely Zone X (except for some minor ponding areas), meaning a BFE of 0, while the proposed FIRMs (or DFIRMs) show no Zone X but rather BFE lines bearing a BFE of in excess of 400 feet. This modification in the BFEs can be seen by comparing Exhibit 1 to the Complaint, the existing FIRM for downtown East St. Louis, with Exhibits 2 and 3, the proposed FIRMS for that area.

13. At no time prior to the Aug. 15, 2007 "levee summit" or the issuance of the Oct. 5, 2007 de-accreditation letters did FEMA notify local officials of the initiation or progress of any USACE studies or investigations relating to the FEMA flood insurance remapping, or the manner in which any such studies would be undertaken, or the general principles to be applied, or of the intended use of the data to be obtained. Nor did FEMA notify any local officials of the communities' role in establishing the BFEs, or of the need for bringing relevant data forward.

14. FEMA officials did meet with local officials after Oct. 5, 2007, which meetings I attended. The FEMA officials did not discuss the de-accreditation studies, other than to say that they had definitive data in hand, and that, once the USACE had provided them with a statement that expressed doubt or uncertainty that area levee systems could meet the standard of 44CFR 65.10, they had no choice except to de-accredit the levees, no matter what information was received from any other party. FEMA officials left absolutely no doubt that the de-accreditation decision was final and not subject to further discussion or debate. Their entire focus was on assisting local officials with planning for the aftermath of de-accreditation, including preparation of a request for AR Zone status for the area landward of the levees, which entailed accepting FEMA's decision to de-accredit the levees on the up-coming FIRMs as a given. FEMA was unambiguous in all its communication with local officials that de-accreditation was a given.

15. As we became more knowledgeable about the subject matter, both local officials and I have asked FEMA on a number of occasions for the studies FEMA referenced on Aug. 15 and Oct. 5, 2007 that allegedly supported the de-accreditation decision. While FEMA has said that it has such studies, it has never given them to us. While FEMA has provided voluminous, mostly irrelevant materials in response to our requests, they have not produced any data, analysis or studies that supported the de-accreditation decision. Neither could the Corps of Engineers produce such information. I have never seen the studies that purport to support FEMA's de-accreditation decision and I know of no one in the Metro East area who has seen such studies either.

16. In December 2008, I wrote to FEMA to inquire why FEMA made formal requests to the levee districts on the Missouri side of the metropolitan area to provide information regarding compliance with FEMA's regulatory standard at 44 C.F.R. 65.10. while never asking the same of the Metro East Levee districts or communities. That letter went unanswered for three months, except for a completely unresponsive reply to Congressman Costello following his inquiry about the whereabouts of a response to me. At that point, Congressman Costello then arranged a meeting in the St. Louis area.

17. That meeting occurred on April 6, 2009 at the offices of East West Gateway. Attending from the communities were: Alan Dunstan, the Madison County Board Chair, Joe Parente, on his staff, Mark Kern, the St. Clair County Board Chair, Dan Maher, on his staff, Delbert Wittenauer, the Monroe County Board Chair, Alvin Parks, the Mayor of East St. Louis, myself and others on my staff. Attending for FEMA were Doug Bellomo from headquarters, Ken Hinterlong, Melissa Janssen, Bob Franke, Rick Nusz, two USACE employees, and perhaps others.

18. At that April 6, 2009 meeting, we made a direct request to the FEMA representatives to allow the Metro East levee districts to provide certification information. The FEMA representatives told us that they could not consider any additional information because they already had information in-hand from USACE that suggested that local levee systems might not meet FEMA standards, and with that foreknowledge by FEMA and the Corps the agency had no choice but to de-accredit the area levee system. Mr. Bellomo said at one point that we would have to agree to disagree on this question.

19. The next meeting we had with FEMA where the subject of submitting more information regarding accreditation came up was on December 15 and 16, 2009, when David Schein of FEMA came to the Metro East area with other FEMA personnel. There were two days of meetings with community leaders and officials, as well as developers, lenders and insurance agents. While FEMA at the outset limited any discussion at the meeting to flood insurance post de-accreditation, attendees expressed great frustration with FEMA's inability or unwillingness to discuss the basis for the de-accreditation decision. During one of those meetings, I had an exchange with Laurie Smith-Kuypers, FEMA outreach specialist, and specifically asked whether FEMA had the information to support de-accreditation. She assured me that they did indeed have such information and suggested that perhaps our request went to the wrong people in the organization and that she would make sure that we got it. That never happened.

20. My most recent communication with FEMA was a letter I sent on Sept. 23, 2010 to W. Craig Fugate, the FEMA Administrator and Norbert Schwartz with the agency's Region 5 office in Chicago. I pointed out that the agency was acting contrary to applicable law in issuing new preliminary FIRMS for neighboring Missouri counties. I noted that the Metro East communities had submitted data challenging the preliminary Illinois FIRMs, and I asked that FEMA issue new preliminary maps for the Illinois communities. A copy of my letter is attached as Exhibit C.

21. FEMA answered my letter three months later on December 29, 2010. The agency noted that this lawsuit had been filed, and stated: "[a]s a result, FEMA is unable to respond to your request outside of the referenced lawsuit." See Exhibit D attached.

22. In paragraph 6 of his affidavit, Mr. Bascom references an issue with a creek in Highland, Illinois. I am not familiar with this issue, except to say that Highland is 25 miles from the American Bottoms. Moreover, the appeals process here is over, in that FEMA resolved the appeals here on September 20, 2010.

23. In paragraph 7 of his affidavit, Mr. Bascom cites a report by Juneau Associates and others submitted by the Plaintiffs in their administrative appeals to FEMA. He states that the report did not contain information or analysis of the Metro East Levee Systems. While this statement is generally accurate, the 90-day appeal period did not allow for the kind of extensive and costly studies that would be needed to challenge the Mississippi River BFEs and the effectiveness of the levee systems. Indeed FEMA had previously informed us that their decision on that matter was effectively not subject to dispute (see 18 above). Rather, we chose to submit information relating to the BFE for tributary streams, information that clearly demonstrated that the preliminary maps were seriously defective. Those defects related to FEMA's use of outdated information (even when newer information was available) and unreliable analysis that was contradicted by empirical data and observation. In our view, the Juneau report cast very serious doubt on the overall quality and credibility of the preliminary maps. Moreover, Mr. Bascom fails to note that each of the appeals cited over 10 of the then current annual inspection reports and periodic inspection reports of the levees by USACE, every one of which concluded that the levee systems would "perform as intended" during the net design flood event (nominally a 500-year flood – far exceeding the FEMA standard). Not only were these reports directly cited for FEMA's consideration, but they are also commonly available. Each of the USACE reports,

prepared by engineers, contained a wealth of detailed scientific and technical data supporting their conclusions the Metro East Levee System are sound and meet USACE's standards, and express conclusions that are wholly inconsistent with the Corps' alleged statements or studies that led FEMA to decide to de-accredit the Metro East levees.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on February 18, 2011.

Les Sterman

US Army Corps of Engineers

Illinois Levee Systems

The Corps of Engineers based on studies completed does not have the required level of confidence that the following urban protection levees could pass the "100-year" event without flood fighting.

- Wood River
- Chain of Rocks
- East St. Louis & Vicinity
- Prairie Du Pont
- Fish Lake

US Army Corps of Engineers

Public Law 84-99 Annual Inspection

- All Illinois levees in the St. Louis District have an acceptable or minimally acceptable rating.
- Many of the Illinois levees received a minimally acceptable rating due to trees in the levee or too close to the levee toe.
- Steps to dealing with tree issue:
  - The Corps of Engineers inspection team (PL84-99) makes a preliminary assessment if the trees may be a problem.
  - A "tree team" then is sent to make a technical assessment to see if tree is a hazard and if it is how they can be removed in an environmentally acceptable manner.
  - No levee will receive an unacceptable rating for trees if they are making an effort to remove those trees identified by the Corps within two years.

Southwestern
Illinois
Flood Prevention
District Council

104 United Drive
Collinsville, IL 62234

618-343-9120
Fax 618-343-9132

September 23, 2010

VIA Email and Facsimile

The Hon. W. Craig Fugate
Administrator
Federal Emergency Management Agency
500 C Street SW
Washington, DC 20472
FAX 202-646-3930

Norbert F. Schwartz
Mitigation Division Director
U.S. Department of Homeland Security
FEMA Region V
536 South Clark Street, 6th Floor
Chicago, IL 60605
FAX 312-408-5551

Dear Messrs. Fugate and Schwartz:

I recently received Mr. Schwartz's letter stating that by September 30, 2010, FEMA will issue revised preliminary Flood Insurance Rate Maps (FIRMs) for St. Louis and St. Charles Counties in Missouri. Mr. Schwartz indicates further that FEMA will, at the same time, issue appeal resolution letters regarding earlier preliminary FIRMs to communities in Madison, St. Clair and Monroe Counties in Illinois.

We believe these actions violate Section 10503 of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, 122 Stat. 3574, Public Law 110-329 (the Act). This legislation explicitly requires FEMA to align the flood mapping processes for the contiguous Missouri and Illinois counties of the St. Louis metropolitan region. FEMA's issuance of revised preliminary maps for the Missouri counties will reopen the statutory appeals process for those Missouri communities. As we have seen, the appeals process has already taken more than a year, and with the advent of the Scientific Resolution Panel, an additional six months will be needed to fully resolve map appeals. Simultaneously ruling on the existing appeals from the Illinois counties will close the appeals process for the Illinois communities, with the exception of the SRP process. Thus, once again, FEMA will put the Illinois communities at a distinct disadvantage by having final FIRMs imposed at a much

EXHIBIT
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earlier time than neighboring Missouri communities. This is exactly what the Section 10503 of the Act was intended to, and does, prohibit.

Your letter acknowledges the intent of the Act, stating that "FEMA recognizes the importance of keeping the maps aligned for Metro St. Louis communities." Yet, the proposed actions will lead to exactly the opposite result, and again FEMA proposes to treat the Illinois communities differently from adjacent Missouri communities. Mr. Schwartz's letter suggests that letters of final determination for Missouri and Illinois counties will be issued in June 2011. Meeting that schedule is highly unlikely if not impossible for the Missouri counties. If the initiation of a new appeals process in the Missouri counties occurs in November 2010, that process that could take 18 months, if past experience is any guide. LFDs for all of the counties covered by the Act should indeed be issued at the same time, but that could not occur in June 2011.

Further, we believe there is credible information supporting the contention that FEMA hastened the release of flawed maps, known to be based on obsolete data, for St. Louis and St. Charles Counties in order to more quickly release preliminary maps for Southwestern Illinois, ostensibly complying with the law. The acknowledgement now by FEMA that new preliminary maps will be issued for St. Louis and St. Charles Counties may indeed confirm our belief.

Communities in all of the counties covered by the Act submitted data disputing the preliminary maps. If new preliminary maps are needed in St. Louis and St. Charles counties, then new preliminary maps are needed for Madison, St. Clair and Monroe counties as well. There is no apparent reason for issuing new preliminary maps in St. Louis and St. Charles counties and not in Madison, St. Clair and Monroe counties, unless the maps for St. Louis and St. Charles counties were known to be deficient before FEMA released them.

The issuance of a new set of preliminary maps in St. Louis and St. Charles counties may certainly be necessary to correct serious deficiencies in those maps. However, doing so at this time without beginning a new appeal period for Madison, St. Clair and Monroe counties, is contrary to the intent and requirements of the Act.

Sincerely,

Les Sterman
Chief Supervisor of Construction and the Works

cc: Hon. Richard Durbin, United States Senate
Hon. Jerry Costello, United States House of Representatives
Hon. John Shimkus, United States House of Representatives

Hon. Alan Dunstan, Madison County Board Chairman
Hon. Mark Kern, St. Clair County Board Chairman
Hon. Delbert Wittenauer, Monroe County Board Chairman
Joseph D. Parente, Madison County Director of Administration
Linda Lehr, Monroe County Coordinator
Mr. Bob Shipley, Metro East Sanitary District
Robert Haida, St. Clair County State's Attorney
Kris F. Reitz, Monroe County State's Attorney
William A. Mudge, Madison County State's Attorney
Members, Flood Prevention District Council Board
Robert J. Sprague, Esq., Sprague & Urban
Harry Wilson, Husch Blackwell
Kim Diamond, Husch Blackwell
David Human, Husch Blackwell

U.S. Department of Homeland Security
500 C Street, SW
Washington, DC 20472

DEC 29 2010

FEMA

Les Sterman
Chief Supervisor of Construction and the Works
Southwestern Illinois Flood Prevention District Council
104 United Drive
Collinsville, Illinois 62234

Dear Mr. Sterman:

Thank you for your letter dated September 23, 2010, to the Department of Homeland Security, Federal Emergency Management Agency (FEMA), regarding the preliminary Flood Insurance Rate Maps for the Missouri and Illinois counties of the St. Louis metropolitan area and the Consolidated Security, Disaster Assistance, and Continuing Appropriation Act of 2009, Pub. L. No. 110-329 §10503, 122 Stat. 3574 (2008).

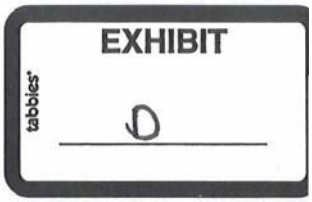
As you know, on November 15, 2010, the Southwestern Illinois Flood Prevention District Council joined in a lawsuit (Southern District of Illinois Case No. 10-CV-000919) against FEMA. As a result, FEMA is unable to respond to your request outside of the referenced lawsuit.

If you need additional information or assistance, please have your counsel contact FEMA's lead counsel, Darren S. Wall, by telephone at (202) 646-4611.

Sincerely,

Sandra K. Knight, PhD, PE
Deputy Federal Insurance and Mitigation Administrator, Mitigation

cc: Andrew Velasquez III, Regional Administrator, FEMA Region V
Norbert Schwartz, Director, Mitigation Division, FEMA Region V
Paul Osman, State NFIP Coordinator
Suzanne Vermeer, P.E., CFM, FEMA Region V
Rob Truelsen, Region V Support Center



DECLARATION OF JOHN LANGA

I, John Langa, do declare as follows:

1. I am licensed real estate broker with 12 years of experience in the field of real estate sales and development. I currently work for Jones Lang LaSalle in its St. Louis office. Jones Lang LaSalle is an international financial and professional services firm specializing in real estate services and investment management.

2. In 2006, 2007 and 2008, I worked as a director of real estate and in house developer for the St. Louis office of Opus Northwest LLC. Opus Northwest was and is a real estate development firm. It developed office buildings, retail centers, office and industrial parks, and industrial facilities throughout the United States. The company was based in Minnetonka, Minnesota, and operated as a subsidiary of Opus Group.

3. In 2006 and 2007, I worked directly on a proposed development known as Opus Park 600. This was a proposed distribution center with a potential for more than three and a half million square feet of improved industrial space on a 595 acre parcel located in Pontoon Beach, Illinois. This parcel is in the American Bottoms area of the Metro East and is protected by the Metro-East levee systems.

4. In 2006, Opus Northwest signed a contract for the purchase of the 595 acre Pontoon Beach property from sellers located in Alton and represented by Mark Mannion of Mannion Properties LLC and Andrew Port of NAI Desco, both real estate brokers. My colleagues and I then went to work on both due diligence and planning. By August 2007, virtually all of the contingencies in the sales contract had been satisfied, necessary zoning had been completed, preliminary engineering work was nearly complete for streets and utilities, and we were in the process of filing site disturbance and building permits.

5. In late summer of 2007, I learned from several sources that the Federal Emergency Management Agency was going to de-accredit the levee systems protecting the planned Opus Park 600 property. My boss, John Pitcher confirmed that in a meeting that Fall with FEMA officials in Belleville. We also learned that FEMA planned to put the American Bottoms area into an AR Zone on the new flood maps. I have some experience with flood plain issues, and I learned more that Fall in researching the issues. One of the issues was that our insurance costs could go from 5 cents a square foot to 40 cents a square foot. We were also concerned that new land use codes could be imposed, with unknown additional costs.

6. I do not recall the exact date, but as the fall proceeded, and before the projected closing on the real estate sales contract, my colleagues and I collectively came to the recommendation and conclusion that we pull out of this deal and refuse to close because of the uncertainty. My reasons were that the FEMA de-accreditation and its consequences, as well as the lack of reliable clarity about FEMA's positions, made the deal uneconomic. Our recommendations and conclusions were accepted. I subsequently told the sellers' agents that we would not close on the contract because we did not know what we were closing on.

7. Opus Northwest did not close this transaction.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on 18 February, 2011.

John Langa