

December 13, 2019

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**Re: *In the Matter of the Dam Safety and Public Waters Work Permit No. 2018-0819 for the Fargo-Moorhead Flood Risk Management Project, Clay and Wilkin Counties, Minnesota, and Cass and Richland Counties, North Dakota***  
**OAH 65-2002-36151**

Dear Counsel:

Enclosed and served upon you please find the **ORDER DENYING DIVERSION AUTHORITY'S MOTION TO AMEND FIRST PREHEARING ORDER** in the above-entitled matter.

If you have any questions, please contact me at (651) 361-7865, at [andrew.hart@state.mn.us](mailto:andrew.hart@state.mn.us), or via fax at (651) 539-0310.

Sincerely,

s/ Andrew Hart

ANDREW HART  
Staff Attorney

Enclosure  
cc: Docket Coordinator

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Dam Safety and Public  
Waters Work Permit No. 2018-0819 for the  
Fargo-Moorhead Flood Risk Management  
Project, Clay and Wilkin Counties,  
Minnesota, and Cass and Richland  
Counties, North Dakota

**ORDER DENYING  
DIVERSION AUTHORITY'S  
MOTION TO AMEND  
FIRST PREHEARING ORDER**

This matter is pending before Administrative Law Judge Ann C. O'Reilly based upon a Motion to Amend the First Prehearing Order.

Colin O'Donovan and Philip Pulitzer, Assistant Attorneys General, appear on behalf of the Minnesota Department of Natural Resources (DNR). Robert Cattnach and Michael Drysdale, Dorsey & Whitney, LLP, appear on behalf of the Fargo-Moorhead Flood Diversion Board of Authority (Diversion Authority). Gerald Von Korf, Rinke Noonan, appears on behalf of the cities of Comstock and Wolverton (Cities) and the Richland/Wilkin Joint Powers Authority (RWJPA). Brent Edison, Vogel Law Firm, appears on behalf of the Buffalo-Red River Watershed District (BRRWD).

On November 5, 2019, the Diversion Authority filed a Motion to Amend the First Prehearing Order. Responses in opposition to the motion were filed by the DNR, the RWJPA, and the Cities on November 19, 2019, and by the BRRWD in November 20, 2019. The motion record closed on November 20, 2019.

Based upon the submissions of counsel and the hearing record, the Administrative Law Judge makes the following:

**ORDER**

1. The Diversion Authority's Motion to Amend the First Prehearing Order is **DENIED**.
2. The prehearing and hearing deadlines set forth in the First Prehearing Order remain in effect, including the hearing dates of **June 8-19, 2020**.
3. The parties shall discuss deadlines for filing pre-filed testimony and shall provide the Administrative Law Judge with a summary of stipulated deadlines for pre-filed

testimony by **January 3, 2020**. The deadlines shall include the dates for service and filing of direct testimony, rebuttal testimony, and surrebuttal testimony (if necessary).

4. If the parties cannot agree to deadlines for submission of pre-filed testimony, or if the parties no longer agree to proceed with pre-filed testimony in this case, the parties shall notify the Judge of such facts by January 3, 2020.

Dated: December 10, 2019



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ANN C. O'REILLY  
Administrative Law Judge

### MEMORANDUM

This matter first came before the Administrative Law Judge for a prehearing conference on July 2, 2019. At that conference, the parties agreed to a two-week evidentiary hearing beginning June 8, 2020, and continuing to June 19, 2020.

On September 27, 2020, the parties advised the Judge that they had agreed to move the hearing date to August 2020, and requested that the Judge amend the First Prehearing Order to reflect a hearing start date of August 3, 2020.

The Judge did not issue an order extending the hearing date and, instead, expressed her intention to discuss a new hearing date with the parties at the second prehearing conference scheduled for November 4, 2019. At the second prehearing conference, the Diversion Authority changed course and requested that the hearing date be moved from June 2020, to April or May 2020. Due to the other parties' opposition to the request, the Diversion Authority agreed to file a formal motion.<sup>1</sup>

On November 5, 2019, the Diversion Authority filed a Motion to Amend the First Prehearing Order. In its motion, the Diversion Authority seeks to accelerate the contested case hearing to either April 20, 2020 (preferred) or May 8, 2020. The Diversion Authority's argument is based upon the assumption that its permit approval will be recommended by the Administrative Law Judge and ultimately affirmed by the Commissioner.

The Diversion Authority asserts that an earlier hearing date would support the possibility of construction on the project beginning in 2021. According to the Diversion

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<sup>1</sup> Although the parties disagreed about whether the hearing date should be accelerated, the parties did express a willingness to submit pre-filed testimony in this case. However, the dates for submission of pre-filed testimony were not selected due to uncertainty surrounding the hearing date.

Authority, if a hearing could be completed in April or May 2020, the Commissioner may be able to act on the Administrative Law Judge's recommendations as early as mid-August 2020. The Diversion Authority believes that a final decision in its favor in August 2020 would allow it to solicit bids in the fall of 2020 and commence construction as early as spring 2021. The Diversion Authority contends that the cost of the project increases each year by tens of millions of dollars and leaves residents in the project area at risk of "catastrophic flooding."

According to the Diversion Authority, since the issuance of the First Prehearing Order in July 2019, there has been significant narrowing of the scope of discovery and the issues to be tried in the case. Specifically, the Diversion Authority claims that the September 23, 2019 Order Denying the Diversion Authority's Motion for a Protective Order and Motion in Limine provided needed direction to the parties, enabling them to limit discovery and more efficiently prepare for hearing. To that end, the Diversion Authority offers to make its expert witness disclosures in early December and waive its right to seek summary disposition of the case in exchange for an earlier hearing date.

All other parties to this litigation oppose the Diversion Authority's motion. While the other parties agreed to the Diversion Authority's original request to change the hearing dates to August 2020, they are unwilling to stipulate to a hearing date earlier than that set forth in the First Prehearing Order (June 2020).

First, the DNR disagrees that the issues in this case have been significantly narrowed by the September 2019 Order. According to the DNR, discovery is on-going and remains extensive. Second, the agency notes that while the Diversion Authority may waive its right to bring dispositive motions, the other parties have not waived such right. The DNR believes that there remain outstanding issues that may be addressed in dispositive or non-dispositive motions, which could narrow the scope of the hearing. Therefore, the DNR encourages the Judge to maintain the current prehearing schedule, which accounts for motion practice.

Third, the DNR explained that a trial before June 2020 would impose a hardship on the agency. According to the DNR, its various duties during the legislative session (which could end as late as May 2020), would make hastened trial preparation too taxing on the agency.

The RWJPA and Cities similarly argue that they need until at least June 2020 to prepare for trial due to the unavailability of their expert witness. According to these three parties, an agreement with their expert assumed live testimony would not be needed until the end of the academic year (June 2020). The RWJPA and Cities assert that moving the trial to April or May would make it difficult for their expert to effectively participate in the case, resulting in unfairness and undue hardship. These parties also note that some additional time is needed in the prehearing schedule to accommodate "unexpected contingencies," such as the need for additional discovery.

The BRRWD also claims it would be “very difficult” to prepare its case for hearing before June 2020. The BRRWD asserts that its trial preparation, to date, has been based upon an anticipated trial date of June 2020 or later, and that any acceleration of the hearing at this point would result in prejudice.

The Minnesota Rules of Administrative Procedure authorizes the Administrative Law Judge to set the time, date, and place for hearing.<sup>2</sup> Unless otherwise dictated by statute or rule, hearing dates and times are chosen by the Judge based upon the needs and interests of the parties and the circumstances of the case.

At the first prehearing conference in this case, the parties agreed to a hearing date in early June 2020, within one year of the case filing. This hearing date recognized the parties’ expressed need to: (1) conduct discovery; (2) engage in non-dispositive and dispositive motion practice; (3) retain and identify expert witnesses; (4) provide full and timely disclosures; and (5) prepare for hearing. The Administrative Law Judge concludes that the deadlines and hearing dates set forth in the First Prehearing Order continue to provide a fair and reasonable litigation schedule.

The majority of the parties in this case (five out of six) oppose the acceleration of the hearing date. For the past six months, all parties have operated under the belief that a hearing would not occur until at least June 2020 -- and could occur as late as August 2020. To move up the hearing date at this time would, according to these parties, impose inconvenience, hardship, and potential prejudice on all parties other than the Diversion Authority.

Pursuant to Minn. Stat. § 103G.311, subd. 5, the RWJPA, the Cities, and the BRRWD filed demands for a contested case hearing to challenge the DNR’s actions in granting the permits at issue in this case. The Administrative Procedure Act, Minn. Stat. ch. 14, confers upon the Office of Administrative Hearings the duty to ensure such hearings are conducted in a manner that is fair to all parties.

While it may well be true that construction costs rise every year, the Diversion Authority surely understood, when it undertook a project of this scope and magnitude, that significant time would be required for permitting and governmental approvals. This tribunal has not imposed any delays or contributed in any manner to the length of time that it has taken for the Diversion Authority to obtain its required permits. Therefore, this administrative proceeding should not be hastened to compensate for the time other courts and tribunals have taken to decide matters related to the subject permits.

In all reality, moving the hearing date up one or two months will not ensure that the project could proceed to construction in 2021, even if the Diversion Authority is ultimately successful in this action. There are many contingencies outside of this proceeding that could impact construction. But based upon the representations of a majority of the parties to this litigation, accelerating the case would affect their abilities to fully prepare and present their cases. Thus, a balancing of the parties’ interests and the equities in this

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<sup>2</sup> Minn. R. 1400.5400 (2019).

case supports a June 2020 hearing date. Accordingly, the Diversion Authority's motion is **DENIED** and the hearing dates set forth in the First Prehearing Order remain unchanged.

The parties are encouraged to work together to determine deadlines for submission of pre-filed testimony consistent with the other dates set forth in the First Prehearing Order. The Administrative Law Judge finds that pre-filed testimony will expedite the hearing process and assist the parties in trial preparation.

**A. C. O.**