UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF OHIO, ex rel. MICHAEL DEWINE, OHIO ATTORNEY GENERAL, 30 East Broad St., 25th Floor Columbus, Ohio 43215 Plaintiff, v. UNITED STATES ARMY CORPS OF ENGINEERS; THE HONORABLE JOHN M. McHUGH, SECRETARY OF THE UNITED STATES ARMY; THE HONORABLE JO-ELLEN DARCY, ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS; LIEUTENANT GENERAL THOMAS P. BOSTICK, CHIEF OF ENGINEERS AND COMMANDING GENERAL, UNITED STATES ARMY CORPS OF ENGINEERS; BRIGADIER GENERAL RICHARD G. KAISER, UNITED STATES ARMY CORPS OF ENGINEERS, GREAT LAKES AND OHIO RIVER DIVISION; AND LIEUTENANT COLONEL KARL D. JANSEN, DISTRICT COMMANDER, UNITED STATES ARMY CORPS OF ENGINEERS, BUFFALO DISTRICT, Defendants.	CASE NO. 1:15-cv-00679-DCN **BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO EXTEND THE PRELIMINARY INJUNCTION**

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SUMMARY OF ARGUMENT

The State of Ohio and the Cleveland-Cuyahoga County Port Authority (the "State") have moved to "extend" the preliminary injunction issued last year only as to 2015 dredging to now encompass a mandate to dredge as the State demands in 2016, asserting that "the facts this year are substantially similar to the facts that triggered initial preliminary relief last year." Pls.' Mem. in Supp. of Pls.' Mot. to Extend or Modify the Prelim. Inj., Dkt. No. 84-1 at PageID.4953. But the State is wrong in claiming that the facts this year are "substantially similar" or even remotely parallel to those last year—and particularly in its claim that the Corps is "again threatening not to dredge the full Cleveland Harbor unless a non-Federal sponsor pays for the Corps' environmental obligations." Dkt. 84-1 at PageID.4938. To the contrary, at this time and based on regular monitoring of the navigability of the Harbor, the Corps has not concluded that dredging the Cleveland Harbor navigation channel is necessary *at all*. The Court should reject the State's request that the Court serve not only as a judicial monitor of when and how the Corps dredges, but also whether dredging is necessary at all.

Moreover, even if the facts were the same as last year (which they are not), Plaintiffs arguments are erroneous, they fail to address controlling Supreme Court precedent, misunderstand the Corps' budget process and Congress's lump-sum appropriations to the Corps, and request a mandamus style injunction despite the absence of evidence supporting this result. More particularly, these errors include:

- Misunderstanding the Corps' budgetary process and erroneously finding that Congress had enacted specific approval and funding for the Cleveland Harbor dredging project, thereby creating a duty to dredge, *see infra* at 4-8, 17-21;

- Failing to consider controlling Supreme Court precedent in *Lincoln v. Vigil,* 508 U.S. 182, 192 (1993), which establishes that lump sum appropriations do not create legally binding restrictions, *see infra* at 18-19;

- Misunderstanding the Water Resources Development Act's ("WRDA") general statement that the Corps shall "expedite" maintenance in the Great Lakes and Connecting channels generally to mandate dredging of Cleveland Harbor specifically, *see infra* at 15-17;

- Conflating the State of Ohio's consideration of its water quality standards with the Corps' independent Federal assessment of those standards and treating Ohio's denial of a water quality certification ("WQC") as controlling upon the Corps' discretionary dredging and disposal activities in a particular way, *see infra* at 22-26;

- Concluding that the state stood to suffer the prospect of any non-financial harm, including in particular that the case involved the prospect of environmental harm, *see infra* at 28-32; and

- Concluding that the Corps was holding dredging "hostage," when Corps regulations constrain it from spending the funds for Confined Disposal Facility ("CDF") disposal that the State demands, *see infra* at 23 n.20.

The State's emergency motion asks for mandamus relief that is not authorized in an action for judicial review brought under the Administrative Procedure Act ("APA"): a Court order requiring dredging a river, at a cost of millions of dollars to the Federal government when the expert agency evaluating the need for such dredging has not concluded it is necessary. As demonstrated below, the State seeks this relief despite the fact that, if it disagrees as to the necessity of dredging or how best to dredge, the State itself could obviate the need for injunctive relief by undertaking to dredge itself or simply paying the costs of whatever dredging it felt was necessary. Despite its ability to accomplish the relief it seeks without this litigation the State not only moves this Court for an emergency injunction, but does so without citing a single statute or regulation that establishes any mandatory duty for the Corps to dredge the entire Upper Cuyahoga River channel. Contrary to what the State asserts, cases uniformly establish that the Corps has substantial—and indeed, unreviewable—discretion in dredging the rivers and harbors of United States. But even if the Corps' discretion under its statutory authorities does not preclude judicial review, it forecloses any finding of a specific and clear-cut ministerial duty. Because an affirmative, mandatory injunction to dredge is not proper under the APA, the State is unlikely to succeed on the merits of this claim.

The State has also failed to show that it meets the high burden for injunctive relief. There is no harm to the State as the navigation is currently unimpeded; and any alleged harm to the State is not immediate nor irreparable. A finding that the Corps must dredge or conduct costly and unnecessary disposal activities would take money from other critical Corps priorities. Further, mandatory CDF disposal at sole Federal expense, when not warranted, harms the public interest through the financial and environmental costs of these large and costly facilities; as Congress has recognized, their capacity must be used judiciously "such that the need for new dredged material disposal areas is kept to a minimum." 33 U.S.C. § 419a. Because the State has not met its burden of showing that any of these factors favor an injunction, the Court should deny the State's motion.

FACTUAL BACKGROUND

I. Sediment from Cleveland Harbor Is Suitable for Open-Lake Disposal.

Although the State tries to characterize the Corps as a polluter, Dkt. 84-1 at 4956, for roughly forty years the Corps has *removed* contaminated sediment from Cleveland Harbor, at great federal cost. Dkt. 84-1 at PageID.4944; *see also* Czekanski Decl. ¶ 13.[1] As the State acknowledges, it was and is Ohio's responsibility to ensure that additional pollutants did not enter Ohio's waterways, including the Cuyahoga River and the greater Cleveland Harbor, *see* Dkt. 84-1 at 4956; *see also, e.g.*, 33 U.S.C. §§ 1313, 1341, 1342; Ohio Rev. Code §§ 3745-1, *et seq*., but until recently, the Corps' scientific testing revealed that new sediment l in Cleveland Harbor remained unsuitable for open-lake placement. *See* Czekanski Decl. ¶ 13; Index 62 at AR0005045. The Corps dredging program, in contrast, has not added contaminants to the river from the shore, but rather removed them.

In 2014, scientific testing revealed that the sediment from Cleveland Harbor was suitable for open-lake placement and the Corps determined that this method of disposal was the Federal

[1]The Cuyahoga River's environmental situation has been "greatly helped" by Corps dredging. .*See* Callie Bolattino, U.S. EPA, *A Summary of Contaminated Sediment Activities With the United States Great Lakes Areas of Concern* 55 (1994).

Standard. Czekanski Decl. ¶ 13. Even after determining that open-lake placement was the Federal Standard, the Corps continued to assess the sediment quality in light of additional sampling performed by the Corps and Ohio EPA in 2014 and 2015. Czekanski Decl. ¶ 15; Pickard Decl. ¶¶ 4-6. These tests confirmed that the sediment was suitable for open-lake placement. Pickard Decl. ¶¶ 7-13; Czekanski Decl. ¶ 15. In particular, the Corps determined that the sediment was not toxic and did not exhibit greater toxicity than the sediment already present at the proposed disposal site, and that differences in PCB bioaccumulation observed in laboratory tests between the reference sediment and channel sediment did not demonstrate meaningful ecological effects when considered under the standard established by an independent standard-setting body. Pickard Decl. ¶¶ 8-12. Moreover, Ohio has previously issued WQCs authorizing the discharge of dredged material was comparable to the channel sediment. Pickard Decl. ¶ 13.[2]

II. The Corps' Budgetary Process[3]

The State asserts the Corps has "manipulated" its budget proposal to "force Ohio to pay its costs." Dkt. No. 84-1 at PageID.4948. This is a distortion of the Corps' actions, and a misunderstanding of the budget process and Congress's action. As part of the normal budget process, the Corps transparently and in good faith provided to Congress its budget request and updates thereto as they were required. Congress then, consistent with past practice, appropriated

[2] The State's claim that the data shows that "testing by the Ohio EPA and by the Corps in 2015 have both shown that the Harbor sediment is approximately five times more polluted than Lake background conditions and approximately two times more polluted then CLA-1" is misleading and inaccurate. Pickard Decl. ¶ 7 (explaining bulk concentrations of total PCBs in the channel and background sediments, as well as reference sediments were similar, and that observed laboratory PCB bioaccumulation from channel sediments was within the range observed in background sediments).

[3] In its briefing in 2015, the Corps noted that its funds for operations and maintenance projects at Cleveland Harbor "are allocated from a single O&M appropriation that funds Corps projects throughout the country, and can be redirected to any other authorized project." Dkt. 25 at PageID.2058; see also Dkt. 25-1 (noting the Corps' allocation of this lump sum among its projects). The Corps provides the following more comprehensive explanation of the budgetary, appropriations, and reprogramming process as applicable to Cleveland Harbor in light of the State's mischaracterization of these processes, the Court's conclusion that the Corps had a duty to dredge in 2015 based on the view the Corps had received specific Congressional approval and funding to dredge, Dkt. 33 at 10, and new, more detailed information provided by the Corps since the Corps' briefing was submitted in 2015.

money in a lump sum for use at the Corps' discretion. Notably, while Congress could have elected to expressly specify funds in the Appropriations Act itself for use on CDF-placement of dredged materials from Cleveland Harbor, *it did not do so*.

Specifically for fiscal year 2016, the Corps' initial budget was submitted to the Office of Management and Budget in September 2014, approximately two years before the 2016 dredging season. *See* McKee Decl. ¶ 11. The Corps' initial recommended FY16 budget for Cleveland Harbor included funding to CDF place all of the dredged material, which was the designated Federal Standard at that time. On December 17, 2014, the Buffalo District determined that the Federal Standard for the upper reach of the Cleveland Harbor Navigation Channel is open lake placement.[4] McKee Decl. ¶ 313; Czekanski Decl. ¶ 13. Each year, at Congress' request, the Corps provides adjusted budget recommendations to Congress during conference negotiations over the House- and Senate-passed appropriations bills.[5] 17In November 2016, the Corps made this submission and, based on the updated Federal Standard designation, determined it was appropriate to adjust the FY16 budget request to reflect the reduction in necessary funds to dredge Cleveland Harbor. McKee Decl. ¶ 1616-17. Failure to adjust accordingly would have been inconsistent with the Federal Standard and an inaccurate representation of the Corps' budgetary needs. McKee Decl. ¶ 14.

It is common for the Corps to adjust, and present to Congress, its budget requests at this juncture when circumstances such as the Federal Standard change. McKee Decl. ¶ 14. Indeed, in the 2016 Appropriation Act alone, the Corps submitted thirty other adjustments in addition to that related to Cleveland Harbor. McKee Decl. ¶ 15. As merely one example, based on the conditions at

[4] Although the Corps had designated the Federal Standard as open lake placement for the upper reach of the navigation channel on December 17, 2014 the window of opportunity to adjust the FY15 budget had passed which is why the FY15 budget does not similarly show the reduced funding request. McKee Decl. ¶ 12 n.1.
[5] *See* Jessica Tollestrup, Cong. Research Serv., *The Congressional Appropriations Process: An Introduction* 8-9 (2014).

Honolulu harbor, the Corps elected to defer dredging until a later date, and as a result reduce the amount it requested for this harbor. *Id.* at ¶ 15 n.2. As pertinent here, on November 9, 2015—before the appropriations bill was final—the Corps submitted its adjusted request to Congress, with a spreadsheet reflecting the original budget request (made when the Federal Standard required CDF placement) and the adjusted request consistent with the new, less costly Federal Standard of open-lake placement. *Id.* at ¶¶ 17-18.

Had Congress wished to specifically appropriate funds for CDF-placement of dredged materials from Cleveland Harbor, Congress had a number of avenues to accomplish this, including directly placing a line item in the Appropriation Act itself. Congress did not take this action, and choose instead to provide a lump sum. The final Act provides the following Appropriation to the Corps under the heading "Operation and Maintenance:

> For expenses necessary for the operation, maintenance, and care of existing river and harbor, flood and storm damage reduction, aquatic ecosystem restoration, and related projects authorized by law; providing security for infrastructure owned or operated by the Corps . . . $3,137,000,000 . . . .

Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2399. Accompanying the Act is legislative history called an explanatory statement (often called a "statement of managers").[6] In the relevant part, regarding Operation and Maintenance, the explanatory statement includes a table that states: "The agreement includes $3,137,000,000 for Operation and Maintenance. The allocation for projects and activities within the Operation and Maintenance account is shown in the following table." 161 Cong Rec. H9694. The table lists Cleveland Harbor as originally requesting $9.54 million, adjusted to $5.94 million in conference, reflecting the less-costly method of open lake placement as explained above. 161 Cong Rec. H9694, H10092 (daily ed. Dec. 17, 2015)).

[6] Christopher M. Davis, Congressional Research Service, Conference Reports and Joint Explanatory Statements, Report 98-382, 7-5700 (June 11, 2015), at 1.

The Appropriations Act provides that the Secretary shall initially allocate its funds in accordance with the explanatory statement. *See* 129 Stat. at 2402at ("The Secretary shall allocate funds made available in this Act solely in accordance with the provisions of this Act and the explanatory statement . . ."). Allocation is a term of art in the budget execution and control context meaning "subdivisions of apportionments that are made by the heads of agencies." Office of Management and Budget Circular A-11 ("OMB Circular A-11") (2016) at Appx. H, page 2-3.[7] After the Office of Management and Budget apportions funds to the various agencies, the agencies then further allocate these funds to specific programs and projects by placing them in appropriate accounts. General Accounting Office, Glossary of Terms (1993), at p.12; OMB Circular A-11 at Section 20, page 2. Therefore, as relevant to this case, Congress directed that in accordance with the explanatory statement, the Secretary is to allocate specific amounts including $5.94 million designated for "Cleveland Harbor, Ohio," from the OMB apportionment of the $3.1 billion appropriation for Operations and Maintenance. 161 Cong. Rec. at H10084.

Congress's use of the term "allocation" is important—a direction to the agency to allocate funds is distinct from a requirement to obligate and expend funds. *See infra* at 17-21. By directing the Corps to "allocate" funds, Congress has allowed to the Corps discretion to reprogram funds that were initially allocated to one project within a parent appropriation (here Operation and Maintenance) to other projects within this same parent appropriation as provided by the Appropriations Act, other applicable law, and Corps guidance. *See infra* at 17-21; U.S. Gov't Accountability Office, 2 GAO-RB pt. B, § 7, *Office of the General Counsel, Principals of Federal Appropriations Law, Legal Framework, The Budget and Appropriations Process, Transfer and Reprogramming*

[7] Available at https://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/app_h.pdf

(4th ed. 2016 Revision), 2016 WL 1275442, at *6 (Mar. 2016) ("GAO Redbook")[8]; McKee Decl. ¶ 26.

III. The Corps' 2016 Dredging Plans

On November 20, 2015, the Corps submitted a WQC application to the Ohio EPA, requesting certification that open-lake placement of dredged material from the Upper Cuyahoga River Channel in Cleveland Harbor does not violate state water quality standards. Czekanski Decl. ¶ 16. Although the Corps could not then determine whether or what amount of dredging of Cleveland Harbor was warranted, the Corps submitted these materials as part of its advance planning in order to ensure that it was in a position to engage in dredging and sediment disposal, should it prove necessary. Czekanski Decl. ¶¶ 17-18; *see also* Asquith Decl. ¶¶ 3-4.[9] For similar reasons—to ensure it was able to dredge if necessary—the Corps continued its evaluation of sediment in Cleveland Harbor, ultimately concluding that the data continued to show that the sediment was suitable for open-lake placement, and likewise went forward with its regulatory process and obtaining contract bids. Czekanski Decl. ¶¶ 20-23, 25. On March 22, 2016, the Corps received a WQC from Ohio EPA which did not authorize open-lake placement of dredged material from Cleveland Harbor. Czekanski Decl. ¶ 21. The Corps will not engage in open-lake placement without a WQC authorizing it to do so. Czekanski Decl. ¶ 11.

The Corps has been actively monitoring the depth in Cleveland Harbor and has not made a decision about whether dredging is necessary at all, where in the channel it may be necessary to

[8] The GAO RedBook is a multi-volume treatise concerning federal fiscal law that is not binding but courts look to for guidance. *See Star–Glo Assocs., LP v. United States*, 414 F.3d 1349, 1354 (Fed.Cir.2005) ("In considering the effect of appropriations language both the Supreme Court and this court have recognized that the General Accounting Office's publication, Principles of Federal Appropriations Law (hereinafter the 'GAO Redbook') provides significant guidance." (citations omitted)); *see also Ramah Navajo Chapter*, 644 F.3d at 1083.

[9] Corps dredging projects often require the Corps to make adjustments or use its technical judgment and discretion as to how best to use its limited resources as it obtains better knowledge during a given year. See Czekanski Decl. ¶ 6; Asquith Decl. ¶¶ 3-4.

dredge this harbor, or in what manner it may dispose of any dredged sediment.[10] Czekanski Decl. ¶ 29, 32. Specifically, the Corps has surveyed the status of the Cleveland Harbor federal navigation channel in late March/early April of 2016, on June 1, 2016, and on July 14, 2016. Asquith Decl. ¶¶ 7-8. The most recent survey on July 14, 2016, established that the vast majority of the Cleveland Harbor federal navigation channel is at or below the authorized project depth to which the Corps typically attempts to dredge. Asquith Decl. ¶¶ 7-8. Due to high water levels, even in the portions of the channel in which sediment has accrued to above the authorized project depth, there is still at least an equivalent amount of draft (23 feet) as the authorized project depth. Asquith Decl. ¶ 7. This survey was consistent with the Corps' past surveys—indeed, channel conditions are essentially unchanged since April 2016—and showed that there is sufficient width and depth to navigate the channel. Asquith Decl. ¶¶ 7-8; *see also* Decl. of Glen Nekvasil ¶¶ 6-7, Dkt. 84-19 at ¶¶ 6-7.

Other information confirms the survey results demonstrating that the channel remains navigable. In past years in which navigation was significantly impaired in the channel, the Corps was informed of this issue by the users of the channel; this year, no channel users have contacted the Corps' project manager for the Buffalo District's operations and maintenance dredging program to express such concerns. Asquith Decl. ¶ 6. Indeed, the State concedes in its motion that navigation on the channel is not currently impaired in any significant manner, but simply speculates that such

[10] In a footnote the State makes the extraordinary allegation that the Corps is "blatantly disregard[ing]" this Court's May 12, 2015 Order and is "defying its obligation to dredge" such that the Corps may be held in contempt. This is a very serious allegation with no support. As the State admits at the outset of its brief, Dkt. 84-1 at PageID.4939, the Corps has steadfastly complied with the Court's May 12, 2015 Order, which pertained only to the parties' dispute as to 2015 dredging. The Court ordered "[1] Defendants to proceed with their original plan for dredging the Cleveland Harbor, 'on or after May 15, 2015,' including the Cuyahoga Navigational Channel . . . [2] the Corps is ordered to dispose of the dredging sediment in a confined disposal facility and [3] to pay all amounts required for such disposal." ECFDkt. No 33 at 15. The limited scope of relief the State sought was consistent with its Complaint which was directed only toward this 2015 dredging project, *infra* at 9, as the Court recognized at the March 23, 2016 conference. The Corps has fully complied with the Court's order as it has (1) "proceed[ed] with their original plan," dredged the Cleveland Harbor including the Cuyahoga Channel, (2) disposed of the sediment a CDF, and (3) paid the full cost to do so. Czekanski Decl. ¶ 14. Moreover, it is nonsensical for the State to move to "extend" the preliminary injunction and supplement its Complaint, citing new facts and 2016 dredging, and then make claims the Corps is in "contempt" of an order that plainly was limited to 2015 dredging.

impairment may occur in the future. *See, e.g.*, Dkt, No. 84-1 (conceding that only "minimal light loading" is occurring in the channel but speculating as to the effects of future weather); Dkt. No. 84-8 (noting that "navigation depths currently are such that only minimal light loading is occurring").[11] The Corps continues to monitor the conditions in the channel but has not yet determined when or whether to dredge Cleveland Harbor in 2016. Czekanski Decl. ¶¶ 29, 32.[12] That decision will be made based on the conditions of the channel and whether in the Corps' technical expertise dredging is required, and if so, whether funds will be obligated on a contract for this project.

PROCEDURAL BACKGROUND

On April 7, 2015, the State filed a Complaint against the Corps directed toward the Corps' "2015 [Annual Cleveland] Dredging Project," *see, e.g.*, Dkt. No. 1, *passim*, and it is this project that defines the State's pending claims, *see id.* ¶¶ 145-47, 160-61, 171, 175, 187-88, and the relief requested, *id.* at 46-47. The State challenged the Corps' December 2014 determination that the Federal Standard for disposal of dredged material is open-lake placement, the Corps' supporting EA/FONSI, and an alleged decision not to dredge Cleveland Harbor unless a non-federal sponsor contributed the additional funds required for CDF disposal. Dkt, 84-1 at PageID.4939. Shortly thereafter, on April 21, 2015, the State moved for a temporary restraining order and preliminary injunction, also directed toward requiring the Corps to undertake 2015 dredging of the Cleveland Harbor navigation channel. *See* Dkt. No. 13-2; Dkt. No. 13-34 at ¶¶ 12-14 (proposed order that the Corps "commence the 2014 project on or about May 15, 2015, specifying the amount to be dredged in 2015). On May 12, 2015, the Court granted the State's request for a preliminary injunction and

[11] The State suggests the Corps must dredge the navigation channel in order for Arcelor Mittal to dredge the area around its docks. Dkt. No. 84-1 at PageID.4941. This is incorrect. There is no technical impediment to Arcelor Mittal dredging the area around its docks prior to any dredging by the Corps. *See* Asquith Decl. ¶ 5.

[12] That the Corps has not yet decided whether or when dredging of Cleveland Harbor is necessary is not contingent on whether a non-federal sponsor provides additional funding to accomplish CDF disposal. Czekanski Decl. ¶ 32. However, if the Corps concludes that dredging has become necessary, it is possible that the Corps may be required to seek a non-federal partner at that time. That decision has not yet been made.

ordered "Defendants to proceed with their original plan for dredging the Cleveland Harbor, 'on or after May 15, 2015,' including the Cuyahoga Navigational Channel . . . [and] to dispose of the dredging sediment in a confined disposal facility and to pay all amounts required for such disposal." Dkt. 33 at PageID. 2460. The Corps has fully complied with this order. Czekanski Decl. ¶ 14.

On July 6, 2016, the State moved to file a Supplemental Complaint pursuant to Federal Rule of Civil Procedure 15(d), alleging it is now also entitled to relief with respect to the Corps "2016 Annual Cleveland Dredging Project." *See, e.g.*, Dkt. No. 82-1 at PageID.4871, 4923-24. On the same day, the State filed a Motion to Extend or Modify the Preliminary Injunction issued in 2015, claiming that

> The Corps' 2014 Federal Standard determination and 2014 Finding of No Significant Impact (currently under consideration in this case) are now jeopardizing the 2016 Project in the same way that those decisions jeopardized the 2015 Project before the Court issued a Preliminary Injunction. Just as it did in 2015, the Corps now refuses to complete the full 2016 Project unless a non-Federal sponsor pays for the Corps' environmental obligations.

Dkt. 84-1 at PageID.4929 (note omitted). However, as explained in greater detail in the United States' Memorandum in Opposition to Plaintiffs' Motion for Leave to File Supplemental Complaint Pursuant to Fed. R. Civ. P. 15(d), also filed today, the State's allegation of fact is false. Moreover, because the facts alleged in the Supplemental Complaint post-date the decisions the State challenged as to the 2015 project, the State's challenge to the 2016 project will be decided on a separate administrative record.

LEGAL STANDARDS

I. Standards for Injunctive Relief Under Rule 65

The State bears the burden of showing that it is entitled to a preliminary injunction. *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009) (citation omitted). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24

(2008) (citation omitted). It has been characterized as "one of the most drastic tools in the arsenal of judicial remedies," which should not be extended to cases which are doubtful or do not come within well-established principles of law. *Am. Civ. Liberties Union of Ky. v. McCreary Cty., Ky.*, 354 F.3d 438, 444 (6th Cir. 2003) (internal quotation marks and citation omitted). The purpose of a preliminary injunction is to maintain the relative positions of the parties until proceedings on the merits can be conducted. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Preliminary injunctive relief, however, should "be applied only in the limited circumstances which clearly demand it." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (alterations and citation omitted).

A court should consider four factors when determining whether to grant a preliminary injunction: (1) whether the plaintiff has shown a substantial likelihood of success on the merits; (2) whether the moving party will suffer irreparable harm without the issuance of the injunction; (3) whether the injunction will cause substantial harm to others; and (4) whether the injunction advances the public interest. *Jones*, 569 F.3d at 265. A finding that there is no likelihood of irreparable harm or no likelihood of success on the merits can prove fatal to the request for preliminary injunction. *Winter*, 555 U.S. at 22; *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000).

A preliminary injunction can take two forms either prohibiting or mandating action. *See generally United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998). A prohibitory injunction prohibits a party from taking action and "preserve [s] the status quo pending a determination of the action on the merits." *Chalk v. U.S. Dist. Court, Cent. Dist. of Cal.*, 840 F.2d 701, 704 (9th Cir. 1988). A mandatory injunction "orders a responsible party to 'take action.'" *Meghrig v. KFC W. Inc.*, 516 U.S. 479, 484 (1996). While the evidentiary standard is the same, "courts have identified three types of particularly disfavored preliminary injunctions" including "mandatory preliminary injunctions" *Snelling v. Romanowski*, No.

15-14129, 2016 WL 3900772, at *2 (E.D. Mich. June 16, 2016), *report and recommendation adopted*, No. 15-14129, 2016 WL 3878259 (E.D. Mich. July 18, 2016); *see also Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979); *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976) (citation omitted).

II. Standard of Judicial Review Under the APA

The United States and its agencies are immune from suit except to the extent Congress has waived sovereign immunity. *See United States v. Sherwood*, 312 U.S. 584, 586 (1941). The Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, provides the only potentially applicable waiver of sovereign immunity in this case and accordingly, all six claims asserted by the State in its Complaint seek relief under the APA. *See* Compl. at ¶ 5, 140-201. The APA confines the appropriate scope of judicial review to the administrative record compiled by the agency at the time its decision was made. 5 U.S.C. § 706; *Latin Americans for Soc. and Econ. Dev. v. Adm'r of Fed. Highway Admin.*, 756 F.3d 447, 464 (6th Cir. 2014).

The APA authorizes judicial review when a person has been "adversely affected or aggrieved by *agency action.*" 5 U.S.C. § 702 (emphasis added). The APA defines agency action with a list of discrete categories: "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13); *see also Norton v. S. Utah Wilderness All. ("SUWA"),* 542 U.S. 55, 61-62 (2004).

As relevant here, the APA enables a "reviewing court" to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). However, "the only agency action that can be compelled under the APA is action legally *required*." *SUWA*, 542 U.S. at 63 (emphasis in original). "Thus, a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64 (emphasis in original).

Further, no judicial review is available under the APA when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Such a commitment occurs where "a court would have no meaningful standard against which to judge the agency's exercise of discretion," such as where the statute is "drawn in such broad terms that in a given case there is no law to apply." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (internal quotation marks omitted); *see also Madison-Hughes v. Shalala*, 80 F.3d 1121, 1127 (6th Cir. 1996).

ARGUMENT

I. The State Has Failed to Show a Likelihood of Success on the Merits.

A. The State Has Identified No Discrete and Mandatory Duty for the Corps to Dredge Cleveland Harbor at Its Request and Congress Has Committed Dredging to the Corps' Discretion.

The State seeks to compel the Corps to dredge at a time when the Corps has determined, based on a scientific evaluation of data generated from multiple studies, that dredging is not required at this time. The State can only succeed on such a "failure to act" claim if it can identify a federal statute that requires the Corps to undertake this discrete and mandatory duty. The State has failed to meet this burden because there is no such mandatory duty in any authority that the State cites. That authority is cannot be found in WRDA nor in any Congressional appropriation. In deciding to appropriate money in a lump sum to the Corps, Congress gave the Corps authority to make decisions about which Operations and Maintenance activities to undertake nationwide, including but not limited to projects within the 140 discrete projects within the Great Lakes. But, that appropriation included no mandatory about where and when to dredge. Nor does WRDA, which directs the Corps to expedite maintenance in the Great Lakes, but says nothing about dredging in Cleveland Harbor specifically. Instead, both WRDA and the appropriations left decisions about where and when to dredge to the Corps' discretions as the Federal agency with the requisite

expertise. Because the State cannot show that the Corps has a mandatory duty to dredge the Cleveland harbor, the State cannot succeed on its claims.

1. The Water Resources Development Act Does Not Contain a Mandate That the Corps Specifically Dredge Cleveland Harbor Annually or Dispose of Dredged Material in Any Specific Way.

The Supreme Court and this Circuit have made clear that when an agency fails to act, it may only be compelled to take action under "limited circumstances." *Huron Mountain Club v. U.S. Army Corps of Eng'rs*, 545 F. App'x 390, 393 (6th Cir. 2013) (upholding finding that there was no likelihood of success on the merits where Corps had no discrete mandatory duty to act); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004). These "limited circumstances" are where "an agency failed to take a *discrete* agency action that it is *required to take*." *Sheldon v. Vilsack*, 538 F. App'x 644, 650 (6th Cir. 2013) (quoting *SUWA,* 542 U.S. at 64)). In other words, there must be a specific "statutory mandate." *Madison-Hughes*, 80 F.3d at 1124 (citation omitted).

Here Plaintiffs argue that "the Corps is required to dredge the Cleveland Harbor with its available funds. 33 USC § 426o-2." ECF 84-1 at 2. This alleged specific duty—the duty to dredge Cleveland Harbor—is not contained within 33 USC § 426o-2 (or any other authority Plaintiffs identify). Rather, 33 U.S.C. § 426o-2, Section 5014 of WRDA 2007, P.L. 110-114, states:

> Using available funds, the Secretary *shall expedite* the operation and maintenance, including dredging, of the navigation features of the Great Lakes and Connecting Channels for the purpose of supporting commercial navigation to authorized project depths.

33 U.S.C. § 426o-2(a) (emphasis added). This provision by its texts contains only one arguable mandate: "the Secretary *shall expedite*" maintenance in the Great Lakes and Connecting channels—an area that encompasses 140 discrete projects. McKee Decl. ¶ 7. Crucially, this provision does not say that the Corps "shall dredge" within any time frame, or at particular any location within the 140 Great Lakes and Connecting Channels—it does not say the Corps "shall dredge" at all. Rather, it

says that the Corps "shall expedite" maintenance that may include dredging. There is simply nothing in this provision that can fairly be read as requiring the Corps to dredge at any particular location, such as the Cleveland Harbor, or that operations and maintenance that is performed *must* include dredging. Because the statute provides "no law to apply," any duty under this statute is "committed to agency discretion by law." *See Raymond Proffitt Found. v. U.S. Army Corps of Eng'rs*, 175 F. Supp.2d 755, 762-63, 767 (E.D. Pa. 2001) (no law to apply where statute's "environmental protection mission was placed upon the Corps as a whole, not upon each individual water resources project"); *see also Heckler,* 470 U.S. at 830 (judicial review unavailable where "the statute is drawn so that a Court would have no meaningful standard against which to judge the agency's exercise of discretion").[13]

Notably Congress could have and indeed *did* specify in other provisions of WRDA that *specific projects* be expedited. *See* WRDA section 5007 (directing expedited action on 14 specifically named projects); Section 5008 (directed expedited action of 5 specific projects).[14] Congress could have done so here, but did not. Instead it asked the Corps to expedite maintenance of an area that encompasses 140 discrete projects. Such a broad and diffuse mandate cannot properly be read to impose a specific duty to dredge one specific harbor of 140 at any given time, let alone dredge Cleveland Harbor when conditions do not warrant it instead of pursuing other projects.

Courts in this circuit and throughout the United States consistently hold that claims such as Plaintiffs' alleging agency action unlawfully withheld requires a showing that "[i]n order to impose a clear-cut nondiscretionary duty, [the statute] must 'categorically mandat[e]'" that the agency perform

[13] Likewise, Plaintiffs' insinuation that 33 U.S.C. § 2211(b)(1) contains a mandate to dredge Cleveland Harbor is unavailing. *See* Dkt. No. 84-1 at PageID.4954. 33 U.S.C. § 2211(b)(1) states "[t]he Federal share of the cost of operation and maintenance…shall be 100 percent." But this law says nothing about what "operation and maintenance" is required, nor when it shall occur, nor that the Corps must pay for costs above and beyond the required operations and maintenance. This is left to the Corps' discretion, and the applicable laws and regulations including the Federal Standard.

[14] However even in those cases where Congress did mandate specific projects be "expedited" it refrained from mandating any specific method or deadline for expediting them.

the act in question." *Sierra Club v. Thomas*. 828 F.2d 783, 791 (D.C. Cir. 1987) (citation omitted); *see also Madison- Hughes*, 80 F.3d at 1124 (citation omitted); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1998). As there is no mandatory duty contained within 33 U.S.C. § 426o-2—the only authority Plaintiffs cite for this proposition—the Corps has no mandatory duty to act and Plaintiffs are not likely to succeed on the merits. *See Sheldon*, 538 F. App'x at 650 (citing *SUWA,* 542 U.S. at 65) ("The limitation to *required* agency action rules out judicial direction of even discrete agency action that is not demanded by law."); *Vill. of Bald Head Island v. U.S. Army Corps. of Eng'rs*, 833 F. Supp. 2d 524, 532-33 (E.D.N.C. 2011) (APA provided no basis for court to grant village's request to enjoin Corps to dredge particular area of harbor where there was no mandatory duty to do so).

2. The Corps' Lump Sum Appropriation Contains No Mandate to Dredge Cleveland Harbor Nor Any Instructions on How to Dredge.

This Court found that, with regard to 2015 dredging, "refusing to dredge . . . after receiving specific Congressional approval and funding to do so, violates the Corps' duty to expedite operation and maintenance of the Channel . . . ." Mem. Op. and Order 10, Dkt. No. 33 at PageID.2455. The Corps respectfully disagrees with this ruling. However, regardless of its correctness as to 2015, there can be no doubt in 2016 Congress did not provide "specific approval and funding" for dredging Cleveland Harbor. To the contrary, when presented by the Corps with the cost of CDF disposal and the opportunity to insert a nondiscretionary line item in the Appropriations Act itself, Congress declined. There was nothing specific to Cleveland Harbor about the lump sum appropriation that Congress gave to the Corps to administer 926 navigation projects, through the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015); *see* McKee Decl. ¶ 7. Even with regard to the Explanatory Statement that Congress included as legislative history with the

Appropriations Act, there is no specific requirement to dredge Cleveland Harbor nor any instructions of when to do so or how to dispose of dredged material.

As a matter of law, this lump sum budget allocation does not represent a mandate that the Corps dredge Cleveland Harbor, regardless of the budget estimates the Corps provided to Congress. Therefore, no Congressional budget appropriation—alone or in conjunction with 33 U.S.C. § 426o-2—provides a specific mandatory duty sufficient to support Plaintiffs' failure to act claim.

The Consolidated Appropriation Act provides a lump sum of $3,137,000,000 to the Corps for Operation and Maintenance and states:

> The following appropriations shall be expended under the direction of the Secretary of the Army and the supervision of the Chief of Engineers for authorized civil functions of the Department of the Army pertaining to river and harbor, flood and storm damage reduction, shore protection, aquatic ecosystem restoration, and related efforts.

Consol. Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat 2242 (2015).

The Supreme Court has many times affirmed the "fundamental principle of appropriations law[:] where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions." *Lincoln v. Vigil,* 508 U.S. at 192 (quotation omitted); *see also Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1063 (10th Cir. 2011), *aff'd*, 132 S. Ct. 2181 (2012). Stated differently, "[a] lump-sum appropriation leaves it to the recipient agency . . . to distribute the funds among some or all of the permissible objects as it sees fit." *Lincoln,* 508 U.S. at 192, (citing *Lincoln,* 508 U.S. at 192 and quoting *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Donovan,* 746 F.2d 855, 861 (D.C. Cir. 1984)).[15] The Court did not previously address this dispositive body of law.

[15] See also *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 608 n.7 (2007); *State of California v. United States*, 104 F.3d 1086, 1093-94 (9th Cir. 1997), cert. denied, 522 U.S. 806 (1997); *State of New Jersey v. United States*, 91 F.3d 463, 470-71 (3rd Cir. 1996); *Vizenor v. Babbitt*, 927 F. Supp. 1193 (D. Minn. 1996); *Allred v. United States*, 33 Fed. Cl. 349 (1995).

This is the case regardless of what the agency's budget requests or estimates were. The black letter rule is "[t]he amounts of individual items in the estimates presented to the Congress on the basis of which a lump-sum appropriation is enacted are not binding on administrative officers unless carried into the appropriation act itself." *Acting Comptroller Gen. Elliott to the President, Bd. of Commissioners, D.C.*, 17 Comp. Gen. 147, 149-50 (Aug. 18, 1937)[16]; *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1085-86 (Fed. Cir. 2003), *aff'd sub nom.*, 543 U.S. 631, 125 S. Ct. 1172 (2005); GAO Redbook, 2006 WL 6179169, at *1-2.

Nor does legislative history create a binding obligation to allocate funds in a particular way. *Ramah Navajo Chapter*, 644 F.3d at 1064 (quoting *Lincoln,* 508 U.S. at 193) ("Although an agency may create ill will by ignoring congressional intent as expressed in legislative history, '[a]s long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives, . . . the decision to allocate funds is committed to agency discretion by law.'"); GAO Redbook, 2016 WL 6179169, at *1. Moreover, the legislative history Plaintiffs cite does not specifically state "the Corps shall dredge Cleveland Harbor" or even reasonably allow this inference. On the contrary, the language they cite in fact supports the Corps' position as it does not mention Cleveland Harbor at all, but rather cites the 140 harbors and channels within the Great Lakes and observes that they are *all* within the Corps responsibility. Dkt. No. 84-1 at 17.

Though Congress could have inserted one, there is no line item appropriating funds to dredge to Cleveland Harbor in the Appropriations Act itself, and therefore no mandate to obligate money on the project. *See* GAO Redbook, 2006 WL 6179169, at *3 ("[Congress has the power to make any restriction legally binding simply by including it in the appropriation act."); GAO Redbook, 2006 WL 6179170, at *1; McKee Decl. ¶ 19.

[16] Comptroller General opinions are not binding, but provide "expert opinions, which [courts] should prudently consider." *Cherokee Nation*, 334 F.3d at 1084 (quotation and citations omitted); *Ramah Navajo Chapter*, 644 F.3d at 1064.

Absent such a line item, the inference is that when appropriating funds in a lump sum, Congress intended to allow the Corps discretion over allocating the funds in this appropriation, including the discretion to reprogram funds as needed. *See* GAO Redbook, 2006 WL 6179169, at *3; GAO Redbook, 2016 WL 1275442, at *1; McKee Decl. ¶ 26. It is common for funds appropriated in a lump sum to be initially set aside for one purpose within a parent appropriation (in this case Operations and Management) but ultimately used for other purposes within that same parent appropriation; this process is called "reprogramming." *See* GAO glossary 69 ("Shifting funds within an appropriation or fund account to use them for different purposes than those contemplated at the time of appropriation."); GAO Redbook 2016 WL 1275442, at *6 ("More specifically, it is the application of appropriations within a particular account to purposes, or in amounts, other than those justified in the budget submissions or otherwise considered or indicated by congressional committees in connection with the enactment of appropriation legislation."); McKee Decl. ¶¶ 26-27. In contrast to a transfer, which "shifts budget authority from one *appropriation* to another… a reprogramming shifts funds *within a single appropriation*." GAO Redbook, 2016 WL 1275442, at *6 (emphasis added). Agencies generally may "transfer" funds only with explicit statutory authority. 31 U.S.C. § 1532; 70 Comp. Gen. 592 (1991). However, agencies are free to reprogram, "even if doing so is inconsistent with the budget estimates presented to the Congress, as long as the resulting obligations GAO Redbook, 2016 WL 1275442, at *6. Here, the Appropriations Act provides for its funds are to be initially allocated in accordance with the Act's own provisions and the joint explanatory statement, while also explicitly allowing reprogramming of funds to other purposes for obligation and expenditure. *See* Consolidated Appropriations Act, 2016 § 101 (describing reprogramming rules); McKee Decl. ¶ 26-27.

Given the Corps' lack of funding to satisfy all of its operations and maintenance requirements, the Corps often is required to make difficult decisions about how best to spend and

reprogram allocated funds among the more than 900 projects in the country and 140 in the Great Lakes region. McKee Decl. ¶¶ 28-31. For example, the top 59 coastal ports have full project depth on average only 30 to 35 percent of the time, and only for the middle half of the channel. In addition, a substantial portion of the bridge inventory is approaching or has exceeded its service life, and the nation's coastal jetties and breakwaters are deteriorating. McKee Decl. ¶ 29. As a result, the flexibility Congress chose to give the agency to accomplish its manifold statutory mandates and priorities is crucial to accomplish the Corps' mission. *See In re Ltv Aerospace Corp.*, 55 Comp. Gen. 307, 318 (Oct. 1, 1975) ("[C]ongress has recognized that in most instances it is desirable to maintain executive flexibility to shift around funds within a particular lump-sum appropriation account so that agencies can make necessary adjustments for 'unforeseen developments, changing requirements, . . . and legislation enacted subsequent to appropriations.'"). The State's attempt to treat the Corps' budget request and Congress' lump-sum appropriation as binding on the Corps notwithstanding the Corps' discretion to reprogram these funds abrogates this flexibility and impermissibly re-writes the Appropriations Act. *See, e.g.*, *Rochester Pure Waters District v. Environmental Protection Agency,* 960 F.2d 180, 181 (D.C. Cir. 1992) (a federal court cannot, consistent with the Constitution, appropriate funds; that is the job of Congress).[17] Because there is no basis in the Appropriations Act to find a mandatory duty to dredge Cleveland Harbor, Plaintiffs' claim is unlikely to succeed on the merits.

[17] *See also In re Monroe Commc'ns Corp.*, 840 F.2d 942, 946 (D.C. Cir. 1988) ("[W]e must give agencies great latitude in determining their agendas."); *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986) ("It is not for the judiciary to . . . sit as a board of superintendance directing where limited agency resources will be devoted. We are not here to run the agencies."); *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 674 (D.C. Cir. 1970) ("[E]ven the boldest advocates of judicial review recognize that the agencies' internal management decisions and allocations of priorities are not a proper subject of inquiry by the courts."), *vacated* 404 U.S. 403 (1972).

B. The State Improperly Conflates the State's Authority to Grant or Deny a Water Quality Certification with the Corps' Authority to Evaluate Water Quality Standards for Federal Funding Purposes.

In addition to asking this Court to oversee implementation of the Corps' budget, serve as a judicial dredging monitor for Cleveland Harbor, and by necessary implication dozens of other needy dredging projects, and override the Corps' view on when, whether, and how to dredge, the State also seeks to require that the Corps use the State's preferred method of sediment disposal. But, just as in its 2015 motion, the State does not meet its burden to show a likelihood of success on its claim that the Corps' conclusion that the sediment is environmentally suitable for open-lake placement was arbitrary and capricious.[18] Instead, it argues only that Ohio has decided to deny a water quality certification allowing open-lake placement. Dkt. 84-1 at 4944. In 2015, this Court stated:

> The Court has not been presented with any information or argument which would allow it to determine whether the CDF disposal requirement was required to enforce established State and local requirements under the Clean Water Act; whether the sediment at issue in fact meets the written standards under Section 404(b)(1) of the Clean Water Act as Defendants have alleged; or, whether compliance with Section 404(b)(l) is sufficient to satisfy the requirements of 33 U.S.C. § 1323(a). (ECF #13-5 p. I). Nonetheless, based on the information that has been provided, and based on Defendants' failure to appeal the certification requirements, it appears likely that Plaintiff could prevail on its claim that the Corps is financially responsible for disposing of the Channel sediment in accordance with the terms of the certification.

Dkt. 33 at 2456. Even if correct, the State's argument should not be applied to 2016 given that the Corps has not concluded that dredging is necessary, but—regardless—the State's position is legal error. In particular, the State suggests that because Ohio has refused to issue a water quality certification authorizing open-lake placement, and the Corps' has decided not to appeal that decision, these two decisions purportedly establish that the State is likely to succeed on the merits.[19]

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[18] By failing to mention this argument in its opening brief, the State has waived it. *See, e.g., Spencer v. Colvin*, No. 1:13CV120, 2014 U.S. Dist. LEXIS 46760, at *41 (N.D. Ohio Feb. 13, 2014).13, 2014).

[19] It is the State's burden to prove that it is entitled to a preliminary injunction, *Jones*, 569 F.3d at 265, and failure to show a likelihood of success is itself typically fatal to a preliminary injunction request, *see Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000). Thus, if as the Court stated it was not presented with information or argument

This argument ignores that the State is challenging a completely different and independent decision in this litigation: the *Corps'* determination, as part of its budget process, that open-lake placement complies with environmental standards, including Ohio's water quality standards, and is therefore appropriate for Federal funding.

In deciding how to proceed with its dredging projects, the Corps is required by duly promulgated federal regulations to apply the "Federal Standard," which requires that the Corps dispose of dredged sediment by selecting "the least costly alternatives consistent with sound engineering practices and meeting the environmental standards established by the 404(b)(1) evaluation process." 33 C.F.R. § 335.7. Although the Corps determines the Federal Standard by applying Federal regulations, *see, e.g.* 33 C.F.R. § 336.1, these regulations require the Corps to consider state water quality standards in doing so. *See* 33 C.F.R. § 336.1(c)(2) ("The evaluation will include consideration of state water quality standards."). In determining the Federal Standard for the Cleveland Harbor project, the Corps conducted a thorough analysis of the impacts of the proposed open-lake sediment placement and concluded, among other things, that it "would not violate applicable State Water Quality Standards." Index 62 at AR0005154; *see also id.* at AR0005074, 5431; Index 60 at AR0005040-41. *See also* 33 C.F.R. § 336.1(b)(8)(i) (noting that information and data demonstrating compliance with state water quality standards may be included within the Corps' Section 404(b)(1) Guidelines evaluation).[20]

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sufficient to conclude the Corps' Federal Standard was arbitrary and capricious, the Court should have simply denied (and should now deny) the State's motion. *Hadix v. Johnson*, 871 F.2d 1087, No. 88-1144, 1989 U.S. App. LEXIS 3921, at *19 (6th Cir. March 28, 1989) (unpublished) ("Courts are no more free to enter preliminary injunctions without evidentiary support than they are to enter permanent injunctions without evidentiary support"). The test is a likelihood of success on the merits, not a mere possibility.

[20] Once the Corps determines that a particular method of sediment disposal is the Federal Standard for an area, the Corps cannot use a more expensive method unless a non-federal partner provides the additional funding. *See* 33 C.F.R. § 337.2(b)(3); Final Rule for Operation and Maintenance of Army Corps of Engineers Civil Works Projects Involving the Discharge of Dredged Material Into Waters of the U.S. or Ocean Waters, 53 Fed. Reg. 14,902, 14,909 (Apr. 26, 1988) ("Final Rule"); *see also infra* at 5-6, 33-34. Once determined, the Federal Standard often remains in place for several years and may apply to many distinct dredging projects. *See, e.g.*, Index 10, AR 3723 (process for revising the Federal Standard

Although the Corps is required to seek a state water quality certification to discharge dredged material, *see* 33 C.F.R. § 336.1(a)(1), (b)(8), the substantive determination of the Federal Standard is not controlled by the contents of this certification, including any conditions the state may impose beyond what the Corps concludes necessary, *see* 33 C.F.R. § 336.1(c) (setting forth factors the Corps considers in evaluating the discharge of dredged material). Rather, determination of the Federal Standard is conducted *by the Corps*, under the Corps' regulations, considering the scientific evidence compiled by the Corps. *See* 33 C.F.R. §§ 335.7, 336.1. As pertinent to this case, Ohio's statutory role as an environmental regulator when it came to the Corps was to issue or deny a water quality certification. *See* 33 U.S.C. § 1341. Now, however, the State seeks to usurp the Corps' authority and disregard the Corps' regulations by claiming that it is Ohio's sole prerogative to "determine[ ] whether a discharge would comply with State water quality standards" for all purposes, even determinations expressly assigned by regulation to the Corps.[21] Dkt. 84-1 at PageID.4956-57.

The Corps' determination under the Federal Standard that it could only fund the cost of open lake placement, and Ohio EPA's determination not to issue a water quality certification approving such placement, are both mutually independent decisions, neither of which controls the other. Ohio EPA and the Corps are free to disagree as to whether open-lake placement of dredged material complies with Ohio's water quality standards. Had Ohio decided not to challenge the Federal Standard determination in this litigation, its water quality certification decision would still remain valid. Similarly, the Corps' decision not to appeal the State's WQC does not demonstrate

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applies "when a major change is contemplated for the existing approach" or when "a district makes a preliminary determination of whether dredged material at a project site meets Federal Guidelines for open-water placement"). In short, the Federal Standard establishes the maximum expenditure of federal funds to dispose of dredged material from an area, regardless of whether that disposal is into the waters of the United States, in confined disposal facilities ("CDFs"), or otherwise.

[21] The State's position also raises an issue under the Supremacy Clause of the U.S. Constitution. Under the Supremacy Clause, when a Federal agency is acting within its constitutional and statutory authorities, a state can control or interfere with those Federal actions and activities only if the state can identify a clear, explicit, unambiguous Federal statute that authorizes such state control. *See Hancock v. Train*, 426 U.S. 167 (1976).

that the Federal Standard determination is arbitrary and capricious.[22] To the contrary, the Corps' decision not to appeal the WQC simply reflected the fact that it has no intent to proceed with open placement of material without the State's approval. Ohio EPA cannot substitute an internal and irrelevant administrative appeals process to avoid affirmatively proving that it is entitled under the APA to the affirmative, mandamus-style injunction it seeks.

Indeed, the Corps' regulations specifically contemplate that such a conflict may arise between the Federal Standard and a state water quality certification that seeks to impose additional or more costly requirements and provide procedures for addressing such conflicts. Should such a conflict arise, the Corps will consider the state's rationale and attempt to address the state's concerns. *See* 33 C.F.R. § 337.2(b). If a state and the Corps are unable to resolve the conflict, however, the Corps will advise the state that the added cost of the measures the state demands will affect the priority of the project unless the state furnishes a suitable disposal area. *See* 33 C.F.R. § 337.2(b)(2); *see also* 33 C.F.R. § 337.2(b)(1) (requiring the state to fund the difference in cost). Moreover, under Corps regulations, the additional cost required to meet the state's demands that exceed the Federal Standard may cause the project to become economically unjustified. *See* 33 C.F.R. § 337.2(b)(2). Treating the State's decision on the water quality certification as controlling federal funding obligations inappropriately renders these express provisions addressing the potential for conflict a legal nullity and ignores that the Corps' interpretation of its own regulations is controlling.[23] *See Auer v. Robbins*, 519 U.S. 452, 461 (1997).

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[22] Indeed, Ohio EPA's decision not to issue a WQC authorizing open lake placement, had the Corps appealed it, would not have given the Corps the benefit of the APA's arbitrary and capricious standard in this Court's review of the Corps Federal Standard determination. As a result, looking to Ohio EPA's water quality certification decision as would necessarily apply an incorrect standard of review.

[23] Plaintiffs' cite the legislative history of the 1977 amendments to the CWA, arguing that Congress contemplated that the Corps may be required to pay additional costs to comply with state water quality standards. Dkt. 84-1 at 4959. Plaintiffs' argument here is entirely circular, as the quoted text makes clear that the reason the Corps may be required to expend additional funds is to ensure "compliance with applicable state water quality standards." Dkt. 84-1 at 4956.

C. The Corps Has Taken No Action that Could Violate the CZMA.

The State is unlikely to succeed on the merits of its Coastal Zone Management Act ("CZMA") claim. The Corps is not presently conducting any activity that requires the State's concurrence because it is not dredging at all. Indeed, this section of the State's brief never identifies the federal action it believes is violating or would violate the CZMA. Presumably this action is open lake placement of dredged materials, but the Corps is not undertaking open lake placement, and indeed has no plans to undertake open lake placement of dredged material without a water quality certification. Czekanski Decl. ¶ 11.

Under Section 307 of the CZMA, federal actions, including "federal agency activities" affecting the uses or resources of the coastal zone must either be "consistent to the maximum extent practicable" or with the enforceable policies of the approved coastal management programs. 33 CFR § 336.1(a)(2); 15 C.F.R. Part 930. Subpart C of the CZMA requires any Federal agency carrying out an activity "within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone" to provide the state with a determination that the activity will "be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies" of the state's coastal management program. 16 U.S.C. §§ 1456(c)(1)(A), 1456(c)(1)(C); 15 C.F.R. §§ 930.34(a)(1), 930.39(c); 33 CFR 336.1(b)(9)(i)-(iii). The state must then either concur with or object to the Federal agency's consistency determination. 15 C.F.R. §§ 930.41(a), 930.42. If the state objects to the consistency determination, the project may still proceed if the federal agency nonetheless determines it is "consistent to the maximum extent practicable" with the state's enforceable policies (i.e., if the federal agency is legally prohibited from complying with the state's

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Indeed, for years the Corps expended additional funds to CDF place the sediment because it concluded that doing so was necessary. Now, however, the Corps has determined that the disposal method the State demands is unwarranted under the Federal Standard, and that the State is therefore the proper entity to bear these costs. In other words, this provision of the legislative history is irrelevant unless Ohio succeeds in its claim and shows that the Corps' determination that open-lake placement would comply with Ohio's water quality standards was arbitrary and capricious.

request by other statutory requirements), 15 C.F.R. § 930.32, or "that its proposed action is fully consistent with the enforceable policies of the management program." 15 C.F.R. § 930.43(d)(2). *See, e.g.*, *Del. Dep't of Natural Res. & Envtl. Control v. U.S. Army Corps of Eng'rs*, 681 F. Supp. 2d 546, 560 (D. Del. 2010) (subpart C applicable to dredging project).

As the regulations require, the Corps provided the Ohio Department of Natural Resources with its consistency determination, and on January 26, 2016, ONDR issued a conditional concurrence, conditional upon, *inter alia*, the Corps receiving a water quality certification. Dkt. 84-1, Ex. B-2. The State declined to issue a WQC authorizing open lake placement and the Corps has stated it has no plans to open lake place dredged materials without a WQS. Czekanski Decl. ¶ 11. Thus, the current activity, to the extent there is any, is entirely consistent with Ohio's letter concurring with the Corps consistency determination and there is no additional planned "agency activity" for which concurrence is required at this time. There has been no violation of the CZMA and the State is unlikely to succeed on the merits of this claim.

II. The State Has Not Shown Irreparable Harm.

The State has not shown that, absent a preliminary injunction, it would suffer irreparable harm. Irreparable harm to the movant has been held to be the most important factor in determining whether to grant this extraordinary relief. *See Contech Casting, LLC v. ZF Steering Sys.,* LLC, 931 F. Supp. 2d 809, 823 (E.D. Mich. 2013) (noting cases declining to award injunctive relief in the absence of this factor). To meet its burden the State must show that it will incur irreparable harm that is "both certain and immediate, rather than speculative or theoretical," if a preliminary injunction is not issued. *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991); *see also Winter*, 555 U.S. at 22 ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.").

"In addition, and of critical importance, 'the irreparable harm requirement contemplates the inadequacy of alternate remedies available to the plaintiff.'" *Contech*, 931 F. Supp. 2d at 818818 (quoting *Smith & Nephew, Inc. v. Synthe*s (U.S.A.), 466 F. Supp. 2d 978, 982 (W.D. Tenn. 2006)). "Thus, '[i]rreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary.'" *Id.*

A. Any Potential Harm to the State Is Speculative and Strictly Monetary.[24]

The fundamental premise of the State's showing of irreparable harm—that "catastrophic and far-reaching" harm would result from the Corps' failure to dredge the channel—is incorrect. As established above, *supra* at 8-10, the Corps' surveys show that the channel remains navigable and dredging is not currently necessary. As a result, the harm the State claims is speculative.

Moreover, the State holds the key to avoid the harm it fears, and the potential loss to the State is speculative—no navigation is impaired now—and at most simply the monetary cost of CDF disposal of sediment should dredging the Cleveland Harbor navigation channel become necessary in the future. *See Nat'l Viatical, Inc. v. Universal Settlements Int'l, Inc.*, 716 F.3d 952, 957 (6th Cir. 2013) (affirming district court's dissolution of an injunction, agreeing that the real harm the plaintiffs sought to avoid was the payment of money); *Contech*, 931 F. Supp. 2d at 821 ("[T]he glaring failure of Plaintiff to pursue other reasonable alternatives to avoid the harm it claims is imminent fundamentally undermines its contention of irreparable injury."); *Overstreet*, 305 F.3d at 579

[24] As the Corps argued last year, the State also cannot claim it will suffer irreparable harm because it cannot assert its standing as *parens patriae* in an action against the United States, and other categories of the alleged harm are not cognizable. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) (holding that a "State does not have standing as *parens patriae* to bring an action against the Federal Government" because the United States, and not the state, represents citizens' rights as *parens patriae*); *see also Iowa v. Block*, 771 F.2d 347, 354 (8th Cir. 1985) (disallowing use of *parens patriae* against the federal government and reserving "*parens patriae* instead for the state to vindicate the rights of its citizens against private defendants."); *Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992); *Kansas v. United States*, 16 F.3d 436, 439 (D.C. Cir. 1994); *Michigan v EPA*, 581 F.3d 524, 529 (7th Cir. 2009) (injury to economy and economic interests not grounds for state standing in suit against federal government); *Arias v. DynCorp*, 752 F.3d 1011, 1015 (D.C. Cir. 2014) (lost tax revenue is not a cognizable legal injury); *Wyoming v U.S. Dept. of Interior*, 674 F.3d 1220, 1234 (10th Cir. 2012) (impairment of state tax revenues should not, in general, be recognized as sufficient injury-in-fact to support state standing). The Court erroneously failed to address these arguments in its decision in 2015.The Court erroneously failed to address these arguments in its decision in 2015.

(monetary loss is typically not irreparable). A preliminary injunction—particularly the affirmative, mandamus-style injunction the State seeks—is an extraordinary and drastic remedy, *see supra* at 11-12, and is not permissibly invoked to avoid the mere expenditure of funds.

The State carefully words its arguments in an attempt to obscure that it has not met its burden to show that irreparable harm will result if the Court denies its motion. Notably absent is any evidence—or even any clear statement—that it is unable to provide the funds necessary to fund the dredging and sediment disposal that it wants to accomplish. Rather, the State's attorneys artfully argue only that Ohio has not "budgeted for" or "planned to cover" such costs, Dkt. 84-1 at 4967, not that Ohio or the Port could not, in fact, allocate such funds if the State's motion is denied. Indeed, *none* of the State's declarants make the simple statement that the State cannot make the requisite funds available if necessary. The only submission the State made on its alleged inability to avert the harm it claims is attorney argument, which is an insufficient basis to grant injunctive relief, *Hadix*, 1989 U.S. App. LEXIS 3921, at *20, and even in this attorney argument the State does nothing more than skirt the issue.

Moreover, the excuses that the State's counsel offer for the State's purported decision not to plan to make funds available are hollow. The State's claim that "Ohio could not have planned to cover any part of the 2016 Project because the Corps had the duty and funds to accomplish the project," Dkt. 84-1 at 4967, is a non-sequitur that is squarely refuted by the facts. The State suggests only that it does not wish to pay for the dredging and manner of sediment disposal that it demands, not that it is unable to make arrangements to do so. The State has known since 2013 that the Corps' sediment sampling and testing suggested that open-lake disposal was appropriate, *see, e.g.*, Index 9 at AR0003611, and have since been fully informed that the Corps regulations prohibit it from expending additional federal funds to accomplish dredging and sediment disposal as the State prefers, *see e.g.*, Index 67 at AR0005743; Index 68 at AR0005748; Index 74 at AR0005766; Dkt. 64 at

PageID.4650, 4652-53.[25] The State has apparently made a strategic decision to create the appearance of a crisis in Cleveland Harbor in the hope that the Court will again intervene, even though it has known for years that the Federal Standard precludes the expenditure of the funds the State demands.

Finally, the Court's analysis of the economic harm that would result if the injunction were not granted in 2015 decision erred in at least two respects, and the Court should not perpetuate those errors now. First, the Court suggested that the Corps' "refusal to proceed absent a financial contribution from the State appears to be nothing more than an attempt to deflect costs that the agency is statutorily mandated to bear itself." Dkt. 33 at 2458. The premise of this statement, however, is false—the Corps has no obligation to bear these costs because the State has failed to show both that the Corps has a mandatory duty to dredge Cleveland Harbor *and* that the Corps' Federal Standard determination was arbitrary and capricious. It is the State, not the Corps, that is seeking to "deflect costs"—demanding that the Federal taxpayer subsidize its preferred method of dredging sediment disposal at the expense of other key Corps projects. Second, because the State has failed to show that it cannot avert the navigational harm it alleges merely by spending money to pay for dredging, it was error for the Court to rely on the alleged economic harms that the State has cited. The harm to the State is strictly monetary at most, and there will be no harm to navigation or the economy should the State simply pay for its preferred method of sediment disposal, should dredging become necessary.

[25] For similar reasons, the State's claim that "Ohio could not have budgeted for 2016 disposal costs because, even to this day, the Corps has refused to disclose what the 2016 delta costs are" is also without merit. It is not necessary to know the precise delta cost in order to prepare such a budget—the Corps routinely does so without this knowledge. *See* Czekanski Decl. ¶ 24. Indeed, in 2015, the State disputed the Corps' calculation of the delta cost, relying on its own estimate of that cost to propose that the Court require a lesser amount of funds to reimburse the Corps in the event that the Corps prevails in this litigation. *See* Dkt. No. 13-2 at PageID.181-82. The State should not be rewarded for its strategic decision to refuse plan for a contingency in 2016 that was not only reasonably foreseeable—given a dispute with the Corps on how to fund dredging—but that, by 2015, had already resulted in the pending litigation.

Combined with the fact that the Corps has not yet determined that dredging is currently necessary—which renders the State's alleged harm completely speculative—the alleged economic harm is insufficient to warrant an extraordinary mandatory, affirmative, preliminary injunction?

B. This Case Involves No Prospect of "Environmental Injury."

The State also claims that the Court should find irreparable harm in this case based on its allegation that "if the Corps were to open-Lake dump the dredged material, the effects would be permanent and irreversible." Dkt. 84-1 at 4965. From here, it argues that a mandatory, affirmative injunction requiring the Corps to dredge would somehow "protect the environment." Dkt. 84-1 at 4965. The State made this argument in 2015, and the Court accepted it relying on a prediction of what would happen if "the State did decide that it had no choice but to acquiesce to the Corps suggested disposal manner." Dkt. 33 at 2458-59. This was error: the State's argument was misleading and wrong then, and it is misleading and wrong now.

The fallacy in the State's argument is clear—if the Corps does not dredge (and it currently has no plans to do so), there will be no sediment to dispose of and thus no prospect of environmental harm. Moreover, even if the Corps were to decide to dredge in 2016, no matter how this motion or this case is decided, the Corps will not engage in open-lake placement of dredged sediment from Cleveland Harbor without permission from the State of Ohio in the form of a water quality certification authorizing this activity. Czekanski Decl. ¶ 11. The State may issue a water quality certification only if it concludes that open-lake placement will comply with applicable water quality standards. See, e.g., Ohio Admin. Code 3745-32-05(A). As a result, open-lake placement will *only* occur upon receiving the State's concurrence that such placement of the dredged sediment will not cause environmental harm.

The State effectively concedes there is no real prospect of environmental harm in this case, yet still asks the Court to find such harm is sufficiently likely as to merit injunctive relief. Dkt. 84-1

at 4965 (arguing that the Corps has "trad[ed] one type of harm (environmental) for another (navigational/commercial)"). Even the alleged "navigation/commercial" harm the State identifies is illusory, as the channel remains navigable and any impairment of it is within the State's power to prevent through the expenditure of money, but it is flatly wrong for the State to suggest that environmental harm will occur if its motion is denied.

III. The State Has Not Shown that the Balance of Equities Favors an Injunction.

An injunction requiring the Corps to dredge and dispose of the disputed sediment at the expense of the nation's taxpayers would result in identifiable harm to the Corps. The Corps—including the Buffalo District—proceeds each year with a limited budget that is insufficient to accomplish all of its various operations and maintenance projects. Czekanski Decl. ¶ 31; McKee Decl. ¶¶ 28-31. The Corps' budget is not sufficient to dredge every harbor or connecting channel in the Great Lakes, let alone every harbor or connecting channel in the nation, on an annual basis. McKee Decl. ¶ 30. As a result, the Corps has a backlog of projects it is unable to pursue or pursue fully due to lack of funding. Czekanski Decl. ¶ 31; McKee Decl. 31. An injunction requiring that the Corps dredge when it has not determined it to be necessary, as well as to unnecessarily dispose of the sixth-mile sediment in CDFs at an additional cost to the Corps of over $2.5 million of its limited funds, *see* Czekanski Decl. ¶ 30, would prevent the Corps from pursuing its mission as to other projects. *See* Czekanski Decl. ¶ 31. These projects include repairs to the Cleveland Harbor West Breakwater and critical maintenance of coastal navigation structures at Huron Harbor. Czekanski Decl. ¶ 31. The Corps' inability to pursue these projects (and others) is to the detriment of the Corps' mission and the public at large who would benefit from these projects.[26] These harms are compounded when considering the ramifications that an injunction would have for the Corps'

[26] The Court's decision last year erred in failing to consider the harm to the Corps and the public caused by the Corps' inability to fund these projects treating the harm to the Corps as strictly monetary.

nationwide dredging operations. The State's position in this litigation—that the Corps can be compelled, as a matter of law and at full federal expense, to dredge the Cleveland Harbor navigational channel at exactly the time and exactly the manner the State demands— is subject to no limiting principle.

The State's argument that the Corps is not harmed by an injunction because "the Court would simply order the Corps to do what it has done for essentially the past 40 years" and as a result of the injunction last year is lacks merit. Dkt. 84-1 at 4966. That the Corps has previously dredged and engaged in confined placement of sediment where the channel conditions and contaminant levels actually warranted doing so does not diminish the harm to the Corps from the State's attempt to seize control of the Corps' budget and dredging program to perform a dredging project the Corps has not concluded is necessary and at a cost above what the Corps has reasonably determined to be appropriate.[27]

These harms far outweigh any monetary loss to the State in contributing to dredging the Cleveland Harbor. In light of the heavy burden the State faces to show the Corps' scientific determination that the sediment is suitable for open-lake disposal was arbitrary and capricious, and clear provisions in Federal regulation regarding local responsibilities for costs in excess of the Federal Standard, it is fair to require the State to bear the costs of CDF disposal for a small portion of the project should dredging be found necessary.

[27] The State suggests that the Corps will not be harmed because the Corps should have anticipated the possibility that the Court might order that dredged material would be disposed of in CDFs in 2016. Dkt. 84-1 at PageID.4966-67. This argument does nothing to rebut the facts noted above that the Corps will be unable to pursue important priorities if it is required to spend its limited funds on accomplishing an unnecessary project in an unnecessarily expensive manner. Moreover, this argument is incorrect both because the Corps has not yet determined that dredging is warranted based on the facts on the ground and because the Federal Standard precludes the Corps from spending federal funds for CDF disposal. The Corps solicited bids providing the option of CDF disposal to ensure that, if ordered to dredge notwithstanding its regulations, the Corps had the contractual mechanism to do so.

IV. The State Has Not Shown that an Injunction is in the Public Interest.

Because there is a strong public interest in conserving scarce financial and administrative resources, the public would be injured by an injunction mandating that the Corps dredge as the State demands. *See Ritter v. Cohen*, 797 F.2d 119, 123 (3d Cir. 1986). This concern is particularly acute given that the Corps has not at this time concluded that dredging is necessary *at all*. As already discussed, every dollar that must be allocated to dredging the Cleveland Harbor is one that cannot be spent to address the backlog of other projects that the Corps has prioritized. Moreover, although the State's unnecessary demands injure the Corps by impacting its budget, subverting its discretion, and precluding it from completing other projects, it is the public that will often bear the brunt of the Corps' inability to pursue a particular project if, for instance, contaminated sediment leaks from a CDF in need of maintenance or damaged infrastructure cannot be repaired. The State has no answer to the fact that it is asking the Court to rob Peter to pay Paul, depriving other projects of scare resources to the detriment of the public, and inviting the Court to enmesh itself with prioritizing and implementing the Corps' dredging program throughout the Great Lakes.[28]

In addition, a party moving for preliminary injunctive relief carries a particularly heavy burden where, as here, the result would impede the orderly administration of a governmental responsibility intended to serve the public interest. *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 437 & n.5, 440 (1944) (noting the public interest in a "centralized, unitary scheme of review" of the relevant regulations and the special consideration given to concerns over the public interest); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) (holding that when injunctive relief would harm the public interest, the Court may withhold the relief, even if doing so would burden the

[28] As explained above, supra __, the State's bald claim that the Corps has "allocated funds" available "with which to perform the 2016 Project" and engage in CDF disposal, Dkt. 84-1 at 4969, is incorrect. Pursuant to Congress's decision to enact the Corps' adjusted budget request, the Corps' allocated funding for Cleveland Harbor to accomplish open-lake, not CDF placement. *See supra* __.at 5-6.

movant). In this case, the public interest is disserved by the State's request that the Court issue an order that nullifies the Corps' ability to rely on its scientific determinations well within its unique expertise on the need to dredge, and overrules the Corps' balancing of the needs of navigation and the environment. *See Hankins v. Norton*, No. 04-cv-02196-PSF-OES, 2005 U.S. Dist. LEXIS 37741, at *43-44 (D. Colo. Sept. 2, 2005) (explaining that "[t]he public has a generalized interest in having administrative matters resolved in an orderly fashion, and by an agency having the expertise and discretion to deal competently and expeditiously with such matters."); *Baranowski v. EPA*, 699 F. Supp. 1119, 1124 (E.D. Pa. 1988); *Utah International, Inc. v. Andrus*, 488 F. Supp. 962, 974 (D. Utah 1979).[29]

The State's arguments claiming an injunction is in the public interest merely rehash its erroneous arguments as to irreparable harm generally, and are wrong for the same reasons. Again, the State has failed to carry its burden to show that it cannot avert the claimed harms to navigation and the economy through the mere expenditure of money. *See supra* at 28-32. The State's suggestion that there is an "environmental risk" if the Court does not issue a mandatory, affirmative injunction to dredge is double fantasy, because there can be no environmental harm if the Corps does not dredge, and because the Corps has been clear that it will not open-lake place sediment without a water quality certificate. *See supra* at 31-32.

The State also cites generally to various statutory and legislative materials that it suggests support issuing an injunction. The State yet again is assuming the conclusion of its erroneous

[29] The public interest is also disserved by an injunction requiring the unnecessary use of CDF space to dispose of sediment suitable for open-lake placement, particularly at federal expense. Czekanski Decl. ¶ 9 (noting the expense of constructing new CDFs); *see also* 33 U.S.C. § 419a (requiring that the Corps "extend the capacity and useful life of dredged material disposal areas such that the need for new dredged material disposal areas is kept to a minimum"). The use of CDFs to dispose of sediment—while appropriate in instances where the contamination merits doing so—can cause adverse environmental impacts because CDFs are typically constructed in areas providing beneficial habitat for fish and other creatures. Czekanski Decl. ¶ 8. Moreover, efficient use of CDF space is crucial for the Corp's ability to use its funds effectively and maintain navigation. Czekanski Decl. ¶ 9. The Court should decline to entangle itself in managing this national and regional program.

argument. As established above, the statutes the State cites do not create an enforceable mandatory duty to dredge Cleveland Harbor regardless of the technical need, and it is undisputed that the Corps does not have sufficient funds to pay for dredging all commercial and recreational harbors and their connecting channels to their authorized depths in the Great Lakes. *See supra* at 32-33.

V. Should the Court Grant Preliminary Injunctive Relief, the State Should Be Required to Post a Bond.

Should the Court grant the State's Motion for a Preliminary Injunction, the Corps requests that the Court order the State to provide a bond in the amount of $2,512,600 under Federal Rule of Civil Procedure 65(c). Federal Rule of Civil Procedure 65(c) provides:

> [t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

Although the Court does not have a mandatory duty to impose a bond as a condition for issuance of injunctive relief, it does have a duty to consider the request. *Roth v. Bank of Commonwealth*, 583 F.2d 527, 539 (6th Cir. 1978) (error for judge not to have considered bond). And the State of Ohio is not exempt from the requirements of Federal Rule of Civil Procedure 65(c). *Md. Dep't of Human Resources v. U.S. Dep't of Agric.*, 976 F.2d 1462, 1483 & n.20 (4th Cir. 1992) ("The rule's only exception to the security requirement exempts 'the United States or . . . an officer or agency thereof'."); *see also NACCO Materials Handling Group Inc. v. Toyota Materials Handling USA, Inc.*, 246 F. App'x 929, 952-53 (6th Cir. 2007) (citing *Roth*, 583 F.2d at 538). The purpose of the bond is to protect the party injured from damage caused by the injunction. *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 100 (6th Cir. 1982). Here, the State asks for the extraordinary relief of an order compelling the Corps to expend federal funds to dredge a mile of river immediately and to dispose of the sediment in confined facilities, at a cost of over $2.5 million (notwithstanding the

Corps not yet determining that such dredging is needed). Because the Corps would be forced to expend $2,512,600 in federal taxpayer money to comply with the State's proposed preliminary injunction, the State should be required to post a bond to protect the Corps from the loss of those funds in the event that the Corps prevails in the litigation. *See Waterfront Comm'n. of N.Y. Harbor v. Constr. & Marine Equipment Co.*, 928 F. Supp. 1388, 1406 (D.N.J. 1996) ("No economic hardship or duress will be imposed upon the Commission by the requirement to post a bond.").

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion to Extend the Preliminary Injunction.

Respectfully submitted this 25th day of July 2016,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Brief in Opposition to Plaintiffs' Motion to Extend the Preliminary Injunction was filed this 25th day of July 2016, through the ECF filing system and will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

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