

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Dam Safety and Public
Water Work Permit Application 2016-
0386 for the Fargo-Moorhead Flood Risk
Management Project, Clay and Wilkin
Counties, Minnesota, and Cass and
Richland Counties, North Dakota

DECLARATION OF CASH AALAND

Cash Aaland provides the following declaration under oath:

1. I am a member of the Joint Powers Authority's leadership team. I've practiced law in North Dakota since 1989 and Minnesota since 1990. My firm, Aaland Law Firm, consists of six lawyers practicing in the areas of criminal defense, family law, personal injury and appeals.
2. I served with Tim Fox as one of the members of the multi-party representatives who met after the conclusion of the Joint Task Force Meetings. The Joint Task Force concluded with each of the task force members submitting statement on the flood control project. The task force did not come to a consensus, and frankly, there was no effort to arrive at an agreement, because the Task Force members did not represent parties.
3. JPA agreed to support a stay of all litigations, including the contested case, understanding that eventually the Governors would call upon us to engage in settlement negotiations to find a project configuration that met Minnesota's permitting requirements. As we understood Minnesota law that meant that the project design would have to meet specific Minnesota permitting criteria, including the least impact requirement of the Minnesota Environmental Policy Act (MEPA).

4. However, as we attempted to participate in the process, the DNR could not get the Diversion Authority and USACE to focus on Minnesota permitting requirements. When the Minnesota DNR denied the FM Diversion Authority's Dam Safety and Work in Public Waters Permit Application in October of 2016, it did so for very specific reasons. Chief among them was that approximately 54% of the lands removed from flooding in the project's proposed 72,923 acre benefited area were "sparsely developed flood plain located outside of Fargo." (Para 36, 154 and 196, Dam Safety and Public Waters Permit Application 2016-0386, Findings of Fact, Conclusions and Order). The proposed high hazard dam, necessary only to mitigate downstream impacts caused by the destruction of so much flood plain storage, would have resulted in the inundation of approximately 20,000 acres of land that did not previously receive flood waters. (Para 34, Findings and Order). The Commissioner found that the project applied for: "simply shifts the burden of flooding from one sparsely developed rural area to another and, to this extent, is of minimal benefit to the public welfare." (Para 196, Findings and Order).
5. The DNR further concluded that "[t]he review of the economic analysis and flood control benefits performed for the proposed project does not establish that the quantifiable benefits support the need for the project" as required by MN statute. (Para 137, Findings and Order). "Constructing a Class I (high hazard) dam is neither reasonable nor practical in light of the incremental increase of flood protection afforded to existing development in the F-M metro area." Id. The FM Diversion Authority failed to establish that its proposal represented the "minimal impact solution" with respect to all other reasonable alternatives as required by MN statute. (Para 85, 198, Findings and Order).

6. At nearly every meeting of the Fargo-Moorhead Area Flood Diversion Task Force Commissioner Landwehr cautioned everyone present that the “current” project was not permissible and that “major changes” must be made before a permit could be issued. The words “major changes” were repeated by Governor Dayton in his written statement in the Task Force Final Report and again by the Commissioner during the subsequent meetings held in St. Paul with leadership representatives from the Army Corps, the FM Diversion Authority and the Richland-Wilkin JPA.
7. Keeping in mind the Commissioner’s finding, Richland-Wilkin JPA worked to place on the table a project based on the Commissioner’s requirements. We hired engineer Charlie Anderson to work with us to develop such a project. Engineer Anderson had advised us that one of the flaws in the LPP (permit application) was that the diversion channel would run through the floodplains south and northwest of Fargo. These channel configurations were located so as to pull water off of the floodplains, destroying their natural water storage functions.
8. Engineer Anderson advised us that returning the diversion channel to the Minnesota side, as recommended by USACE, would more efficiently and cost effectively protect Fargo and Moorhead and automatically avoid removing the floodplains storage function. However, he indicated that if the channel had to go through North Dakota, it could be designed to dramatically reduce impacts.
9. With the assistance of engineer Anderson, we presented a proposal that would reduce the size of the project from the 72,923-acre plan that was denied a permit, to a 49,000-acre plan that would leave unchanged the plan’s specific features that protect the existing development in the FM Metro. (Para 154, Findings and Order). The JPA’s proposal also

allows a reasonable area for future growth. The northwest modification proposed by the JPA would preserve the flood plain of the Maple and Rush rivers northwest of the Metro area. By reducing the length of the diversion channel and moving it east, approximately 29,400 acres of sparsely developed flood plain would be excluded from the project footprint, maintaining its natural flood plain storage capacity. Existing development in this rural area would remain “as is” and not receive any additional waters. The JPA’s proposal on the southern end of the project would move the dam a reasonable distance north preserving another 10,000 acres of rural flood plain.

10. We were able to arrange for engineer Anderson to have access to USACE engineering to complete modelling of our alternative proposal. Based on that work, the Technical Assistance Group of engineers acknowledged that the JPA’s proposals would lower the staging area elevation by 5.4 feet to 916.2, wholly removing impacts from Richland and Wilkin Counties and greatly reducing Minnesota impacts in Clay County.
11. That report was scheduled to be presented to a meeting of the party representatives for review on March 8. At that March 8 meeting, DNR representative Kent Lokkesmoe acknowledged that if, in addition to the JPA’s proposed modifications, another 6 inches of flow downstream was allowed as suggested in the Task Force Guidance for TAG, the result would reduce staging by another foot or more, wholly removing Oxbow Hickson Bakke from the staging area and potentially eliminating all the Minnesota impacts. The elevation of OHB is approximately 915 to 916.5.
12. However, the Army Corps of Engineers and Diversion Authority came to the final meeting with a press release announcing their decision to seek a permit on Option described as Option 7A/10D. Fargo’s proposed Plan B, as outlined in the Diversion

Authority's press release and the TAG documents reflecting the size and shape of 7A/10D, would actually *increase* the Diversion project from the 72,923-acre project that was denied a permit, to a 76,812-acre project with the dam located further south. (Para 36, 154 Findings and Order) (TAG spreadsheet: FM Diversion Project – Southern Embankment/Dam Option Comparison). The Northern Alignment Alternative, proposed for permit by the DA in their 2016 Dam Safety and Public Waters application, and upon which the DNR Denial Order was tied, proposed the dam and embankment be located *1.5 miles further north than that proposed by 7A10D*. I have attached two maps to illustrate this point. One shows the location the high hazard was proposed in the alignment that was denied permit. (Northern Alignment Alternative). The second depicts with a red line where the denied dam location was relative to Fargo's current 7A/10D proposal. (7A-10D).


13. The Richland-Wilkin JPA has always maintained that the original NED plan was a reasonable less impact alternative that should serve as the true baseline for comparison. The NED plan proposed a simple Minnesota side diversion, one-half the size of Fargo's plan, which fully protected the FM Metro while preserving the existing flood plains both North and South of the cities. This cost-efficient alignment, with its inlet north of the Wild Rice / Red River confluence, stands as proof that Fargo's past or current 7A/10D plan cannot survive the "least impact solution" test required by Minnesota statute.
14. JPA has asked its attorney to seek summary disposition, because we believe that the current procedural course cannot efficiently arrive at a final conclusion that delivers flood control to Fargo and Moorhead while meeting Minnesota permitting criteria.
15. Proceedings in the Federal District Court, the 8th Circuit, the Minnesota Court of Appeals

and this contested case were all stayed based on the representations that the parties would work towards a settlement. Now we have all of those litigations plus a second permit application. Two alternatives have been presented that provide acceptable flood protection to Fargo and Moorhead, both with dramatically less impacts. One is the Minnesota Diversion, the NED project recommended by USACE in 2010. The second is the JPA proposal, which also dramatically reduces impacts. But there is no forum for those alternatives to be considered, because Diversion Authority and USACE have been allowed to veto even their consideration.

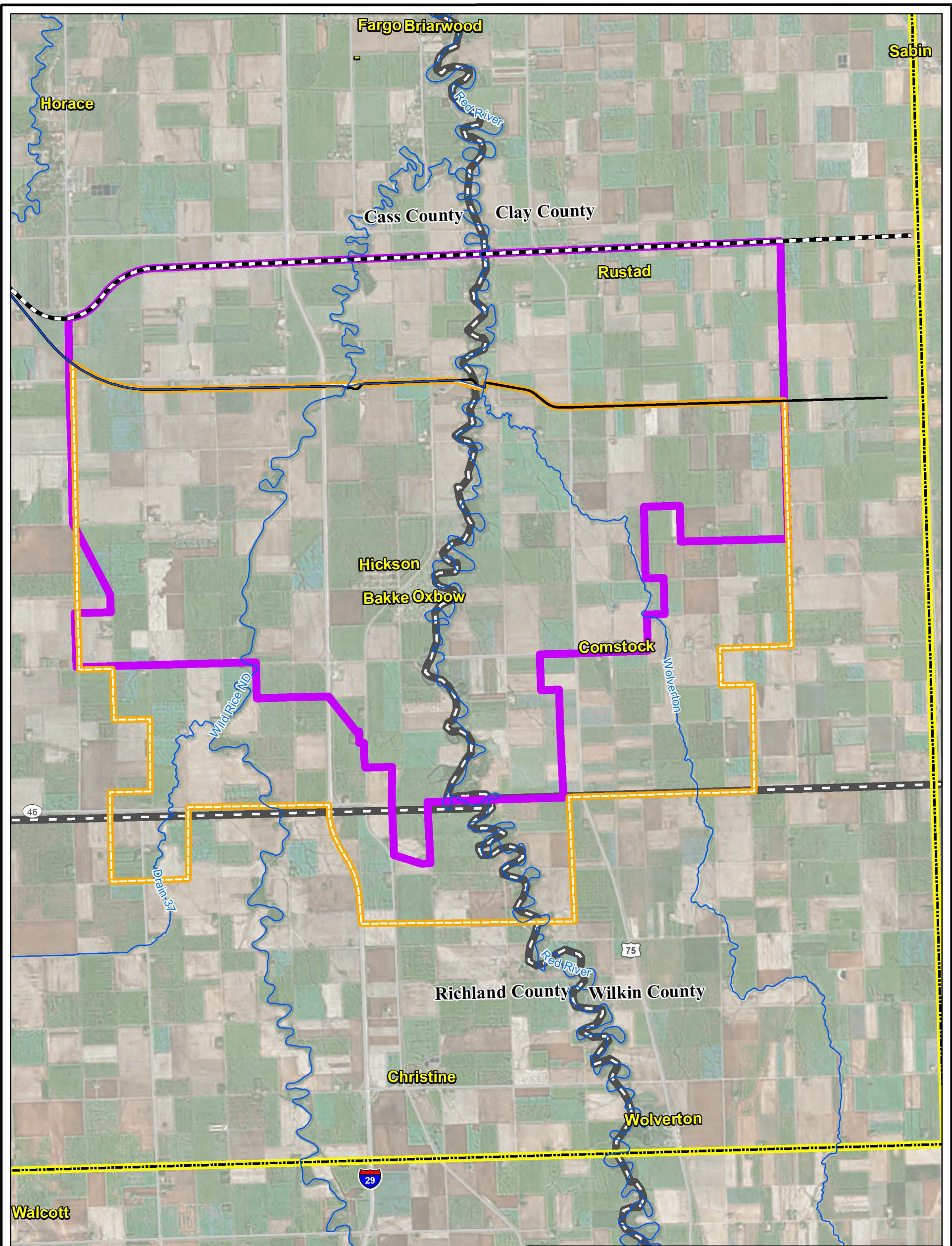
16. For over 5 years, JPA has been advocating that in order to meet Minnesota permitting requirements, a least impact solution must be selected. However, neither the Minnesota environmental review nor the Minnesota permitting process are proceeding to identify that least impact solution. Minnesota DNR does not – and did not --examine the least impact solution in its environmental review. Minnesota DNR did not identify the least impact solution in the first permitting proceeding, but rather rejected the first application as being unpermittable. The second application procedure is going around the same merry go round and is likely to end up with a permit rejection without a selection of the least impact solution. If that happens, we will then have two separate contested cases, neither of which will produce a least impact solution.

I declare under penalty of perjury, pursuant to Minn. Stat. §358.116, that everything I have stated in this document is true and correct.

Executed this 31 day of May, 2018, in the County of Cass, State of Minnesota.

A handwritten signature in black ink, appearing to read 'Cash Aaland', written over a horizontal line.

Cash Aaland



<p>Aerial Photograph (Source: ESRI)</p> <p>0 0.75 1.5 3 Miles</p> <p>Path: L:\1472\09\mxd\PreDraft\EIS_Rev\Wenck_Created\Proposed Project and Northern Alignment Staging Areas.mxd</p>	<p>Source: Esri, AEX, Getm</p>	<p>Legend</p> <table border="0"> <tr> <td> Streams/Rivers</td> <td> Northern Alignment</td> </tr> <tr> <td> Project Area</td> <td> Northern Alignment Staging Area</td> </tr> <tr> <td> Project Alignment</td> <td> Major Roads</td> </tr> <tr> <td> Project Staging Area</td> <td> County Boundary</td> </tr> </table>	Streams/Rivers	Northern Alignment	Project Area	Northern Alignment Staging Area	Project Alignment	Major Roads	Project Staging Area	County Boundary
Streams/Rivers	Northern Alignment									
Project Area	Northern Alignment Staging Area									
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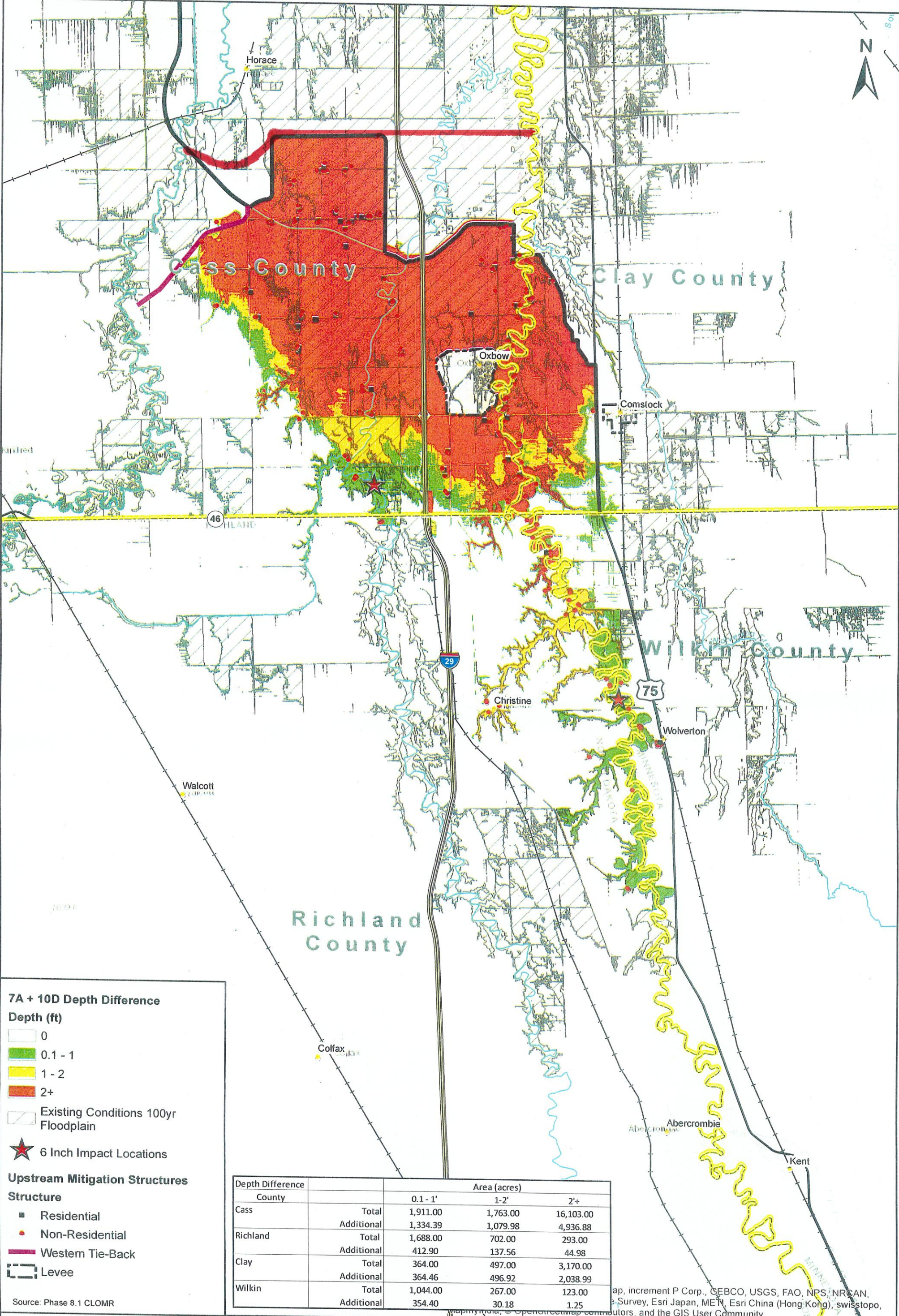
FARGO-MOORHEAD FLOOD RISK MANAGEMENT PROJECT

Proposed Project and Northern Alignment Staging Areas

Created By: ShuJC0243 Date Created: 05/22/2015 Date Exported: 2/17/2016

Figure 7

Source: 2014 1202 Diversion Authority Northern_ALT_Staging_Area Shapefile; 2012 11 SEAW Figure 4 Project Features Shapefile.



7A + 10D Depth Difference

Depth (ft)

- 0
- 0.1 - 1
- 1 - 2
- 2+

Existing Conditions 100yr Floodplain

★ 6 Inch Impact Locations

Upstream Mitigation Structures

Structure

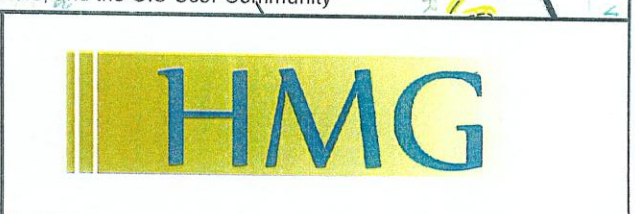
- Residential
- Non-Residential
- Western Tie-Back
- Levee

Source: Phase 8.1 CLOMR

Depth Difference	County	Area (acres)		
		0.1 - 1'	1-2'	2'+
Cass	Total	1,911.00	1,763.00	16,103.00
	Additional	1,334.39	1,079.98	4,936.88
Richland	Total	1,688.00	702.00	293.00
	Additional	412.90	137.56	44.98
Clay	Total	364.00	497.00	3,170.00
	Additional	364.46	496.92	2,038.99
Wilkin	Total	1,044.00	267.00	123.00
	Additional	354.40	30.18	1.25

Map, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, Survey, Esri Japan, METI, Esri China (Hong Kong), swisstopo, mapbox, OpenStreetMap contributors, and the GIS User Community

Option 7A + 10DE Alignment Depth Difference Map



Created By: enelson Date Created: 12/06/2017 Date Exported: 1/20/2018 Image: 2016 County NAIP Elevation Data - Coordinate System: NAD 1983 UTM Zone 14N Datum: North American 1983 H:\Fargo\BNU\4007438\13_7438_015\Minnesota Dam Safety Permit\Small Team\2017-11-13 Tech Advisory Com\GIS\H7A_10DE_DD.mxd