

Minnesota Department of Natural Resources

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January 14, 2014

Via electronic and U.S. Mail

Chair Darrell Vanyo
Fargo-Moorhead Diversion Board of Authority
Moorhead City Hall
P.O. Box 779
Moorhead, MN 56561-0779

RE: Fargo-Moorhead Flood Risk Management Project (Project) and the Oxbow Memorandum of Understanding

Dear Chair Vanyo:

As you are aware, a significant component of the Fargo Moorhead Area Diversion Project (Diversion Project), also referred to as the Fargo-Moorhead Metropolitan Area Flood Risk Management Project, is the construction of a "high hazard dam" that will be used to divert flood water from the Red River around Fargo-Moorhead. This dam requires a Minnesota Department of Natural Resources (MDNR) permit and the preparation of a state Environmental Impact Statement (EIS). The Minnesota Environmental Policy Act (MEPA) which parallels the National Environmental Policy Act (NEPA) requires that the state evaluate direct, indirect, and/or cumulative impacts of not only the construction of the dam but of the entire Diversion Project of which the dam is an integral part. Minnesota law, like federal law prohibits a governmental unit from taking any action on a project including both construction of all or any part of the project and the acquisition of property in anticipation of construction, if the action will prejudice the ultimate decision on the project, until the final EIS has been completed and found to be adequate. "Prejudicial actions are those that limit alternatives or mitigative measures or predetermine subsequent development. In other words, actions that makes one option, including the option of not building the project, more or less likely to be chosen." Minn. R. ¶ 4410.3100. This language closely parallels federal case law under NEPA.

The MDNR has commenced the necessary environmental review for the Diversion Project. The scoping phase of the environmental review process is nearing completion; however, we do not anticipate completing the final EIS for another year. Therefore, it would be unlawful for any Minnesota governmental unit or organization of which it is a member to commence work on a component of the Diversion Project unless there is an independent basis for that component part separate and apart from the Diversion Project. Put another way, a Minnesota local unit of government cannot participate in the construction of a component part of the larger Diversion Project which is undergoing environmental review unless it can be demonstrated that the component part would be built and the public expenditures undertaken even if the full Diversion Project was never built.

The MDNR was recently made aware of an agreement entered into between the Metro Flood Diversion Board of Authority (Diversion Authority) and the City of Oxbow concerning the construction of a ring levee which the Diversion Authority has characterized in its web site as protecting the Oxbow area, which is located in the Diversion Project Staging Area, from flooding in the event of a 500 year flood. MDNR has reviewed the Memorandum of Understanding (MOU) between the City of Oxbow and Diversion Authority, in which the Diversion Authority agrees to construct a levee (hereafter referred to as the O-H-B Levee) to reduce the risk of

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flooding for many of the parcels located within the City of Oxbow and for the community of Hickson and the Bakke Subdivision. According to the MOU, the O-H-B Levee is necessitated because the Oxbow community will be "impacted by the periodic staging of water upstream of the physical structure" of the Diversion Project and the O-H-B Levee is designed to mitigate the additional flooding within the Oxbow community associated with the Diversion Project. Section 2.9 of the MOU further provides that "design and construction of the O-H-B Levee may commence before the [Diversion] Project..." and that it "is the intent of the Diversion Authority that the O-H-B Levee be designed and beginning in 2013 with acquisition of land, buildings (including houses) and improvements...with construction to commence in 2014." Both of these dates precede the completion of Minnesota's environmental review process.

Because of the complexities of Minnesota law it is imperative that the MDNR fully understand the relationship between the O-H-B Levee and the Diversion Project. If the O-H-B Levee is a stand-alone project that would be built even if the full Diversion Project is not built, commencement of construction would not present a problem under MEPA. However, if, as suggested in the MOU, the O-H-B Levee is a segment of the larger Diversion Project (e.g., a phased or connection action), the commencement of construction prior to completion of the state final EIS and adequacy determination would be a violation of Minnesota law. We would appreciate understanding the Diversion Authority's position and reasoning on this issue. Specifically, is the O-H-B Levee a stand-alone project or is it a part of the larger Diversion Project, and what is the reasoning the Diversion Authority has applied in reaching its determination?

In light of the high public visibility of the Diversion Project, the pending federal litigation and the potential liability of the Diversion Authority and its Minnesota members if the O-H-B- Levee project is commenced in potential violation of Minnesota law, we urge you to give prompt consideration to our inquiry so we might incorporate the Diversion Authority's viewpoints in the state environmental review process.

This letter is not intended to provide legal advice, rather merely to relay information as it may apply to environmental review under the Minnesota Environmental Policy Act and to obtain the most accurate information possible for incorporation in the state environmental review process.

Please contact me at (651) 259-5168 if you have any questions regarding this letter.

Sincerely,



Jill Townley
EIS Project Manager

- cc: Randall Doneen, MDNR
- Melissa Doperalski, MDNR
- Nathan Kestner, MDNR
- Steve Hirsch, MDNR
- Peter Buesseler, MDNR
- Mike Carroll, MDNR
- Kent Lokkesmoe, MDNR
- Barb Naramore, MDNR
- Sherry Enzler, MDNR
- Nancy Otto, Diversion Authority Member, Moorhead City Councilwoman
- Kevin Campbell, Diversion Authority Member, Clay County Commissioner
- Gerald Van Amburg, Buffalo-Red River Watershed District