



June 2, 2017

The Honorable Tim Mahoney
Board Chair
Fargo-Moorhead Flood Diversion Authority
Box 2806
211 Ninth Street South
Fargo, North Dakota 58108

Re: Fargo-Moorhead Area Diversion Project Technical Team Discussions

Dear Mayor Mahoney:

I write to inform you that I have decided it is not possible for Minnesota to continue productive discussions regarding flood control alternatives for the Fargo-Moorhead metropolitan area at this time, given ongoing litigation and construction activities.

The Fargo-Moorhead Flood Diversion Authority (Diversion Authority) and the State of Minnesota (State) are presently involved in three major pieces of litigation concerning the Fargo-Moorhead Area Diversion Project (Project): (1) a contested case hearing arising from the Diversion Authority's decision to challenge the Department of Natural Resources' (DNR's) denial of a dam safety and work in public waters permit; (2) federal litigation concerning the decision by the Diversion Authority and U.S. Army Corps of Engineers (USACE) to commence construction on the Project without the required state permit; and (3) an appeal of the adequacy of the DNR's Environmental Impact Statement (EIS), which has been put on hold pending the outcome of the first two pieces of litigation. On a parallel track, and at the Diversion Authority's request, technical staff from DNR and the Diversion Authority have been meeting in an attempt to scope out a "Plan B" alternative for the Project that could be permitted by the State and meet the flood protection needs of the developed areas of the Fargo-Moorhead Metropolitan Area.

Given these outstanding legal questions and effort to identify a Plan B alternative, it is both disappointing and problematic that both the Diversion Authority and USACE continue to pursue construction of the Project without a DNR permit, with the most recent step being last week's announcement that USACE is allocating an additional \$20 million in FY 17 construction funding to the Project. It is beyond acting in bad faith; indeed, the continuation of construction is an insult to collaboration.

Managing both the litigation and the Plan B alternative discussions simultaneously, even under the best of circumstances, would require a substantial resource commitment on the part of the DNR, but I agreed to commit those resources in the hope that we might together find a mutually agreeable resolution to the challenges posed to Minnesota by the locally preferred Project. Unfortunately, we are not in the best of circumstances. Your counsel's ongoing litigation strategy, combined with an increased investment in construction, have led me to realize it is not reasonable to proceed down this dual path.

More specifically, the discovery and motion practice strategy your counsel is taking is beyond the bounds of what reasonably might be expected in legal matters of this type and seems to be directed more towards compelling the DNR to expend state resources than to fully and fairly litigate the issues presented to the Federal District Court and the Minnesota Office of Administrative Hearing (OAH) at the early stages of litigation. Additionally, I am concerned about some of the positions taken by your counsel in these proceedings. For example, in a recent appearance in a contested case matter, your counsel represented to the Hearing Officer that the Diversion Authority had never applied for a dam safety and work in public waters permit and that, by submitting a permit application to the DNR, the Diversion Authority was merely seeking the DNR's "advice" about the Project. This despite the fact that the Diversion Authority submitted a permit application together with a permit application fee and had numerous meetings with my staff about the necessary permit and permit requirements. Moreover, your counsel's prolific motion practice and discovery demands involve thousands of documents, many of which are not reasonably connected to resolving the immediate legal questions at hand. Producing these documents requires hundreds of hours of staff time – often the same staff that are participating in the Plan B technical meetings.

The Diversion Authority's overall strategy appears designed to prolong the litigation, obfuscate the issues, and maximize costs to the State. In combination with the increased commitment to constructing the Project without a DNR permit, I cannot in good faith continue to invest limited state resources in these Plan B discussions. For this reason I have instructed my staff to put all further work on our ongoing dialogue on hold until such time as the circumstances are more favorable to a genuine discussion of a Plan B alternative that can both meet Minnesota standards and provide meaningful improvements in permanent flood protection for the developed portions of the Fargo-Moorhead metropolitan area.

Sincerely,



Tom Landwehr
Commissioner

c: Colonel Samuel Calkins, U.S. Army Corps of Engineers