

# Minnesota Department of Natural Resources

500 Lafayette Road • St. Paul, MN • 55155-40



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.

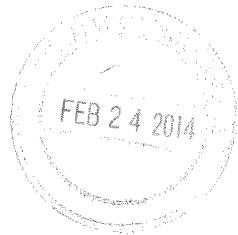
Please contact me at (651) 259-5168 if you have any questions regarding this letter.

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



February 20, 2014

Ms. Jill Townley  
Environmental Policy and Review Unit  
Division of Ecological and Water Resources  
MN Department of Natural Resources  
500 Lafayette Road, Box 25  
St. Paul, MN 55155

Re: Minnesota Department of Natural Resources Jurisdiction Over North Dakota's Construction of the Oxbow-Hickson-Bakke Ring Levee

Dear Ms. Townley:

Thank you for your January 14, 2014 request for information regarding the relationship between the Oxbow-Hickson-Bakke Ring Levee Project ("OHB Ring Levee") and the Fargo-Moorhead Flood Risk Management Project ("FM Project"). There has been a considerable amount of public commentary by third parties regarding the relationship between the two projects that does not reflect all of the facts, and we appreciate the opportunity to provide further clarification regarding the relationship between the two projects. The short response to your question as to whether the OHB Ring Levee should be considered to be a stand-alone project is "yes," and we are happy to provide some additional context to explain why that is.

At the outset let me further note that the Diversion Authority respects and supports the environmental review being conducted by the Minnesota Department of Natural Resources ("MDNR") of the FM Project under Minnesota law. We hope you will agree that our ongoing cooperation and funding demonstrates that support and we look forward to continuing to work collaboratively with the MDNR as it completes its environmental review of the project. As you know, the greater Fargo-Moorhead metropolitan area is at severe risk of seasonal flooding from the Red River of the North and its tributaries. This includes not only Fargo and Moorhead proper, but areas downstream – which will now be protected by the Locally Preferred Plan – as well as upstream, including the North Dakota communities of Oxbow, Hickson, and Bakke.

Indeed, absent additional protective measures, these upstream communities would be substantially inundated when significant flood events occur, regardless of whether the FM Project is built. Like the communities that are members of the Diversion Authority, these upstream communities have historically had to fight floods with the kind of ad hoc, emergency measures that are inherently inefficient and subject to greater risk of failure. The OHB Ring Levee is intended to alleviate that threat in the future.

In 2008, the United States Army Corps of Engineers ("Corps") initiated a feasibility study to develop and design permanent flood solutions for the Fargo-Moorhead area. The feasibility study process, in which the MDNR has fully participated, ultimately led to the FM Project design now undergoing MDNR environmental review. The FM Project design incorporates a 20,000 cfs diversion channel running through North Dakota, coupled with a control structure on the Red River and tie-back levees that in high flow years would temporarily stage and store a portion of the flow of the Red until floodwaters recede enough to allow their release without precipitating further downstream flooding. Unlike other, lower-cost (but also lower-benefit) solutions evaluated in the feasibility study, including a diversion channel through Minnesota, the FM Project design would protect a group of communities downstream of Fargo and Moorhead from flooding by tributaries of the Red, including the Rush, Lower Rush, Maple, and Sheyenne Rivers. The control structure is also strategically located to avoid having to displace hundreds of current residents.

The diversion/control structure combination would not, however, protect Oxbow, Hickson, or Bakke. This prompted concern in those communities, and in the North Dakota Legislature, about their independent need for flood protection. These concerns led to development of the OHB Ring Levee.

The North Dakota Legislature has recognized the independent value of the OHB Ring Levee as quite distinct from the FM Project as a whole, which is reflected in how the two projects are being funded. As an interstate flood control project, the FM Project has been developed under the authority of the U.S. Army Corps of Engineers, and requires authorization by Congress in a Water Resources Development Act in order to proceed to full implementation. The Diversion Authority is confident that the FM Project meets all federal requirements and merits federal authorization and funding, but there are considerable uncertainties in predicting

the precise timing and contours of any action by Congress. For that reason, the North Dakota Legislature has conditioned the expenditure of state construction funding for the FM Project on the receipt of federal authorization.

Most significantly, however, the North Dakota Legislature *exempted* the OHB Ring Levee from this condition, and expressly recognized that the OHB levees have independent value even if the FM Project is not authorized. These structures are located entirely in the State of North Dakota. Similar flood protection has already been provided to other Cass County cities such as Argusville, Mapleton, and Casselton that are at risk of flooding. In this respect, they are similar to the many flood control measures implemented up and down the Red River that are located wholly in Minnesota and were implemented without North Dakota review or approval.

In recognition of their independent utility and uniquely North Dakota focus, the OHB Ring Levee is being funded entirely by North Dakota entities. No Minnesota entity, including any Minnesota member of the Diversion Authority, will provide funding for the OHB Ring Levee. While the respective states have been discussing a 10% Minnesota share for the project cost in fairly general terms, these discussions remain ongoing as it is understood that the request for funding will ultimately be decided upon by the Minnesota State Legislature. There may have been some initial confusion as to whether the Minnesota share might include funding for the OHB Ring Levee, since it obviously complements the FM Project, but it was always the Diversion Authority's understanding that the entire funding for the OHB Ring Levee will be provided by North Dakota entities.

Likewise, as you will have noted from your review of the OHB Ring Levee Memorandum of Understanding, no Minnesota entity is a signatory to that Memorandum. The Minnesota members of the Diversion Authority – Moorhead, Clay County, and the Buffalo Red River Watershed District – were all keenly aware of the North Dakota-unique benefits of the OHB Ring Levee, as well as their limitations under Minnesota law with respect to the use of Minnesota funding for non-Minnesota projects. The Minnesota entities of the Diversion Authority reviewed the project details, and recognized that the purpose, beneficiaries, and funding were so exclusively focused on North Dakota interests that it was neither necessary nor appropriate for them to be signatories.

With this factual clarification, the application of the law becomes quite straightforward. As you note in your letter, both the National Environmental Policy Act and Minn. Stat. Ch. 116D allow the construction of projects prior to the completion of environmental review for another, related project, where the project to be constructed has independent utility from the project under environmental review. As a further point of clarification, the Diversion Authority has never understood the Minnesota Legislature or MDNR to have intended Minn. Stat. Ch. 116D to have extraterritorial scope.

The Diversion Authority generally agrees with your characterization of how projects with independent utility are to be treated for purposes of environmental review. In this context, we think it is particularly important to keep in mind that an independent utility assessment is not a strictly either/or proposition. That is, a project can *both* have value in connection with another project *and* have independent utility distinct from that project. Projects have independent utility if "each could exist without the other, although each would benefit from the other's existence." *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394 (9<sup>th</sup> Cir. 1989). Similarly, projects are "connected actions" only when "[t]he dependency [between the projects] is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken." *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1118 (9<sup>th</sup> Cir. 2000).

With this understanding of how dual-purpose projects are treated for purposes of environmental review, it becomes clear that the OHB Ring Levee plainly has independent utility, distinct and apart from the larger FM Project, even though it will be designed and constructed in a way that will allow it to be fully integrated with the FM Project if it is authorized and funded. Conversely, even if the FM Project is never authorized and never built, the OHB Ring Levee will protect the respective communities from the most serious future floods that will inevitably occur. If the MDNR has any concern that the construction of the OHB Ring Levee may later be argued to influence the outcome of the MDNR's environmental review, the Diversion Authority assures you that it will not at any point contend that the FM Project should or must be constructed as designed because of the OHB Ring Levee has been built, or that some other alternative should not be selected because of the existence of the OHB Ring Levee. In hindsight, had the Diversion Authority been aware of any concerns by the MDNR on this issue, we could have

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explained the critical distinction between how the North Dakota Legislature has unconditionally funded the OHB Ring Levee versus how it has conditioned the funding of the FM Project as a whole and perhaps avoided the need for this more formal exchange of letters. Going forward, if there is anything that the Diversion Authority can do to improve the communications with the MDNR on questions like this, please let us know and we would be happy to respond.

Finally, I should note that the Diversion Authority does not presume to speak on behalf of the Corps, which has been the lead agency throughout. While North Dakota views the OHB Ring Levee as its responsibility, for its part the Corps obviously also has an interest in ensuring that the OHB Ring Levee is designed and constructed in a manner that is compatible with the FM Project as a whole – again, if it is ultimately authorized and funded.

I hope this information has helped clarify your understanding of the proper characterization of the OHB Ring Levee as an independent flood control element, and has addressed any concerns you may have had, recognizing that you may not have been fully aware of the additional facts we have provided. To the extent you have remaining questions, please do not hesitate to contact me.

Very truly yours,



Darrell Vanyo, Chairman  
FM Diversion Board of Authority

<u>City of Fargo</u>	<u>City of Moorhead</u>	<u>Cass County</u>	<u>Clay County</u>	<u>Cass County Joint Water Resource District</u>	<u>Buffalo-Red River Watershed District</u>
Dennis Walaker	Nancy Otto	Darrell Vanyo, Chair	Kevin Campbell	Rodger Olson	Gerald VanAmburg (ex-officio)
Tim Mahoney		Ken Pawluk			
Brad Wimmer		Mike Thorstad (City of West Fargo)			

# Minnesota Department of Natural Resources



April 22, 2014

Transmitted 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 and the Oxbow-Hickson-Bakke Ring Levee Project

Chair Vanyo:

In a letter dated January 14, 2014 to the Fargo-Moorhead Diversion Board of Authority (DA), the Minnesota Department of Natural Resources (MDNR) inquired about the relationship between the Oxbow-Hickson-Bakke Ring Levee (OHB levee) and the Fargo-Moorhead Flood Risk Management Project (F-M project). Specifically, we requested clarity on whether the OHB levee is an independent project or if the OHB project is part of the F-M project for purposes of the Minnesota State Environmental Impact Statement. Your letter response dated February 20, 2014 stated the OHB levee has independent utility as these communities were in need of flood protection, but the levee is being designed to also provide flood protection if the F-M Project is approved and constructed.

As we indicated in our January letter, 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 F-M project unless there is an independent basis for that component part separate and apart from the F-M project. However, we also continue to acknowledge that, because the OHB levee is entirely within North Dakota, the MDNR has no jurisdiction over construction of the OHB levee.

We have reviewed your February response, along with additional pertinent information available such as the U.S. Army Corps September 19, 2013 Supplemental Environmental Assessment (EA) and Finding of No Significant Impact (FONSI), U.S Army Corps March 21, 2014 Section 404 Public Notice, and levee design plans. Our review has concluded that the OHB levee is a project component of the F-M Project, without an independent basis for its construction as proposed. Our basis for this determination is as follows:

- Although these communities are currently in need of flood protection, the OHB levee was not considered except in relationship to the F-M Project. The timing and development of the OHB levee has only been in the context of the F-M Project.



- The U.S. Army Corps of Engineers Supplemental EA and FONSI refer to the OHB levee as a “modification to the project.” All federal environmental review and permitting documents related to the OHB levee describe it as part of the F-M Project.
- The DA is seeking the cost of the OHB levee to count toward the local match for federal money toward the F-M Project.
- The proposed height of the OHB levee is approximately nine feet above FEMA 100 year flood event protection and approximately seven feet above the U.S. Army Corps of Engineers Expert Elicitation Panel 100 year flood event protection. This additional height appears intended to accommodate increased inundation from the F-M Project.

In light of the jurisdictional challenges and to protect the integrity of Minnesota's environmental review process we will consider the OHB levee as a component of the F-M project in the state EIS. Consistent with Minnesota law, MDNR will not be making **any** final governmental approvals on the F-M project or any component thereof until the state's EIS process is complete.

Sincerely,



Mike Carroll  
Assistant Commissioner

Cc: Craig Evans, U.S. Army Corps  
Judy DesHarnais, U.S. Army Corps  
Tom Crump, U.S. Army Corps  
Aaron Snyder, U.S. Army Corps  
Keith Berndt, Cass County  
Bob Zimmerman, City of Moorhead  
Michael Redlinger, City of Moorhead  
Mark Bittner, City of Fargo  
Pat Zavoral, City of Fargo



211 9th Street South, P.O. Box 2806, Fargo, ND 58108-2806  
Phone 701-241-5600      Fax 701-241-5728

April 24, 2014

Mike Carroll, Assistant Commissioner  
Minnesota Department of Natural Resources  
500 Lafayette Road  
St. Paul, MN 55155-4040

Dear Mr. Carroll:

Thank you for your letter of April 22nd, which I received electronically yesterday. The Fargo-Moorhead Diversion Board of Authority ("Diversion Authority") appreciates the ongoing dialogue with the Minnesota Department of Natural Resources ("MDNR") regarding the relationship between the Fargo-Moorhead Metropolitan Area Flood Risk Management Project ("F-M Project") and the proposed Oxbow-Hickson-Bakke, North Dakota Ring Levee Project ("OHB Ring Levee").

The Diversion Authority respects MDNR's efforts and supports a robust, accurate, and objective environmental review of the F-M Project by the MDNR, and your interest in protecting the jurisdiction of the MDNR in that process. I hope that you also understand that the preliminary protective activities that North Dakota entities have to undertake to minimize the potential for serious consequences of future flood events are not being done with any intent to prejudice or prejudge the outcome of that process, and we appreciate the MDNR's prior acknowledgement that such work will not have that effect. I was personally very gratified that the MDNR appreciates that "these communities are currently in need of flood protection" and your confirmation that the MDNR's interest in protecting its process will in no way prevent North Dakota entities from commencing construction of the OHB Ring Levee as scheduled.

We are also very open to further discussions with the MDNR regarding the independent utility of the OHB levee project, a subject about which I think it is fair to say our perspectives differ in no small measure. Along with the United States Army Corps of Engineers, the Diversion Authority has identified a number of substantial factors that establish that the OHB levee project has independent utility. In that sense, the MDNR's April 22nd letter contains several incorrect assumptions:

- It is not accurate to suggest that the OHB Ring Levee was only considered as a component of the F-M Project. The legislative history regarding the authorization for the funding of those levees makes it quite clear that it was considered and funded as a stand-alone project and would be constructed regardless whether the F-M Project is federally authorized and constructed.

Mr. Mike Carroll

April 24, 2014

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- We have also acknowledged that the OHB Ring Levee was simultaneously considered as part of the larger F-M Project for important and obvious reasons; to have ignored its role as part of the project would have been impractical. The MDNR's selected references to that parallel consideration do not in any way address the fact that something can have both independent utility and be part of a larger project, a concept well-recognized by the courts when interpreting the requirements of NEPA.
- The MDNR's objection to the design of the OHB Ring Levee "as submitted" suggests that the MDNR would not have objected to the OHB Ring Levee if it had been under designed to avoid taking into account the very strong probability that the F-M Project ultimately will be constructed. The MDNR's approach apparently would prefer that those levees would then later be redesigned and reconstructed at an additional cost, and waste, of tens of millions of dollars of taxpayer money. The MDNR's interest in preserving the integrity of Minnesota's review process certainly is understandable, but the citizens of both Minnesota and North Dakota deserve some fiscal and flood protection common sense as part in that process.

All that said, we understand and will continue to actively support the MDNR's desire to analyze the effects of the OHB Ring Levee as part of its own environmental review process. We hope you understand that our position on the independent utility of those structures was never intended to suggest that they should not be evaluated in that review. In closing, let me restate how committed we at the Diversion Authority are to keeping an open and constructive line of communication with the MDNR as we move forward.

Sincerely,



Darrell Vanyo, Chairman  
Metro Flood Diversion Board of Authority

cc: Craig Evans, U.S. Army Corps of Engineers  
Judy DesHarnais, U.S. Army Corps of Engineers  
Tom Crump, U.S. Army Corps of Engineers  
Aaron Snyder, U.S. Army Corps of Engineers  
Keith Berndt, Cass County  
Bob Zimmerman, City of Moorhead  
Michael Redlinger, City of Moorhead  
Mark Bittner, City of Fargo  
Pat Zavoral, City of Fargo

<u>City of Fargo</u>	<u>City of Moorhead</u>	<u>Cass County</u>	<u>Clay County</u>	<u>Cass County Joint Water Resource District</u>	<u>Buffalo-Red River Watershed District</u>
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