UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Gary Bailey,

Plaintiff,

v.

Civ. No. 02-639 (RHK/RLE)
MEMORANDUM OPINION AND ORDER

United States Army Corps of Engineers, an agency of the United States of America; Minnesota Pollution Control Agency, an agency of the State of Minnesota; Minnesota Department of Natural Resources, an agency of the State of Minnesota; and Lake of the Woods County, a political sub-division of the State of Minnesota,

Defendants.

Alan B. Fish, Alan B. Fish, P.A., Roseau, Minnesota, for Plaintiff.

Joshua Levin, U.S. Department of Justice, Washington D.C., and Mary J. Madigan, Assistant United States Attorney, Minneapolis, Minnesota, for Defendant U.S. Army Corps of Engineers.

Richard P. Cool and Matthew B. Seltzer, Assistant Attorneys General, State of Minnesota, Saint Paul, Minnesota, for Defendants Minnesota Pollution Control Agency and Minnesota Department of Natural Resources.

Scott T. Anderson and Mark J. Girouard, Ratwik, Roszak & Maloney, P.A., Minneapolis, Minnesota, for Defendant Lake of the Woods County.

Introduction

Plaintiff Gary Bailey owns a parcel of lakefront property on Lake of the Woods in northern Minnesota. The land in question includes wetlands adjacent to navigable waters and falls under the jurisdiction of the United States Army Corps of Engineers ("Corps")

pursuant to the Clean Water Act, 33 U.S.C. §§ 1251 et seq., and its implementing regulations. In December 1996, Bailey applied to Lake of the Woods County ("the County") to plat the land for residential development. Months before the plat was approved, he began building an access road across the parcel by dredging and filling wetland. After the road was already roughed in, he applied for an "after-the-fact" permit from the Corps for the project. He also submitted a wetland "replacement" plan to the County pursuant to the state's Wetland Conservation Act, Minn. Stat. § 103G.222, subd. 1(a), because the road project would drain and fill wetlands. While the permit application to the Corps and the wetland replacement plan proposal were pending, Bailey began selling lots to individuals wanting to build homes on Lake of the Woods. He finished building the road in the summer of 1999.

In October 2000, the Minnesota Pollution Control Agency ("MPCA") learned from the Corps that virtually all of the land platted for residential development was wetland and that the impact of the road on the wetland was much greater than first reported. The MPCA determined that, because the lots had no more than small isolated areas of upland, there was insufficient land available for locating individual sewage treatment systems that would comply with state regulations, calling into question whether the lots could be developed and, thus, whether an access road for the residential development was necessary. The MPCA revoked its earlier certification to the Corps that the road project could be achieved consistent with the state's water quality standards. In June 2001, the Corps denied Bailey's permit application and the state agencies rejected

his proposed wetland replacement plan. The Corps directed Bailey to remove the road and the Minnesota Department of Natural Resources ("DNR") directed Bailey and the other landowners in the development to restore the wetlands on their lots.

Bailey brought this lawsuit in March 2002, seeking judicial review of various actions of the Defendants and compensation from the Defendants on the grounds that their actions constituted a taking of his property in violation of the Fifth Amendment of the United States Constitution. Before the Court are motions to dismiss brought by the Corps, the State agencies, and the County. For the reasons set forth below, the Court will grant the motions.

Background

I. Federal and State Laws and Regulations Regarding Wetlands

In 1977, Congress enacted the Clean Water Act ("CWA" or "Act") to protect the quality of surface water in the United States. Among other things, the Act makes it unlawful for any person to discharge a pollutant into navigable waters unless that person either has a permit or falls within one of the statutory exceptions to the permit requirement. The CWA defines the terms "pollutant" and "navigable waters" broadly. "Pollutant" includes "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste." 33 U.S.C. § 1362(6). "Navigable waters" are "the waters of the United States," 33 U.S.C. § 1362(7), a phrase defined in the implementing regulations to

include wetlands adjacent to waters that are currently used, or were used in the past, or may be used in the future, in interstate or foreign commerce.[1] 33 C.F.R. § 328.3(a)(7).

Section 404 of the CWA authorizes the Secretary of the Army, acting through the Corps, to issue permits for the discharge of dredged or fill materials into waters of the United States, including wetlands. 33 U.S.C. § 1344(a), (d). No more than fifteen days after an applicant has submitted all of the information necessary to complete the permit application, the Corps must publish a public notice describing the contents of the application, including the proposed activity, its location, and potential environmental impacts. The public notice invites comments within a specified time. 33 U.S.C. § 1344(a). After the comment period has closed, the Corps evaluates the application based on both the comments received and its own evaluation of the project. Before the Corps can issue a § 404 permit for a proposed project, however, it must obtain from the state in which the project is located a certification under § 401(a) of the Act that the discharge of dredged or fill materials will comply with the Act and any applicable state water quality standards. 33 U.S.C. § 1341(a).

Several types of permits are available under § 404. One type is an "after-the-fact" permit, issued after a violation of the CWA has already occurred. 33 C.F.R. § 326.3(e).

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[1] "Wetlands" are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b). "The term 'adjacent' means bordering, contiguous, or neighboring." Id. § 328.3(c).

In deciding whether to issue an after-the-fact permit, the Corps "must determine that the work involved is not contrary to the public interest, and if section 404 is applicable, that the work also complies with the Environmental Protection Agency's section 404(b)(1) guidelines." Id. § 326.3(e)(2). If the Corps decides to deny the "after-the-fact" permit application, the notification of denial generally prescribes required corrective actions and establishes a reasonable period of time for the applicant to complete such actions. Id. The Corps may decide, however, that further information is required before specifying the necessary corrective measures. Id. Finally, "[i]f an applicant refuses to undertake prescribed corrective actions ordered subsequent to permit denial . . . the district engineer may initiate legal action in accordance with § 326.5." Id.

In addition to the federal laws and regulations governing the dredging and filling of wetlands, states have also enacted legislation to protect water quality and wetlands. See 33 U.S.C. § 1344(t) (providing that nothing in § 404 of the CWA precludes or denies the right of a State to control the discharge of dredged or fill materials in any navigable waters within that State's jurisdiction). Minnesota has enacted several statutes regulating its surface waters, including the Wetland Conservation Act ("WCA"), which prohibits the draining or filling of wetlands unless the person taking such actions "replaces" the impacted wetland areas by restoring or creating other wetland areas of at least equal public value. Minn. Stat. § 103G.222, subd. 1(a). The WCA is administered by both local and state officials, the local governmental unit being responsible for reviewing and approving replacement plans. Minn. Stat. § 103G.2242, subd. 1(b). If non-exempt

draining and filling activities are conducted without the prior approval of a replacement plan, the DNR can issue a cease-and-desist or restoration order. Minn. Stat. § 103G.2372, subd. 1. Minnesota also has enacted a Water Pollution Control Act, administered and enforced by the MPCA. See Minn. Stat. § 115.03, subd. 1(a). Among the MPCA's duties is the adoption and enforcement of rules for the prevention, control, and abatement of any discharge or deposit of sewage into the waters of the state, such as standards for individual sewage treatment systems. See Minn. Stat. § 115.03, subd. 1(e); Minn. R. 7080.0010 et seq. The MPCA is also responsible for administering the State's § 401 water quality certification program under the CWA.

II. Bailey's Parcel of Land in Lake of the Woods County

In the late 1980s, Bailey purchased a sixty-five acre parcel of land adjacent to Lake of the Woods. (Bailey Aff. ¶ 2.) He put much of the parcel to agricultural use, but kept approximately thirteen acres along the shoreline in a natural state. (Id. ¶ 3.) In the early 1990s, Bailey planned to develop those thirteen acres by constructing a marina on the property. (Id. ¶ 4.) The County and the Corps approved the excavation of an inland harbor and access channel. (See Bailey Aff. Ex. 5.) In August 1993, the Corps advised Bailey in writing of the need for § 404 permits for any filling of wetlands on the site. (See Bailey Aff. Ex. 15.) Several months later, in May 1994, the Corps met with Bailey on the site and confirmed that it was composed of wetlands. (Id.)

Bailey did not build the marina for financial reasons. (Bailey Aff. ¶ 4.) He later decided to develop the land as lakeshore residential property. On December 5, 1996,

Bailey applied to the County to plat the non-agricultural portion of his parcel into lots for residential development; this new plat would lie south of a residential development known as "Sandy Shores" and eventually became known as "Sunny Beach." (See Bailey Aff. Ex. 1.) A road running through the "Sandy Shores" development reached a dead end at the northern boundary of the proposed "Sunny Beach" plat.

III. Construction of the Sunny Beach Access Road

On June 17, 1998, Bailey completed a "Local-State-Federal Project Notification Form," indicating that he planned to build a quarter-mile long road on the thirteen-acre parcel. Bailey acknowledged on the form that the road would affect wetlands by causing about 1.5 acres to be filled or drained. (Bailey Aff. Ex. 1.) He stated that the purpose of the project was to "construct road for access – logging." (Id.) He further indicated that he had already begun work on the project, having roughed in the road.[2] (Id.)

In June 1998, the Corps made a site visit to Bailey's property and found that Bailey had done mechanized landclearing in the wetlands as the first step in constructing the access road. (Bailey Aff. Ex. 15.) The roadway bisected the forested wetland, running generally parallel to the shoreline between 260 and 400 feet from the lake and creating a large opening in the hardwood canopy. (Id.) At the time of the Corps' site

[2] Bailey constructed the road by clearing a sixty-six foot wide zone through an approximately 1,500-foot long forested wetland area. He then excavated two drainage ditches, one on each side of the roadway, and used the excavated materials to build up the road. He later brought in additional fill to raise the level of the road and topped it with gravel.

visit, Bailey had not yet brought in fill material and had not yet excavated ditches on either side of the proposed road. (Id.) The Corps verbally told Bailey to cease work on the road. (Id.) He did not.

Bailey applied to the County on July 31, 1998, for approval of a "replacement plan" under Minnesota's WCA. (Bailey Aff. Ex. 7.) He offered to replace the land affected by construction of the new road with 2.9 acres of wetland located elsewhere in the county. (Id.) The County notified members of the DNR and the Corps about Bailey's proposed wetland replacement plan. (Id.)

In September 1998, Bailey asked the County Highway Department to inspect the road for compliance with the County's road construction policy. (Bailey Aff. Ex. 5.) On September 16, 1998, the Highway Department advised him of ten deficiencies with the road and stated that, before it could recommend that the County Board accept the road as an unorganized Township Road, all of those issues would have to be addressed. (Id.)

On November 25, 1998, the County's Office of Environmental Services ("OES") told Bailey that the County Planning Commission had approved his initial plat of Sunny Beach. (Bailey Aff. Ex. 2.) The County thereupon authorized Bailey to prepare and submit a Preliminary Plat of Sunny Beach. (Id.) Five days later, the County's Highway Department told Bailey that, because the initial plat for Sunny Beach had been approved, the Department would set a road bond in the amount of $10,000 for the expenses

necessary to bring the road into compliance with County standards.[3] (Id. Ex. 4.) On December 22, 1998, the County Commission approved an amendment to the zoning ordinance, changing the zoning for the Sunny Beach property from agricultural/ natural environment to residential. (Bailey Aff. Ex. 3.) At that meeting, the County Board also approved the final plat for Sunny Beach. (Id.)

IV. Bailey's Applications to State and Federal Regulatory Agencies

On May 19, 1999, Bailey revised and resubmitted to the County his application for a state Wetland Conservation Act replacement plan. (Bailey Aff. Ex. 9.) The County's Soil and Water Conservation District determined that Bailey's new road impacted 2.91 acres of wetland in a shoreland area. (Id.) Bailey's revised replacement plan proposed the creation of 2.9 acres of wetland elsewhere in the County plus the application of credits Bailey had earned from the earlier restoration of a gravel pit. (Id.) The County gave representatives of the DNR and the Corps twenty days to comment on Bailey's modified application. (Id.) On June 17, 1999, the County OES issued a Notice of Wetland Conservation Act Decision to Bailey, the DNR, and the Corps, stating that the County had accepted Bailey's modified wetlands replacement plan. (Bailey Aff. Ex. 9.)

After receiving the County's decision on Bailey's wetland replacement plan, the Corps issued a public notice on June 24, 1999, regarding Bailey's application for an after-the-fact permit for the road, soliciting comments from the public and from federal, state,

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[3] Bailey and his wife assigned an account containing $10,000 as security for completion of the road. (Id. Ex. 5.)

local, and tribal agencies and officials. (Bailey Aff. Ex. 5.) The Corps described the project as follows:

> The applicant constructed the new road in 1998 by extending an existing road (Sandy Shores Drive) to the south as access for the 14 lots that were recently platted for this portion of shoreline. The applicant attempted to build the road to County standards so that the County would assume maintenance responsibility for it, as they have for the remainder of the road to the north. The County Highway Department has not yet determined if they will accept it.

(Id.) The notice indicated that the County's Soil and Water Conservation District had found that the project impacted about 2.91 acres of wetland, taking into account the two drainage ditches alongside the road. (Id.) The Corps also indicated that, as of the date of the public notice, Bailey had sold nine of the fourteen lakeshore residential lots. (Id.)

In late June 1999, Bailey purchased culverts and some gravel from the County Highway Department and continued making improvements to the Sunny Beach road. The Highway Department inspected the road on August 2, 1999, and decided that it complied with County standards.[4] (Bailey Aff. Ex. 5.) On November 5, 1999, the Highway Department sent a facsimile to the Corps stating that it should address any permit to the County because "the County has taken the road over."[5] (Bailey Aff. Ex. 10.)

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[4] On September 1, 1999, the County's Highway Department advised Norwest Bank in Baudette that the construction on the road for the Sunny Beach plat had been completed and the Baileys' assignment of an account to secure the road construction bond could be released. (Bailey Aff. Ex. 5.)

[5] The copy of the facsimile provided to the Court appears to be incomplete. The Court has only one page, yet the facsimile cover sheet indicates that the County Highway Department sent three pages to the Corps and refers to those pages in stating that it had

V. The Defendants' Evaluation of Bailey's Road Project

On December 19, 1999, the MPCA advised the Corps that it was certifying the Sunny Beach road project under § 401 of the CWA, provided that Bailey compensated for the lost wetlands on at least a 1:1 ratio and included an erosion management plan.[6] (Bailey Aff. Ex. 12.) Given all of the information before it, the MPCA concluded that there was a reasonable assurance that the Sunny Beach access road project would not violate applicable water quality standards. (Id.)

In late August 2000, staff from the Corps and the United States Department of Agriculture's Natural Resources Conservation Service ("NRCS") conducted an on-site wetland delineation for the Sunny Beach plat. (See Bailey Aff. Ex. 15.) On September 26, 2000, the Corps issued its wetland delineation determination, finding that most of the lots in Bailey's Sunny Beach plat consisted almost entirely of wetlands, with the exception of a few small isolated islands of upland. (See Bailey Aff. Ex. 13.) The Corps

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"taken the road over." (Bailey Aff. Ex. 10.)

[6] On October 14, 1999, representatives from the County OES had advised the MPCA that it was their opinion that

> because of the [coarse] gravelly nature of the subsoil . . . the water table could not establish itself to within at least a foot of the surface within 100 feet of the lakeshore. Although a specific wetlands delineation was not done, it appeared that the soils conditions in the area of the septic systems and buildings would allow for mound systems and occupied structures.

(Bailey Aff. Ex. 6.) The OES also indicated that "septic systems would likely not be permitted further from the lakeshore than 100 [feet] due to the lack of draw-down of the water table by the lake beyond that distance." (Id.)

also found that the impact of the road project consisted of not only the 1.58 acres of fill associated with the road itself but also 4.97 acres of drainage on the lots themselves. (Id.)

After receiving the Corps' wetland delineation determination, the MPCA issued a second letter in October 2000, revoking the § 401 certification for the road project. (Bailey Aff. Ex. 13.) The MPCA determined that construction of the access road would have not only a direct impact on the acreage involved in the road itself but also a secondary and cumulative impact on the wetlands found on the proposed lots. (Id.) "Since there is no upland or minimal upland on these lots, the developability of these lots must be considered at this time and, therefore, the need and justification for the access road." (Id.) The MPCA was specifically concerned about the lack of available upland on which septic systems could be placed in compliance with state regulations. (Id.)

On June 12, 2001, the Corps denied Bailey's request for an after-the-fact permit for the road, determining that issuance of a permit would be contrary to the public interest. The Corps observed that the purpose of the unauthorized road was to facilitate potential residential development in a hardwood swamp by providing vehicular access to the lots. (Id.) The Corps concluded that the access road had

> resulted in (1) approximately 1.45 acres of wetland fill; and (2) approximately 0.63 acre of wetland excavation for road ditches and discharge of that dredged material in the wetlands for use in constructing the road. A secondary adverse impact is that the ditches are now draining approximately 4.96 acres of adjacent wetlands.

(Id.) In addition to these 7.04 acres of hardwood swamp impacted by the road, the Corps noted that another approximately 1.3 acres had been cleared and/or filled for preliminary

lot development by landowners. (Id.) The Corps issued a public notice requesting comments from Bailey and the general public regarding what remedial actions were required at Sunny Beach.

VI. Consequences of the Defendants' Decisions

On October 22, 2001, after receiving comments from the public, the Corps issued a restoration order directing Bailey to remove the access road, fill in the ditches, and return the land to its natural state. (Bailey Aff. ¶ 17.) Bailey's deadline for compliance with the Corps' restoration order was in August 2002. To date, he has not complied with the order and has not removed the road.

On November 2, 2001, the Minnesota Commissioner of Natural Resources issued restoration orders to several lot owners, including Bailey, directing them to do one of the following by June 10, 2002: (1) remove the gravel and other fill material placed on the property, thus restoring the wetland, (2) submit an application for approval of a replacement plan to the County, or (3) apply to the County for an exemption or no-loss determination. (Bailey Aff. Ex. 18.) The State's restoration orders state that violation of their requirements will constitute a misdemeanor. (Id.)

In December 2001, Bailey filed an administrative appeal from the Corps' decision to deny his § 404 permit application. The Corps' decision was upheld in January 2002. To date, the Corps has not brought an enforcement action against Bailey for failing to comply with the restoration order.

Analysis

I. The U.S. Army Corps of Engineers' Motion

Of the three claims Bailey has asserted against the Corps, it moves to dismiss two.[7] It argues that sovereign immunity precludes this Court from deciding Bailey's challenge to the October 2001 Restoration Order. The Corps further contends that this Court lacks subject matter jurisdiction to consider Bailey's claim that the Corps violated Executive Order No. 12,630 because no private right of action exists to enforce that Executive Order.[8] The Corps moves to dismiss these two claims pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction.

A motion to dismiss for lack of subject matter jurisdiction may challenge the plaintiff's complaint either on its face or on the factual truthfulness of its averments. See Titus v. Sullivan, 4 F.3d 590, 593 (8th Cir. 1993); Osborn v. U.S., 918 F.2d 724, 729 n.6 (8th Cir. 1990). "[T]he trial court is free to . . . satisfy itself as to the existence of its power to hear the case." Osborn, 918 F.2d at 730, quoted in Faibisch v. University of Minn., 304 F.3d 797, 801 (8th Cir. 2002). Therefore, the Eighth Circuit has recently

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[7] The Corps is not moving to dismiss Bailey's claim seeking judicial review of the denial of the § 404 permit; it acknowledges that Bailey has exhausted his administrative remedies and that its decision is now a final agency action subject to judicial review under the Administrative Procedures Act.

[8] Together with an alleged violation of Executive Order No. 12,630, Bailey complains that the Corps has deprived him of property without just compensation. The Corps argues that the Court lacks jurisdiction over Bailey's taking and just compensation claim because, pursuant to the Tucker Act, a claim such as Bailey's (seeking over $10,000 in compensation) must be brought in the Court of Federal Claims. Bailey concedes that this Court does not have jurisdiction to decide whether denial of the "after-the-fact" permit has resulted in a taking. (Pl.'s Mem. Opp'g Mot. to Dismiss at 4.)

stated that a factual challenge to subject matter jurisdiction does not arise only when a court considers matters outside the pleadings; rather, a district court engages in a factual review of subject matter jurisdiction whenever it inquires into and resolves factual disputes. See Faibisch, 304 F.3d at 801. The plaintiff bears the burden of proof that jurisdiction does in fact exist. Osborn, 918 F.2d at 730. The Court evaluates the Corps' motion as a factual challenge to subject matter jurisdiction.

A. The October 2001 Restoration Order

Bailey claims that the Corps' order requiring removal of the road and full restoration of the wetlands is a final agency decision subject to review in this Court pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701 et seq. The Corps responds that the APA does not provide for judicial review of the restoration order -- and therefore sovereign immunity has not been waived -- for two reasons. First, the CWA precludes judicial review of a restoration order prior to enforcement. Second, the restoration order is not a final agency action. Bailey replies that, where a constitutional right is involved, there is an inherent right of appeal from an administrative agency's order.

The Supreme Court has explained that "[t]he APA confers a general cause of action upon persons 'adversely affected or aggrieved by agency action within the meaning of a relevant statute,' 5 U.S.C. § 702, but withdraws that cause of action to the extent the relevant statute 'preclude[s] judicial review,' 5 U.S.C. § 701(a)(1)." Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984). Bailey argues that there is no

express language in the CWA precluding judicial review of a CWA restoration order. (Pl.'s Mem. Opp'g Mot. to Dismiss at 3.) As the Supreme Court has pointed out, however, "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." Block, 467 U.S. at 345. The Corps here must establish by clear and convincing evidence that Congress intended to restrict access to judicial review. Lindahl v. Office of Personnel Mgmt., 470 U.S. 768, 778 (1985) (citing Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967)).

While the Eighth Circuit has not addressed the issue of a federal district court's review of a restoration or "cease-and-desist" order issued pursuant to the CWA prior to agency enforcement, other appellate and district courts have. The Corps relies on a line of cases beginning with Hoffman Group, Inc. v. Environmental Protection Agency, 902 F.2d 567 (7th Cir. 1990), and holding that a compliance order under the CWA cannot be reviewed by a federal court before the relevant agency (either the EPA or the Corps) undertakes to enforce it.[9] The Seventh Circuit in Hoffman Group observed that a civil action brought by the agency "is the only forum for enjoining violations of the Act," 902

[9] Bailey's argument that Hoffman is distinguishable from his case is not persuasive. As in this case, Hoffman Group was filling wetlands without a permit under the CWA. As in this case, Hoffman Group applied to the Corps for a "nunc pro tunc" permit to fill the area. As in this case, the Corps denied the permit application. Finally, as in this case, after the permit application was denied, Hoffman Group then received an agency order directing it to restore the site. Hoffman Group, 902 F.2d at 568.

F.2d at 569, and, thus, the recipient of a compliance order would always have an opportunity to challenge that order in court before being forced to comply with it. Id.; see also Southern Pines Assocs. v. United States, 912 F.2d 713, 716 (4th Cir. 1990) (reasoning that pre-enforcement judicial review would be contrary to Congress' intent that agencies be free to "act to address environmental problems quickly and without becoming immediately entangled in litigation"). The Seventh Circuit concluded that, because Congress had "provided a detailed mechanism for judicial consideration of a compliance order via an enforcement proceeding, [it] had impliedly precluded judicial review of a compliance order except in an enforcement proceeding." Hoffman Group, 902 F.2d at 569; see also Mullberry Hills Dev. Corp. v. United States, 772 F. Supp. 1553, 1557-58 (D. Md. 1991) (holding that CWA does not provide for review of Corps' cease-and-desist letter prior to the Corps instituting a proceeding to enforce it); McGown v. United States, 747 F. Supp. 539, 541-42 (E.D. Mo. 1990) (holding that pre-enforcement judicial review of Corps' restoration and cease-and-desist orders was unavailable). Indeed, were this Court to review the Corps' restoration order before the Corps brought an action to enforce it, the Court would effectively negate the discretion Congress had reposed with the agency to decide whether or not to bring an enforcement action.

Bailey has cited no case squarely on point with the facts of this case that has reached a contrary result to Hoffman Group and its progeny. Nor has the Court found any. The reasoning of the appellate and district court cases discussed above is persuasive; accordingly, the Court holds that pre-enforcement judicial review is not available for a

restoration order issued by the Corps. The Corps' motion with respect to Bailey's challenge to the restoration order will be granted; that claim will be dismissed without prejudice to Bailey's ability to assert the same arguments in any enforcement action brought by the Corps.[10]

B. Executive Order No. 12,630

Bailey claims that the Corps' regulations, and its administration of those regulations, violate Executive Order No. 12,630, which requires governmental agencies to prepare a takings implication assessment for its actions. The Corps argues that no private right of action exists under the Executive Order because, by its own terms, the Executive Order is "intended *only* to improve the internal management of the Executive branch *and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person*." Exec. Order No. 12,630, § 6, 53 Fed. Reg. 8859, 8862 (Mar. 15, 1988) (emphasis added). Bailey offers no compelling response to this argument. Nor does he address the two district court opinions that have held that Executive Order 12,630 does not provide a private right of action. Duval Ranching Co. v. Glickman, 965 F. Supp. 1427, 1446 (D. Nev. 1997); McKinley v. United States, 828 F. Supp. 888, 892-93 (D.N.M. 1993). While the Eighth Circuit has not yet decided whether a private right of action exists under

[10] Because the Court reaches this conclusion, it need not address the Corps' alternative argument that the restoration order cannot be reviewed under the APA because it is not a final agency action.

Executive Order 12,630, the Court finds persuasive the reasoning of the district court opinions cited above. Accordingly, the Court holds that no private cause of action under Executive Order No. 12,630 exists. Bailey's claim for a declaration that the Corps has violated Executive Order 12,630 will be dismissed with prejudice.

II. The State Agency Defendants' Motion

The MPCA and DNR move pursuant to Rule 12(b)(1) to dismiss Bailey's claims seeking judicial review of the MPCA's October 2000 decision to revoke its § 401 certification of the road project and the DNR's restoration order for the lots in the Sunny Beach development that Bailey owns. The State Defendants argue that these claims must be dismissed based on Eleventh Amendment immunity from suit. As an alternative to his claims seeking a declaration that the State Defendants' actions are invalid, Bailey alleges that their actions have caused a taking of property without just compensation. The State Defendants move to dismiss the takings claim on the ground that Bailey has failed to pursue all available state condemnation remedies and found them to be inadequate. The Court considers each argument in turn.

A. Eleventh Amendment Immunity

The State Defendants contend that the Eleventh Amendment bars Bailey's claims regarding the validity of the MPCA's § 401 certification decision and the DNR's restoration order because (1) Congress has not abrogated the state's sovereign immunity from suit in federal court on these claims and (2) the state has not expressly consented to suit in federal court. The Eleventh Amendment states that "[t]he judicial power of the

United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const., amend. XI. The Supreme Court has interpreted the Eleventh Amendment's prohibition to encompass suits by *all persons*, including citizens of the same state, against a state in federal court. Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 304 (1990); Hans v. Louisiana, 134 U.S. 1, 13 (1890). Bailey does not contend that Congress has abrogated the State's immunity. Indeed, he acknowledges that his claims against the State Defendants do not arise under the Court's federal question jurisdiction, but rather fall under the Court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

Bailey resists the Eleventh Amendment argument by contending that the State has waived its immunity from suit, relying on the Eighth Circuit's statement that "[a] state may . . . waive its Eleventh Amendment immunity through its conduct." Hankins v. Finnel, 964 F.2d 853, 856 (8th Cir.) (citations omitted), cert. denied, 506 U.S. 1013 (1992). According to Bailey, the conduct through which the State Defendants have waived their immunity is their reliance on the Corps' decisions for their actions. Bailey specifically complains that the DNR and MPCA relied on the Corps' determination that the "Sunny Beach" subdivision consisted almost entirely of wetlands and its decision to deny the "after-the-fact" § 404 permit application. Bailey further argues that, because his claims against the state agencies fall within the scope of the supplemental jurisdiction statute, subject matter jurisdiction exists.

Hankins, on which Bailey relies, does not support his waiver argument. In Hankins, the State of Missouri voluntarily defended a state employee, William Finnel, who had been sued in his individual capacity in a § 1983 action for allegedly sexually molesting Hankins during the time he taught at the penitentiary school Hankins attended. Hankins, 964 F.2d at 854. Shortly before the Eighth Circuit affirmed the jury's verdict in Hankins's favor, the State started an *ex parte* state court action, although it knew Hankins was represented by counsel, seeking to attach Hankins's assets (i.e., the judgment) as reimbursement for the costs of his incarceration. Id. at 854-55. The State caused a credit to be made to Hankins's prisoner account for an amount equivalent to the judgment and, the same day, caused a debit for "cell reimbursement" to be made. Id. at 858. Hankins returned to federal district court to enforce his judgment and conduct proceedings in aid of execution. Id. at 855. When the district court enjoined the State from attaching the funds in question, which were being held by a receiver, the State asserted Eleventh Amendment immunity.

The Eighth Circuit affirmed the district court's conclusion that the State had waived its Eleventh Amendment immunity by its conduct. After voluntarily representing Finnel, and agreeing to pay any judgment entered against him, the State took action by "satisfying Hankins' judgment and then immediately attempting to recoup it." Id. at 857. The Eighth Circuit concluded that, *with respect to the litigation*, the State acted "to the advantage of and for the benefit of itself," and engaged in conduct effectively the same as reneging on a promise to pay. Id. at 858. The Eighth Circuit concluded that, in light of

the "narrow and unique factual situation presented in this case," id. at 858 n.6, the State had made a limited waiver of its Eleventh Amendment immunity with respect to the judgment against Finnel. Id. at 858-59.

The conduct relevant to a waiver in Hankins occurred in the context of the lawsuit; it did not arise due to pre-litigation conduct by the State. Since Hankins, the Eighth Circuit and other courts of appeal have determined whether a waiver of immunity has occurred by examining the extent to which the state participated in the lawsuit and whether it has defended the case on its merits. See In re SDDS, Inc., 225 F.3d 970, 973 (8th Cir. 2000), cert. denied sub. nom South Dakota v. SDDS, 532 U.S. 1007 (2001); College Sav. Bank v. Florida Prepaid Post-secondary Educ. Expense Bd., 131 F.3d 353, 365 (3d Cir. 1997) (collecting cases), aff'd, 527 U.S. 666 (1999); see also Santee Sioux Tribe of Neb. v. Nebraska, 121 F.3d 427, 431 (8th Cir. 1997) (holding that Nebraska assistant attorney general's conduct in answering complaint and filing counterclaim did not waive state's Eleventh Amendment immunity because there was no showing that attorney general was specifically authorized to do so by state constitution, statute, or decision). Bailey cites no authority supporting his contention that the MPCA and DNR's consideration of the Corps' wetland delineation, prior to the litigation, gives rise to a waiver of their immunity from suit in federal court. Nor has the Court found any. The Court concludes that Bailey has failed to establish a waiver of Eleventh Amendment immunity by conduct.

Bailey's argument that his claims regarding the validity of the MPCA and DNR's

actions fall within § 1367's grant of supplemental jurisdiction does not solve his Eleventh Amendment problem, either. The Supreme Court has recently held that "[section] 1367(a)'s grant of jurisdiction does not extend to claims against non-consenting state defendants." Raygor v. Regents of Univ. of Minn., 534 U.S. 533, 542 (2002). As § 1367(a) does not authorize a district court to exercise jurisdiction over claims against non-consenting state defendants, it cannot "trump" the Eleventh Amendment.

The Court concludes that Bailey has failed to meet the stringent requirements necessary to establish that the State agency Defendants have waived their Eleventh Amendment immunity from suit in federal court. Accordingly, the Court will grant the motion with respect to Bailey's challenges to the MPCA and DNR's agency actions.

B. Ripeness of Bailey's Takings Claims

Bailey alleges, in the alternative, that even if the agencies' actions are valid, they constitute a taking of property without just compensation. Assuming that Bailey's takings claims against the MPCA and DNR are based on the Fifth Amendment's Just Compensation Clause, the State Defendants argue that his claims are not ripe because he has failed to satisfy the state-proceeding exhaustion requirement set forth in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985). In Williamson, the Supreme Court held as follows:

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time

> of the taking. If the government has provided an adequate process for obtaining compensation, and if resort to that process yield[s] just compensation, then the property owner has no claim against the Government for a taking. Thus, . . . if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Williamson, 473 U.S. at 194-95 (internal citations and quotation marks omitted). The State of Minnesota provides a process by which plaintiffs may be compensated for any takings of property. Pursuant to the Minnesota Constitution, Article I, section 13, private property may not be taken, destroyed, or damaged for a public purpose without just compensation. To enforce this provision, a plaintiff may bring an inverse condemnation action. See, e.g., Wilson v. Ramacher, 352 N.W.2d 389, 394 (Minn. 1984). Bailey has not shown that the existing state procedures are either unavailable or inadequate, and until he has utilized those procedures, a federal takings claim is not ripe for adjudication.

Accordingly, until Bailey seeks relief in a state court inverse condemnation action and relief is denied, his claim of a taking without just compensation is not ripe for decision by a federal court. This Court therefore lacks subject matter jurisdiction, and the State Defendants' motion to dismiss will be granted. Bailey's takings claims will be dismissed without prejudice.

III. Lake of the Woods County's Motion

Bailey claims that he relied to his detriment on statements made by the County to him about having taken possession and ownership of the Sunny Beach access road. He asserts that he has been harmed due to his reliance because the County failed to follow

through on its application for a permit from the Corps. Bailey further claims that he relied to his detriment on the County's guidance and direction to comply with state law. The County argues that this "detrimental reliance" claim is barred by res judicata or, in the alternative, must be dismissed for failure to state a claim upon which relief can be granted. Bailey also asserts a claim against the County for an uncompensated taking of his property. The County argues that this claim is not ripe for adjudication under Williamson because Bailey has failed to exhaust available state court remedies. The Court begins with Bailey's detrimental reliance claim.

A. The Detrimental Reliance Claim

The County argues that Bailey's detrimental reliance claim must be dismissed either because it is barred by Bailey's earlier state court settlement with the County and the Wolfs or because it simply fails to state a claim upon which relief can be granted. The Court begins with the issue of res judicata.

In late March 2001, after the MPCA had revoked its § 401 certification for the Sunny Beach access road, but before the Corps denied Bailey's application for the after-the-fact permit, David J. and Charmaine C. Wolf sued Bailey in state court, alleging that he had breached certain warranties in the parties' February 1999 purchase agreement, including warranties that (1) the road providing access to the lots was a public right of way and (2) he had received no notice from any Governmental authority as to violations of any law, ordinance, or regulation. (Girouard Aff. Ex. 1 (Compl., Wolf v. Bailey, No. C6-01-60 (Minn. Dist. Ct. dated Mar. 27, 2001).) The Wolfs further alleged that Bailey

had not told them their lots were classified as wetlands and were subject to wetlands mitigation statutes and several other restrictions. (Id.) The Wolfs complained that they were unable to build a lake cabin on the property they purchased from Bailey. (Id.)

On April 25, 2001, Bailey answered the Wolfs' Complaint and asserted a "cross-claim," -- actually, a third-party complaint -- against the County seeking contribution and indemnity. Bailey alleged that the land for the road had been granted to the County during the course of construction and that compliance with any applicable federal, state, or local laws was the County's responsibility "at the time the platted roads were dedicated." (Girouard Aff. Ex. 2 (Answer and Cross-Claim, Wolf v. Bailey, No. C6-01-60), Cross-Claim ¶ IV.) Bailey further asserted that, prior to the County's acceptance of the plat, it had reviewed and approved all of Bailey's actions regarding the road and had agreed to accept responsibility for the road's completion. (Id., Cross-Claim ¶ V.) Bailey claimed that the County had "maintained the road, exclusively controlled the road and, in fact led . . . Bailey to believe that all legal requirements and compliance with all state, federal and local regulations and ordinances had been met or would be fulfilled by [the County]." (Id., Cross-Claim ¶ VI.) Ultimately, Bailey alleged, the County had induced him (and the Wolfs) to believe that there was no lack of access to the "Sunny Beach" lots. (Id., Cross-Claim ¶ VII.)

On September 19, 2001, the Wolfs, Bailey, and the County filed a Stipulation and Order for Dismissal With Prejudice and Without Costs. As of the date of the dismissal with prejudice, the Corps had already denied the "after-the-fact" permit for the road, and

issued a public notice requesting comments from Bailey and the general public as to the remedial actions that would be required at Sunny Beach.

The County contends that Bailey's agreement to dismiss *with prejudice* his state court action against the County operates as res judicata bar as to the "detrimental reliance" claims asserted in this action. The County contends that the same allegations made against it here were also made in the Bailey's third-party complaint in the state court action. A prior Minnesota state court judgment is entitled to the same preclusive effect in federal court as it would receive in Minnesota. Sondel v. Northwest Airlines, Inc., 56 F.3d 934, 937 (8th Cir. 1995) (citing 28 U.S.C. § 1738).

> The doctrine of res judicata (claim preclusion) bars a claim when litigation on a prior claim involved the same cause of action, there was a judgment on the merits, and the claim involved the same parties or their privies. . . . In addition, the party against whom res judicata is applied must have had a full and fair opportunity to litigate the matter in the prior proceeding. . . . If those requirements are met, res judicata bars not only claims as to matters actually litigated, but also as to every matter that might have been litigated in the prior proceeding.

Nelson v. American Family Ins. Group, 651 N.W.2d 499, 511 (Minn. 2002) (internal citations omitted). A dismissal with prejudice based on a stipulation is a final adjudication on the merits. State Bank v. Western Cas. & Sur. Co., 178 N.W.2d 614, 617 (Minn. 1970) (citing Melady-Briggs Cattle Corp. v. Drovers State Bank, 6 N.W.2d 454, 457 (Minn 1942). The Court concludes that there is no question that the same parties are involved and that the stipulated dismissal *with prejudice* was a judgment "on the merits" in the state court action. The only remaining issue is whether this action and Bailey's

third-party complaint in state court involve the "same claim."

Bailey argues that his claims against the County in this action are not the same as the claim he asserted against the County in his third-party complaint in state court. He contends that the state court action was limited to the three parcels of land owned by the Wolfs, and did not involve the access road. He further contends that the claims asserted against the County in the state court action were only for contribution; therefore, his common law claims against the County were never before the state court. Neither of these arguments has merit.

The Wolfs, in their Complaint against Bailey, had clearly put the viability of the road at issue. Furthermore, Bailey's third-party claim against the County made several factual assertions regarding the County's handling of the road – allegations that are mirrored in the present lawsuit. The legal theory by which a claim is labeled does not matter for purposes of claim preclusion. Under Minnesota law, the test for determining whether two successive suits involve the same claim is "whether both actions arise from the same operative nucleus of facts." Nitz v. Nitz, 456 N.W.2d 450, 451 (Minn. Ct. App. 1990) (holding that a change in legal theory cannot be used to avoid res judicata); see also Amalgamated Meat Cutters v. Club 167, Inc., 204 N.W.2d 820, 821 (Minn. 1973) (framing test to determine if two claims are identical as whether same evidence will support both judgments); Paulos v. Johnson, 597 N.W.2d 316, 319 (Minn. Ct. App. 1999); Anderson v. Werner Continental, Inc., 363 N.W.2d 332, 335 (Minn. Ct. App. 1985). The Court concludes that the facts underlying both actions are the same. With

respect to both suits, Bailey has alleged that the County (1) accepted the Sunny Beach plat, (2) provided "advice and guidance" to him as he sought to obtain state and federal approval for the road, and (3) ultimately "took over" the road and the responsibility for following through on the permit applications relating thereto. Bailey has not demonstrated that he could not have brought claims against the County for "detrimental reliance" or "negligence" in the state court action, given Minnesota's liberal procedural rules for joinder of claims and parties, which are modeled on the Federal Rules of Civil Procedure. Claim preclusion bars Bailey's common law claims against the County regarding the access road. The Court will dismiss those counts with prejudice.

B. Ripeness of Bailey's Takings Claim.

The Court has dealt with the issue of whether Bailey's takings claims are ripe above in section II.B. In light of Williamson, and for the reasons set forth above, the Court concludes that Bailey's takings claim against the County is similarly not ripe for adjudication and must be dismissed without prejudice.[11]

Conclusion

Based on the foregoing, and all of the files, records and proceedings herein, **IT IS ORDERED** that

1. The United States' Motion to Dismiss (Doc. No. 13) is **GRANTED**;

2. The State Agencies' Motion to Dismiss (Doc. No. 21) is **GRANTED**; and

[11] Having concluded that Bailey's takings claim is not ripe, the Court does not reach the County's arguments that he has failed to state a legally viable claim for a taking.

3. Lake of the Woods County's Motion to Dismiss (Doc. No. 18) is **GRANTED**.

IT IS FURTHER ORDERED that the following counts and prayers for relief in Plaintiff Gary Bailey's Complaint are **DISMISSED WITHOUT PREJUDICE**:

Paragraphs 32-39 and Prayer for Relief No. 2;

Paragraphs 44-52 and Prayer for Relief No. 5;

Paragraph 57 and Prayer for Relief No. 8; and

Paragraphs 59-62 and Prayer for Relief No. 9;

IT IS FURTHER ORDERED that the following counts and prayers for relief are hereby **DISMISSED WITH PREJUDICE**:

Paragraphs 40-42 and Prayer for Relief No. 3;

Paragraphs 53-56 & 58 and Prayer for Relief Nos. 6 and 7

Dated: November 21, 2002

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RICHARD H. KYLE
United States District Judge