

**STATE OF MINNESOTA  
DEPARTMENT OF NATURAL RESOURCES**

**RECORD OF DECISION**

In the Matter of the Final Supplemental	)	
Environmental Impact Statement for the Fargo-	)	
Moorhead Flood Risk Management Project, Clay	)	
and Wilkin Counties, Minnesota, and Cass and	)	<b>FINDINGS OF FACT, CONCLUSIONS AND</b>
Richland Counties, North Dakota, Pursuant to	)	<b>ORDER</b>
Minnesota Rules, Parts 4410.0200 to 4410.6500	)	

Based upon, and after having considered the entire record of the proceeding, including written reports, written and oral data, information, and statements, the Minnesota Department of Natural Resources (DNR) makes the following:

**I. FINDINGS OF FACT**

**A. Procedural History**

1. The Minnesota Department of Natural Resources (DNR) prepared a state Environmental Impact Statement (hereinafter State FEIS) for the Fargo-Moorhead (FM) Flood Risk Management Project (the previously-proposed Project). The previously-proposed Project was a dam and diversion channel system flood risk reduction project designed to divert flood waters around the cities of Fargo and Moorhead, and surrounding metropolitan areas. The previously-proposed Project called for the dam and associated staging area not to be used until flood levels were approximately at or above the 10-year flood.
2. The State FEIS was completed in accordance with the provisions of Minnesota Environmental Policy Act (MEPA) and concluded in June 2016 with DNR's EIS adequacy determination. See Minn. Stat. Ch. 116D (2018).
3. On February 18, 2016, prior to completion of state environmental review, DNR received an application for a Dam Safety and Public Waters Work permit (2016-0386) for the previously-proposed Project, listing the Flood Diversion Board of Authority (Diversion Authority) as the applicant. Based on the October 2016 Findings of Fact for the Dam Safety and Public Water Work Permit Application, DNR denied the permit application for the previously-proposed Project.
4. As a result of the permit denial, North Dakota Governor Doug Burgum and Minnesota Governor Mark Dayton created a joint Task Force in October 2017 to discuss flood risk reduction options and make recommendations. The Task Force created a Technical Advisory Committee/Group that included engineers and staff from the Diversion Authority and DNR. The members of the Task Force included: Del Rae Williams, Mayor, Moorhead; Heidi Durand, Council Member, Moorhead; Joel Paulsen, Council Member, Moorhead; Jenny Mongeau, Commissioner, Clay County; Tim Fox, former attorney, Wilkin County; Mark Anderson, Treasurer, Buffalo-Red River Watershed District; Curt Johannsen, Mayor, Hendrum; Mark Jacobson, Commissioner, Norman County; Jason Benson, Engineer, Cass County; Rob Bergan, Business Leader and Entrepreneur, Fargo; Nathan Berseth, Commissioner, Richland County; Bernie Dardis, Board Chair, Greater

North Dakota Chamber of Commerce; Craig Hertsgaard, Farmer, Richland County; Tami Norgard, Vogel Law Firm; John Strand, Commissioner, City of Fargo; Ken Vein, City Council Member, Grand Forks. The Technical Advisory Committee/Group presented the Task Force with options and supporting information for potential revisions to the previously-proposed Project. The Task Force considered several potential project revisions, but there was not a recommendation to pursue a specific option.

5. On March 16, 2018, the DNR received a permit application for a Dam Safety and Public Waters Work permit (2018-0819) for a revised FM Project (hereinafter, Plan B) listing the City of Fargo, City of Moorhead, Diversion Authority and U.S. Army Corps of Engineers (USACE) as the Project Applicants. Plan B included changes in the alignment of the southern embankment, alignment of the eastern and western tiebacks, and river flow through town. These component changes resulted in a new inundation and staging area, and also resulted in modifications to, and elimination of, some project structures, such as the Comstock Ring Levee. DNR determined that the proposed changes were substantial and could affect the potential significant adverse environmental effects of the Project [Minn. R. 4410.3000, subp. 3A(1) (2015)], and ordered preparation of a Supplemental EIS (SEIS).
6. A SEIS Preparation Notice was published in the May 21, 2018 edition of the *EQB Monitor* (Vol. 42, No. 21). Minn. R. 4410.3000, subp. 5B.

## **B. Purpose and Need**

7. The purpose for the Project as stated in the USACE *Final Feasibility Report Environmental Impact Statement (2011)* (FFREIS) was "...to reduce flood risk, flood damages and flood protection costs related to the flooding in the Fargo-Moorhead Metropolitan Area." *FFREIS* § 2.5. A different Project purpose, however, was used for the Clean Water Act Section 404(b)(1) evaluation in the FFREIS. This purpose and need statement included the non-Federal sponsor's need to address flooding from the five Red River tributaries (Wild Rice, Sheyenne, Maple, Rush and Lower Rush Rivers) in the Project Area. *FFREIS* Attachment 1.
8. In addition, during the State scoping process for the 2016 State EIS, a determination was made that the criteria for alternative screening and analysis that were used by the USACE for the FFREIS would not meet the requirements for State environmental review set forth in Minn. R. 4410.2300, G (2015).
9. To adequately apply the State's alternative screening requirements set forth in Minn. Stat. § 116D.04, subds. 2 and 4 (2018) and Minn. R. 4410.2300, G (2015), the DNR needed one purpose and need statement. The DNR requested that the project proposer clarify the apparent discrepancy in project purposes identified in ¶¶ 7 and 8. DNR facilitated development of the Project purpose and need statement for state environmental review with the Diversion Authority and the USACE. The DNR was mindful that, as recognized by numerous federal courts, the project purpose should not be so narrow as to preclude the analysis of reasonable, environmentally less impacting alternatives. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) and *Audubon v. U.S. Dept. of Transp.* 524 F. Supp. 2d 642, 663-64 (D.Md. 2007). In establishing Project purpose, the DNR also considered the State's interest in public safety and flood risk reduction.
10. The purpose and need statement was revised by the Diversion Authority in consultation with the USACE to meet the needs of the State environmental review process. The Project purpose and need statement used by the DNR for the State environmental review is: "...to reduce flood

risk, flood damages, and flood protection costs related to flooding in the F-M metropolitan area. To the extent technically and fiscally feasible, the Project will:

- Reduce flood risk potential associated with a long history of frequent flooding on local streams including the Red River, Sheyenne, Wild Rice, Maple, Rush and Lower Rush Rivers passing through or into the F-M metropolitan area;
- Qualify substantial portions of the F-M metropolitan area for 100-year flood accreditation (i.e., meets the standard to be shown on Flood Insurance Rate Maps (FIRMS) as providing protection) by the Federal Emergency Management Agency (FEMA) under the National Flood Insurance Program (NFIP); and
- Reduce flood risk for floods exceeding the 100-year flood or greater, given the importance of the F-M metropolitan area to the region and recent frequencies of potentially catastrophic flood events.”

State FEIS § 1.4.

### C. Plan B Description

11. The previously-proposed Project was described in detail in the 2016 State FEIS § 2.1.1. Plan B is described in detail in Final SEIS § 2.1.1. Many of the Plan B components are similar to those from the previously-proposed Project. The Plan B Project changes the alignment of the Southern Embankment, as well as the Eastern and Western Embankments. Plan B also allows more flows through the Fargo-Moorhead urban area. These component changes result in a new inundation area, and result in modifications to, and elimination of, some project features. *See Attachment A.*
12. In addition to project component revisions, the DNR elected to use the Period of Record (POR) hydrology to analyze Plan B, rather than the Expert Opinion Elicitation Panel (EOEP) hydrology that was used on the previously-proposed Project. The decision to use the POR hydrology was discussed, and agreed to, by the Governor’s Task Force. This revision resulted in lower flood stage elevations for the various flood events that were analyzed.
13. As proposed, Plan B would retain an approximately 30-mile long diversion channel on the North Dakota side of the Fargo-Moorhead area. Plan B also includes about 20 miles of Dam/Southern Embankment and Tieback Embankments. Major changes between the previously-proposed Project and Plan B include:
  - The Southern Embankment was called the tieback embankment for the previously-proposed Project. The embankment formerly extended from the diversion inlet control structure east into Minnesota. Plan B adds a square-shaped jog to the north in the alignment. Starting near the Diversion Inlet Control Structure that is proposed approximately 6 miles west of the Red River, the alignment travels east for about 0.6 mile, then the alignment jogs north for about 1.7 miles, then east for about 2.2 miles, then south for about 2.5 miles, before meeting up again very near the previously-proposed alignment just west of the Wild Rice Control Structure. The purpose of this jog is to store additional water.
  - A realignment of the Eastern Tieback Embankment in Minnesota just north of the Clay/Wilkin County line crossing Wolverton Creek, where a non-gated culvert structure would allow Wolverton Creek to pass through the embankment. The Eastern Tieback

Embankment formerly headed straight east on the Minnesota side of the Red River Control Structure under the previously-proposed Project.

- The Western Tieback begins at the Diversion Inlet Control Structure and heads in a southwesterly direction along a high ridge. The Western Tieback formerly headed straight south under the previously-proposed Project.
- Slight adjustments to the exact locations of the Diversion Inlet Control Structure, Red River Control Structure and Wild Rice River Control Structure.
- Project operations would allow flows through town up to 21,000 cubic feet per second (cfs), rather than at 17,000 cfs under the previously-proposed Project. A flow of 21,000 cfs at the Fargo gage is approximately a five-percent chance flood (i.e., 20-year flood), while a flow of 17,000 cfs equates to a ten-percent chance flood (i.e., 10-year flood).
- The City of Comstock, Minnesota, would no longer require a community ring levee and one is not proposed as part of Plan B.

#### **D. Supplemental EIS Scoping**

14. In accordance with Minn. R. 4410.3000, subps. 5A and 5B (2015), DNR adopted a scope and issued a SEIS Preparation Notice on May 21, 2018 for Plan B (Preparation Notice). The Preparation Notice included those components required by Minn. R. 4410.3000, subp. 5B (2015), including issues to be analyzed and alternatives to be examined.
15. An estimated schedule for completion of the supplemental environmental review process was included in the Preparation Notice as required by Minn. R. 4410.3000, subp. 5B(4) (2015).
16. The scope of a supplement to an EIS must be limited to impacts, alternatives, and mitigation measures not addressed or inadequately addressed in the final EIS. Minn. R. 4410.3000, subp. 5A (2015).
17. The State FEIS fully evaluated the environmental and social effects of the previously-proposed Project on sixteen topics. Plan B was not expected to result in significantly different impacts for five of the sixteen topic areas that were included in the State FEIS; thus, additional information on those topics was not required as part of the SEIS. The topics that were adequately evaluated in the State FEIS included:
  - Cold Weather Impacts on Aqueduct Function and Biotics.
  - Cover Types.
  - Potential Environmental Hazards.
  - State-listed and Special Status Species.
  - Invasive Species.
18. Changes in Plan B could affect the potential for significant environmental or social effects of the other eleven topics evaluated in the State FEIS [note that three of the eleven (wildlife, stream stability and fish passage) were combined for readability in the SEIS]. As a result, the following topic areas were proposed for evaluation in the SEIS.
  - Hydrology and Hydraulics
  - Federal Emergency Management Agency (FEMA) Regulations and the Conditional Letter of Map Revision (CLOMR) Process
  - Wetlands

- Aquatic and Terrestrial Resources (combined Wildlife, Stream Stability and Fish Passage sections of the State FEIS)
  - Cultural Resources
  - Infrastructure
  - Land Use Plans and Regulations
  - Dam Safety and Public Waters Regulations and Permitting
  - Socioeconomics
19. The Preparation Notice identified that the State FEIS contained a robust evaluation of alternatives and that this evaluation would not be revisited as part of the SEIS. The proposed scope did not identify any additional alternatives for full evaluation in the Draft SEIS. The Preparation Notice identified evaluation of Plan B and the No Action Alternative (with Emergency Measures), which was based on the assumption that emergency measures currently employed in the Project Area would continue to be implemented as necessary to reduce flood damages.
20. The Preparation Notice was distributed to all who received the State FEIS and everyone on the EQB distribution list. Minn. R. 4410.1500 (2015). The DNR issued a press release and published a summary of the Preparation Notice in the *EQB Monitor*. Minn. R. 4410.3000, subp. 5B (2015). In accordance with the requirements of Minn. R. 4410.3000, subp. 5B (2015), the Preparation Notice was made available for public review during a 20-day scoping period. The scoping period commenced on May 22, 2018 and lasted until June 11, 2018.
21. DNR received 46 individual comment letters or emails on the Preparation Notice. The DNR considered all public comments received on the scope of the SEIS. Minn. R. 4410.300, subp. 5B (2015). The Draft SEIS included responses to timely and substantive comments received on the scope. These responses indicated whether and how the scope was modified based on the comments. See Draft SEIS Appendix A. A number of comments were considered and resulted in minor additions to the details of the scope described above in ¶18, but no new topics were identified for inclusion. Several commenters suggested evaluating additional alternatives, including options that were identified as part of the Task Force process and variations of alternatives previously investigated, such as a diversion in Minnesota. All of these alternatives were considered during development of the Draft SEIS. The SEIS consideration of alternatives is described in greater detail below in ¶¶ 64 through 68, Final SEIS § 2.2 and Appendix B.

## E. Draft SEIS

22. The Draft SEIS incorporates by reference the State FEIS.
23. Pursuant to Minn. R. 4410.3000, subp. 5C, the DNR prepared a Draft SEIS for Plan B as required by and consistent with Minn. R. 4410.2300, D through J, 4410.2400, and 4410.2500 (2015). The SEIS's treatment of items D to J (content of EIS) is detailed in ¶¶ 24 through 33.
24. Cover Sheet: The Draft SEIS has a cover sheet with a signature page.
25. Summary: The Draft SEIS contains an executive summary.
26. Table of Contents: The Draft SEIS contains a table of contents.
27. List of Preparers: This topic is addressed in Chapter 8 of the Draft SEIS.
28. Project Description: The proposed Project is described in Chapter 2 of the Draft SEIS.
29. Government Approvals: Governmental permits and approvals, including the government unit responsible for each action, are listed in Chapter 1 of the Draft SEIS.

30. Alternatives: The Draft SEIS addressed the alternatives identified by public comments in response to the proposed scope described in the SEIS Preparation Notice. The topic of alternatives, including alternatives proposed by commenters, is presented in Chapter 2 of the Draft SEIS and discussed in SEIS Appendix B. Draft SEIS § 2.2 and App. B.
31. Environmental, economic, employment and sociological impacts: Chapter 3 of the Draft SEIS addresses these topics.
32. Mitigation measures: Measures available to avoid or minimize potential adverse impacts are described in each topic subsection of Draft SEIS Chapter 3. Chapter 6 of the Draft SEIS includes a comparison of proposed mitigation measures between the previously-proposed Project and Plan B, and identifies additional mitigation measures brought forward through public comments on the original EIS and the during development of the SEIS.
33. Appendix: The SEIS contains a total of eight appendices.
34. Pursuant to Minn. R. 4410.2400 (2015), the Draft SEIS incorporates material from the State FEIS by reference to reduce the bulk of the SEIS document without impeding governmental and public review of the project. All incorporated material was made available for inspection by interested persons within the time allowed for comment.
35. The Draft SEIS presents information on public and agency involvement in Chapters 1 and 7.
36. References for information cited in the SEIS are listed in Chapter 9 of the SEIS and in the Acronyms and Definitions introductory sections of the Draft SEIS.
37. On August 27, 2018, the DNR issued the Draft SEIS, making it available for public review and comment pursuant to the requirements of Minn. R. 4410.2600 (2015). The Draft SEIS, Appendices and Summary were distributed to the EQB distribution list and other interested parties as required by Minn. R. 4410.2600, subps. 3 through 4 (2015). A notice of availability of the Draft SEIS was published in the *EQB Monitor* on August 27, 2018 as required in Minn. R. 4410.2600, subp. 5 (2015). Pursuant to Minn. R. 4410.2600, subp. 7 (2015), the DNR issued a press release containing notice of the Draft EIS; notice of the date, time, and place of the required informational meeting; notice of the locations at which the copies of the Draft EIS were available for public review; and notice of the date of termination of the comment period. The required 30-day minimum public comment period for the Draft SEIS extended from August 28 to September 27, 2018.
38. On September 13, 2018, the DNR held a public information meeting on the Draft SEIS in Moorhead, Minnesota. Two stenographers were present at the meeting to transcribe all public comments as required by Minn. R. 4410.2600, subp. 8 (2015).
39. DNR received 107 written letters, emails and oral comments on the Draft SEIS. Responses to all substantive comments are in Appendix A of the Final SEIS. Each submittal was given an identification number. Many submittals contained more than one comment. In those cases, each comment was assigned a unique comment identification (comment ID). Similar comments were grouped together and a single response was provided. Copies of all submittals, annotated with comment IDs, were included as Attachment 1 to Appendix A of the Final SEIS. Minn. R. 4410.2600, subp. 10 (2015).
40. Public comments on the Draft SEIS covered a wide range of topics from agriculture to Wolverton Creek Impacts. The most prevalent topics identified by commenters are identified below and detailed in ¶¶ 41 to 47.
  - Project alternatives
  - Cost benefit/economic considerations
  - Dam safety

- Flood risk transfer
- Mitigation sufficiency
- Consistency with local plans
- Project purpose

Many of these topics are also identified as “Issues and Areas of Controversy” in the Executive Summary and at the beginning of the Final SEIS, before the table of contents. Minn. R. 4410.2300, B (2015).

41. Project alternatives. Many comments addressed various aspects of the alternatives analysis. These comments ranged from submitting new alternatives, raising alternatives that were previously eliminated from evaluation, and providing additional details on aspects of alternatives, to raising concerns with the alternative screening. Each of these comments received a response; and, in some cases, DNR collected additional information and reevaluated some alternatives. See Final SEIS App. A. In summary, all alternatives were considered and screened with respect to the requirements of Minn. R. 4410.2300, G (2015). Additional details, information collected, and evaluation of alternatives can be found below in ¶¶ 64 through 68 and Final SEIS Appendix B.

During the public comment period on the Draft SEIS, the DNR received public comments requesting reconsideration of Alternative 30 and Alternative 31, along with additional data on these two alternatives. See Final SEIS App. A. The DNR’s reconsideration of these two alternatives raised in the public comment period included additional modeling and analysis, and is included in a section at the end of the Alternatives Screening Report. See Final SEIS App. B. The DNR reconsidered the alternatives using the criteria set out in Minn. Stat. § 116D.04 (2018) and Minn. R. 4410.2300, G (2015). Information for Alternative 30 and Alternative 31 was collected as part of developing the Final SEIS and this resulted in a determination that further analysis would not be conducted for these alternatives. Final SEIS App. B.

42. Cost benefit/economic considerations. As part of the project feasibility analysis and National Environmental Policy Act (NEPA) compliance, the USACE conducted a cost/benefit analysis of the previously proposed Project. The DNR’s State FEIS did not include a cost/benefit analysis; rather, it provided an analysis of the socio-economic impacts of the previously-proposed Project. The SEIS Preparation Notice did not propose to reevaluate the economic impacts of Plan B, noting that these impacts would be similar to what was evaluated for the previously-proposed Project in the State FEIS. In response to comments on the Draft SEIS, additional socioeconomic information was included in the Final SEIS to address the different flood inundation impacts of and revised mitigation for Plan B. Final SEIS §§ 3.10.2 and 3.10.3.

Many commenters believed that a new cost/benefit analysis should be conducted for Plan B. Pursuant to Minn. R. 4410.3000, subp. 5A (2015), DNR declined to conduct a cost/benefit analysis because the socioeconomic analysis in the State FEIS and the Final SEIS contained adequate information to understand the economic impacts of the Project. See Final SEIS App. A.

43. Dam safety. Many commenters were concerned about the construction of a high hazard dam or that the dam breach analysis in the SEIS did not account for future development. *Id.* The reasonableness of a high hazard structure is considered during permitting. A dam breach analysis cannot be conducted on future development unless the specific location of that future development is known. However, a dam breach analysis can show geographic areas where the amount and speed of water after a dam breach would present a threat to life or property. This information is contained in the dam breach analysis and DNR would use this information to

recommend development restrictions as part of any dam safety permit application review. Final SEIS § 3.9 and App. H.

44. Flood risk transfer. Many commenters were concerned about transferring the flood risk that currently exists in the Fargo-Moorhead metropolitan area to other areas. This concern is increased when the flood risk is transferred to areas that currently have little flood risk or have not historically been inundated during flood conditions. There was also concern about transferring flood risk across geopolitical boundaries, such as state or county lines. Additional concerns included the large geographic area over which flood risk would be transferred under Plan B. See Final SEIS App. A.

The Final SEIS accurately describes and discloses the flood risk transfer that would occur under Plan B. Commenters did not disagree with the flood risk transfer analysis in the Draft SEIS; rather, commenters felt that the flood risk transfer was unfair or too extensive. *Id.* The high level of concern about this topic in public comments led the DNR to include flood risk transfer as an Area of Controversy in the Final SEIS.

45. Mitigation sufficiency. The proposed Project would have many impacts over a large geographic area. The extent and severity of these impacts are disclosed in the Final SEIS; however, there is some uncertainty in these predictions. Insufficient mitigation was one of several factors that led DNR to deny a permit for the previously-proposed Project. The project proposers have made several revisions to the mitigation measures for Plan B. Notable revisions include a debris clean up and repair program and an extension of the property acquisitions and flowage easements area. Despite this additional information being available, many commenters had questions and/or concerns on how mitigation would occur and whether mitigation would adequately address all impacts. Many commenters expressed concern about the suitability of mitigation for agricultural impacts. The flowage easements are intended to cover the financial impact of project operation to agricultural practices. *Id.* In general, the DNR responses directed commenters to specific components of the Diversion Authority's Property Rights Acquisition and Mitigation (PRAM) plan that is intended to address these impacts. See Final SEIS App. F. A specific theme emerged from comments about family farms where generations of people have been connected to the land, and being relocated would not address that loss of connection that has developed over generations. No mitigation has been proposed or identified to address this concern. See Final SEIS App. A.

As part of developing the Draft SEIS, DNR reviewed the USACE Adaptive Management and Mitigation Plan (AMMP) and determined that it had insufficient mitigation for impacts to fish passage and biological connectivity. See Final SEIS App. G. The AMMP claimed that the proposed revision in Plan B to allow increased flows through town relative to the previously-proposed Project (from 17,000 cfs to 21,000 cfs) would reduce impacts to fish passage and biological connectivity so that mitigation was not warranted. DNR identified in the Draft SEIS that, even with the reduced frequency of operation associated with increased flows through town, Plan B would still have impacts to fish passage and biological connectivity from increased water velocities through control structures and culverts, the diversion channel acting as an attractant to fish, potential geomorphological impacts and the loss of floodplain connectivity by placing a dam across the rivers and adjacent floodplain. See Final SEIS Chp. 6. The Diversion Authority commented on the Draft SEIS indicating a willingness for additional discussion on how to address these impacts. See Final SEIS App. A. These discussions did not result in an agreement of how fish passage and biological connectivity should be mitigated. Proposed mitigation for fish

passage and biological connectivity for the previously-proposed Project included construction of fish passage on Drayton Dam, the last low head dam on the Red River within the United States. The DNR has determined that this mitigation measure would address potential impacts to fish passage and biological connectivity. The Diversion Authority and USACE remain concerned that the Drayton Dam fish passage project would provide greater mitigation than predicted project impacts warrant. The DNR does not agree that fish passage at Drayton Dam would provide more mitigation than is needed. This disagreement led the DNR to include mitigation sufficiency as an Area of Controversy in the Final SEIS.

46. Consistency with local plans. Comments on the Draft SEIS from the Buffalo-Red River Watershed District, City of Horace, Wilkin County and the Wilkin-Richland Joint Powers Authority (JPA) asserted that Plan B is not consistent with various land use plans, water plans, or local ordinances. The basis for these assertions varied by jurisdiction, but included loss of land for future development, loss of agriculture, and improper floodplain management. Conversely, the Diversion Authority provided comments that Plan B reduced issues of local plan compliance. The Diversion Authority further commented that any remaining conflicts could not be resolved by a project alternative still capable of meeting the project purpose. The Diversion Authority also noted that local ordinances or plans in North Dakota would be overridden by state law. See Final SEIS App. A, Attachment 1.

None of these commenters requested additional information or analysis to address these identified deficiencies, with the exception of proposing evaluation of different project alternatives. The DNR responded that plan compatibility would be a consideration in rendering a decision on the Diversion Authority's Dam Safety/Public Water Works permit application. DNR's response also noted the poor alignment of the Diversion Authority's perspective with the perspectives of the jurisdictions who developed and implemented the plans and ordinances. The DNR did ask the North Dakota State Water Commission (Commission) to confirm that the Diversion Authority had interpreted North Dakota's statutory requirements correctly. The DNR further asked the Commission whether it intended to exercise its authority to override local plans and ordinance, assuming that authority exists. The Commission did not respond to either of these questions. See Final SEIS App. A. The disagreement over how consistent Plan B is to local plans and ordinances, and the need for such consistency, led DNR to include consistency with local plans as an Area of Controversy in the Final SEIS.

47. Project purpose. Many commenters asserted that the true purpose of the proposed Project is to provide development opportunities south of Fargo. DNR responded that this was not a stated purpose of the Project, but acknowledged the project purpose of providing FEMA accreditation for a 100-year flood would make development opportunities more attractive south of Fargo. The response also noted that regardless of a project proposer's motive, DNR's authority is limited to determining if Plan B complies with the requirements of Minnesota Rule and Statute. *Id.*

## **F. Final SEIS**

48. The Final SEIS incorporates by reference the Draft SEIS.
49. DNR developed the Final SEIS contents in accordance with the requirements of Minn. R. 4410.2300 (2015). The Final SEIS was developed and included responses to substantive comments on the Draft SEIS. Minn. R. 4410.2600, subp. 10. The sections of the Draft SEIS that have major changes (i.e., other than editorial) described in the Final SEIS are as follows:

- Issues and Areas of Controversy updated based on public comments and pursuant to Minn. R. 4410.2700, subp. 1 (2015).
- Chapter 2, Project Description updated to include the most current proposed project operations.
- Chapter 3, § 3.3—FEMA regulations; includes a clarified description of the USACE Zone 5 Takings Analysis.
- Chapter 3, § 3.4—Wetlands; includes corrected wetland impact acreages and data sources.
- Chapter 3, § 3.5—Aquatic and Terrestrial Resources; includes additional and expanded descriptions of anticipated impacts due to construction and operation, as well as new considerations and recommendations for mitigation and monitoring.
- Chapter 3, § 3.7—Infrastructure; includes an expanded description of staging area drainage.
- Chapter 3, § 3.8—Land Use Plans and Regulations; includes many updates based on comments received during the Draft SEIS comment period; particularly from the City of Horace, Buffalo-Red River Watershed District and Wilkin County, as well as considerations regarding the North Dakota State Water Commission’s authority.
- Chapter 3, § 3.9—Dam Safety and Public Waters Regulations; includes updated floodplain acreages.
- Chapter 3, § 3.10—Socioeconomics; includes additional potential impacts to the city of Horace and St. Benedict’s Church, and a clarified description of the USACE Zone 5 Takings Analysis.
- Chapter 5—Comparison of Alternatives; includes updates to reflect changes made in Chapter 3.
- Chapter 6 —Proposed and Recommended Mitigation; includes the updated recommendation to include Wolverton Creek in monitoring efforts. Section 6.1 was added at the end of the chapter and discusses recommended environmental and land use mitigation.
- Appendix A was replaced with Responses to Comments Received on the Draft SEIS. Some commenters are instructed to reference the updated Appendix B (Alternatives Screening Report).
- Appendix A (Responses to Comments); the DNR responded to all timely, substantive comments received on the Draft SEIS. Minn. R. 4410.2700, subp. 1 (2015).
- Appendix B (Alternatives Screening Report); includes an expanded discussion on the reconsideration of Alternatives 30 and 31.

50. The EIS includes a thorough analysis of all environmental, economic, employment and sociological impacts of the Project and Project alternatives as required in Minn. R. 4410.2300, H (2015). *See* State FEIS Chps. 3 and 4 and Final SEIS Chps 3 and 4.

51. The DNR also considered and analyzed both proposed and recommended monitoring and mitigation measures that could reasonably eliminate any adverse environmental, economic, employment, or sociological effects of the proposed Project pursuant to the requirements of Minn. R. 4410.2300, I (2015). *See* State FEIS Ch. 6 and Final SEIS Ch. 6.

52. On November 13, 2018, the DNR issued the completed Final SEIS and distributed it for public review in accordance with Minn. R. 4410.2700, subp. 3 (2015). The Final SEIS was provided to those persons and entities on the EQB distribution list; all persons for whom we have contact information and submitted substantive comments on the State Draft EIS, State FEIS, SEIS Preparation Notice, or Draft SEIS; and other interested parties as required by Minn. R. 4410.2700, subp. 3 (2015). On November 13, 2018, a notice of availability of the Final SEIS was published in the *EQB Monitor* and the DNR issued a press release announcing the availability of the Final SEIS and the commencement of the minimum 10-day adequacy review and comment period required by Minn. R. 4410.2800, subp. 2 (2015). See Minn. R. 4410.2700, subps. 4 through 6 (2015).

### **G. Consideration of Comments on Adequacy**

53. Timely comments provided during the November 13 to November 29, 2018 comment period were considered in the determination of adequacy for the Final SEIS.
54. During the review period, twenty-eight individuals submitted comments on the Final SEIS. Three individuals sent more than one comment letter.
55. All comments and issues raised in the comment submittals were reviewed to determine if they were related to the three adequacy criteria set forth in Minn. R. 4410.2800, subp. 4 (2015). Comments related to any of the three adequacy criteria were analyzed and addressed. Copies of the comment letters are attached hereto as Attachment 2 and made a part hereof. Upon request, comment letters will be provided to the project proposer and to permitting and/or approval authorities for their consideration as part of further decisions about whether to permit, approve, and/or implement the proposed Project.
56. Twenty-two commenters reiterated concerns on topics that had previously been raised and addressed in the Final SEIS and/or State FEIS. These commenters did not address the criteria for determining an EIS adequate, and as such, their comments are not addressed further in this Order. These commenters, in alphabetical order by organization or last name include:
- Berger, Brad
  - Bernhardson, Eddie
  - Betting, R.
  - Breimer, Arden
  - City of Horace (Brenton Holper)
  - Hertsgaard, Craig
  - Holy Cross Township (Shelley Lewis)
  - Israelson, Colleen
  - Israelson, Dallas
  - Minnesota Pollution Control Agency (Karen Kromar)
  - Nelson, Mike
  - Ness, Larry and Judy
  - North Dakota Game and Fish (Greg Link)
  - Northern Cheyenne Tribe, Tribal Historic Preservation Office (Teanna Limpy)
  - Ohman, Mary Lou
  - Rich, Jon
  - Rogne, Trana
  - Shilling, Tara

- Storvick, Sylvia
  - Walleyebrooks
  - Wetch, Doreen
  - Wiegand, Elaine
57. Three commenters asserted that the EIS was inadequate because DNR did not comply with the Environmental Review procedures for addressing alternatives in an EIS. These commenters, listed in alphabetical order by last name, include:
- Bye, Kenneth
  - Luick, Larry
  - Redlin, Patricia
58. Section 2.2 and Appendix M of the 2016 State FEIS describes the alternative analysis that was completed, including the alternatives that were considered. If an alternative was eliminated from full evaluation, this Section provided the basis for the elimination. Section 2.2 and Appendix B of the 2018 Final SEIS identifies the supplemental alternative analysis that was completed, including the alternatives that were considered. If an alternative was eliminated from full evaluation, this Section provided the basis for the elimination. The consideration of alternatives for the 2018 Final SEIS complied with the requirements of Minn. R. 4410.2300, G.
59. Jared Huibregtse of the North Dakota State Water Commission commented that their agency's comment on the Draft SEIS related to North Dakota regulatory requirements was intended to clarify which North Dakota agency has authority to issue water permits. DNR did not recognize that the contact information provided after this Draft SEIS comment statement was a request to change the identified state agency. The Draft SEIS correctly identified a North Dakota water permit as being a requirement. Although an incorrect state agency was listed for North Dakota's water permit program, this oversight does not substantively change the environmental impacts described for Plan B. The Project Proposer will be notified that the North Dakota Office of the State Engineer issues water permits in North Dakota.
60. Two commenters provided comment letters that addressed various aspects of the criteria for determining EIS adequacy. These comments are addressed individually below. These commenters, listed in alphabetical order by organization or last name, are:
- Nelson, Don
  - Richland Wilkin County Joint Powers Authority
61. Don Nelson provided eight specific topics related to EIS adequacy:
- Commenter points out that DNR's response to the comment correcting the relationship of the Maple and Sheyenne Rivers to the Fargo-Moorhead urban area acknowledges the need to make that correction, but noted the executive summary still contains the error. The editorial request made by the commenter was corrected within the main document, but was inadvertently left off corrections within the Executive Summary. No substantive change to the environmental impact or alternatives analysis will result from this omission.
  - Commenter reiterated that three National Register-eligible farmsteads were not included in the Draft SEIS and this missing information was provided in comments on the Draft SEIS. As part of developing the Final SEIS, DNR reached out to the USACE, which performed the surveys, and determined that these three sites are likely in an area not surveyed yet. Mr. Nelson confirmed in his comments on the Final SEIS that these

three sites are in the area that has not completely been surveyed. The Final SEIS identified the areas that have not been surveyed and indicates that those areas will require surveys (Final SEIS § 3.6.1).

- Commenter points out that Comment ID 107b was miscoded and asserts that the correct response to Comment ID 107b contained inaccurate information regarding the inability for a river stage of 41-feet to flow through town and still have the acceptable freeboard. The listing of Comment ID 107b under topic heading "Mitigation, Recommendation" should have been 90e (Buffalo-Red River Watershed District, BRRWD). This miscoding of Comment ID 107b does not substantively change the EIS because Comment IDs 107b and 90e were both responded to, as required.

Moreover, the response to comment 107b does not contain inaccurate information. While many in-town levees have been constructed greater than 42-feet following the 2009 flood, not all of the levees are built, or are capable of being built, to 42-feet. There are sections of the levee that angle down and tie into high ground of 39-feet. A levee that ties into ground at 39-feet does not meet the USACE's design standards, which require tying into high ground of the 1% chance plus freeboard. Therefore, they can't be certified because a higher freeboard is needed to address the high uncertainty (e.g., ice jams, debris jams, modeling assumptions).

- Commenter asserts that elimination of Alternative 33 (Wild Rice River Diversion) was inappropriate and that just because this alternative would be more difficult to get FEMA accreditation for is not a sufficient reason for elimination.

The DNR response to this comment on the Draft SEIS was as follows:

*"The Wild Rice River-only Diversion alternative was described as Alternative 33 in the Draft SEIS Alternative Screening Exercise Report (DSEIS Appendix B). To operate properly, this alternative would include a control structure on the Wild Rice River, a dam/southern embankment located entirely in North Dakota (between the Wild Rice and Red Rivers), a staging area (that would have to extend upstream to about Christine), and no control on the Red River. A project design that does not account for Red River flow would also not account for the years that the Red River floods more than the Wild Rice River, which would make it **harder** for the project to receive FEMA 100-year accreditation (because it couldn't be assured). As such, it was excluded from further evaluation." [emphasis added).*

Mr. Nelson's comment on EIS adequacy focuses on the use of the word "harder" in the DNR response. It is acknowledged that use of the word "harder", in this context, does suggest that FEMA accreditation for a 100-year flood event could be obtained, but that it would take additional effort. This characterization was not what was intended in the response. The parenthetical statement, "(because it couldn't be assured)" is actually the more important characterization. This is the case because, during any given flood event, the Wild Rice River and the Red River could contribute very different flood flows to the Fargo-Moorhead area. During some floods, a majority of flows could come from the Wild Rice River and, in that circumstance, the Red River flows could pass through town.

Conversely, a 100-year flood, based on the period of record hydrology, where the majority of the flow is from the Red River would not be able to pass through town. This circumstance would prevent FEMA accreditation based on the period of record hydrology, and as such was the reason this alternative was eliminated from evaluation.

- The commenter finds unreasonable the DNR response to the comment requesting information on where displaced landowners would relocate. The DNR response indicated that any relocation would be up to the specific landowner. DNR's response is included in the Final SEIS. The Diversion Authority has proposed to provide relocation assistance as part of the Property Rights Acquisition, but the ultimate decision would be up to the landowner.
- The commenter asserts the DNR comment response that Holy Cross Township ordinance #0001 (interim ordinance establishing a moratorium of water impoundments; term expired in 2016) has not been updated was incorrect. DNR contacted Holy Cross to request the most recent version of its ordinance. Holy Cross only provided Ordinance #0001 (upon request, as well as in both its scoping and draft comments). The Township also never made mention of a Comprehensive Plan or updated Ordinance #0001 in any other comments. Because this was the response we received from the Township, this is the information we provided. However, in its submittal on the adequacy of the Final SEIS, Holy Cross did submit a 2016 Comprehensive Plan and 2016 Ordinance (#02, establishing a Planning Commission (i.e., not reinstating Ordinance #0001)).
- Commenter asserts that response to comment about stranded wildlife was miscoded and that DNR's assertion that stranded wildlife was out of scope was incorrect. The coding of 107o under topic heading "Wildlife Impacts" should have been 107i. This miscoding of the Comment ID does not substantively change the EIS because Comment IDs 107o and 107i were both responded to, as required. Minnesota Rules part 4410.3000, subp. 5A requires the scope of a SEIS to be limited to alternatives, impacts, and mitigation measures not addressed, or inadequately addressed, in the final EIS. DNR did not include impacts related to wildlife stranding as a topic in the SEIS because DNR did not believe there would be a substantial impact change with Plan B relative to the previously-proposed Project. Wildlife stranding for the previously-proposed Project was addressed in the State FEIS. The requested information regarding operation impacts to wildlife, including stranding, are adequately addressed in State FEIS at § 3.9.2.1.2.
- Commenter suggests evaluation of a new alternative that prevents North Dakota tributaries from entering the diversion channel to reduce the staging area. This alternative was not suggested by commenters in scoping, nor was it raised during the Draft SEIS comment period; and therefore, was not included in analysis. However, many other alternatives that had similar components were evaluated, including alternatives that reduced the staging area. Because all other project components would remain in place, it is anticipated that this alternative would not have significant environmental benefits over the proposed Project. In addition, the area and extent of needed property interests would not be decreased over Plan B (i.e., property interests would still be required up to the Probable Maximum Flood level per Minnesota Dam Safety Rules); and thus, this alternative would have no significant socioeconomic benefit.

62. Gerald W. Von Korff of Rinke Noonan, Attorneys at Law, submitted a comment letter on behalf of the Richland-Wilkin County Joint Powers Authority. The comment letter contained four specific topics related to the Final SEIS adequacy.

- Commenter believes the proposed Project should have been screened out, per their Draft SEIS comment 99d, and is concerned that the SEIS scope did not include an alternative capable of being permitted for other permitting authorities.

DNR responded to commenter's concern about screening out the Proposed Plan B, informing that Minnesota Rules 4410.2300, H (2015), require that an EIS evaluate the proposed Project. Further, environmental review does not render a final decision on whether or not a permit can be issued. Information collected during the environmental review process is intended to be used by permitting authorities to assist in making permitting decisions.

- Commenter believes the MN Diversion and the JPA North Dakota Diversion [Alternative 30] should have been fully evaluated in the SEIS, per their Draft SEIS comment 99c.

DNR responded to this comment in the Final SEIS. DNR carefully considered 33 other alternatives, including the MN Diversion and Alternative 30 [JPA North Dakota Alternative]. Appendix B of the Final SEIS includes details of why these alternatives were not fully evaluated.

- Commenter restated previous concerns over proposed Plan B's ability to have local and regional plan consistency and the proposer's intent to comply with permit requirements, as articulated in the commenter's Draft SEIS comment 99g.

DNR responded to comment 99g in the Final SEIS. Section 3.8.2.1 of the Final SEIS identifies how Plan B relates to local ordinances and plans that would be affected by the proposed project. Some of these communities have identified that the proposed changes in flood inundation area are inconsistent with ordinances or plans. This issue was expanded upon in the Areas of Controversy portion of the Executive Summary and main Final SEIS. DNR will consider plan compatibility during permitting (per Minn. R. 6115.0220, subps. 5C to D).

- Commenter believes the proposed Project violates Floodplain Development Law, per the Joint Powers Authority's Draft SEIS comment 99a.

The majority of the information on this topic was discussed in Final SEIS sections 3.3 (FEMA Regulations) and 3.10 (Socioeconomics). DNR responded to comment 99a in the Final SEIS, stating that consideration of the Dam Safety and Public Waters Work permit application will include an evaluation of how well the project complies with the requirements of the Minnesota Floodplain Management Act.

63. The U.S. Fish and Wildlife and North Dakota Department of Health submitted late comment letters. The comment letters did not address the criteria for determining an EIS adequate, and as such, are not addressed in this Order.

## H. SEIS Topics

### *Alternatives*

64. Minnesota Statutes § 116D.04 requires the RGU to analyze all “appropriate alternatives” and feasible and prudent alternatives less environmentally intrusive than those alternatives that are likely to impair natural resources located within the state. Minn. Stat. § 116D.04, subds. 2a and 6 (2018). Additionally, Minn. R. 4410.2300, G (2015) requires the RGU to consider at least one alternative from each of the following categories: alternative sites; alternative technologies; modified design or layouts; modified scale or magnitude; and alternatives incorporating reasonable mitigation measures identified through comments received during EIS development. Alternatively, the RGU must explain why it has failed to explore alternatives within each of these categories. *Id.*
65. During each step of the EIS process for the proposed Project (EIS scoping, Draft EIS, Final EIS, SEIS Scoping, Draft SEIS and Final SEIS), the DNR conducted a robust and independent assessment of potential project alternatives within the above categories. See *Alternatives Screening Report: Fargo-Moorhead Metropolitan Area Flood Risk Management Project (December 2012) (Alternatives Screening Report)*; State FEIS at Ch. 2, Apps. C and M; Final SEIS at App. B. The Alternatives Screening Reports completed for the State FEIS and Draft SEIS were conducted in such a way that they both reevaluated alternatives conceptualized during the previous environmental review document, thus, cumulatively adding to the list of alternatives to consider. The Draft SEIS reflects consideration of 33 different alternatives.
66. An alternative may be excluded from further analysis if it would not meet the underlying need for or purpose of the Project; it would likely not have a significant environmental benefit compared to the Project as proposed; or another alternative, of any type, that will be analyzed in the EIS would likely have similar environmental benefits but substantially less adverse economic, employment, or socioeconomic impacts. Minn. R. 4410.2300, G (2015).
67. Final SEIS Appendix B included the Alternatives Screening Report. For purposes of the screening, the DNR revised the Proposer’s Purpose and Need Statement to include just one of the three purpose and need components described in ¶¶ 7 through 10. The one purpose and need component selected for the rescreening evaluation was 100-year flood accreditation. The Alternatives Screening Report reconsidered all 29 previously-screened alternatives from the State FEIS, as well as four new alternatives brought forward during SEIS scoping. The 29 previously-screened alternatives were reconsidered using the updated period of record hydrology to determine if they met the legal requirements to be included or excluded from full evaluation in the SEIS. In some cases, alternatives presented a readily apparent reason for being excluded. Other alternatives did not present a readily apparent reason for exclusion and, therefore, remained included and additional information was collected to analyze the alternative. This additional data on individual alternatives was analyzed. If, during the course of this analysis, it was determined that the alternative did not meet the requirements for further evaluation as set forth in Minn. R. 4410.2300, G (2015), a determination was made that the alternative would not advance for further evaluation.

This was the case for Alternative 30 and Alternative 31 (also known as Alternative C) for which substantial additional information was collected and analyses performed. Following substantial analysis, both Alternative 30 and Alternative 31 were excluded from full analysis per Minn. R. 4410.2300, G (2015). Alternative 30 was excluded from full analysis because it did not present significant environmental benefit compared to the proposed Project. Alternative 31 was excluded from full analysis because it had similar environmental effects, but had greater adverse socioeconomic impacts compared to the proposed Project. Final SEIS Appendix B contains the details of the DNR's decision to exclude Alternative 30 and Alternative 31 from full analysis. See Minn. R. 4410.2300, G (2015).

68. During the public comment period on the Draft SEIS, the DNR received a public comment requesting reconsideration of Alternative 30 and Alternative 31, along with additional data on the two alternatives. The DNR's reconsideration of these two alternatives for which additional data was provided in the public comment period is included in a new section at the end of the Alternatives Screening Report, which is included in the Final SEIS as Appendix B. The DNR reconsidered Alternative 30 and Alternative 31 using the criteria set out in Minnesota Statute and Minn. R. 4410.2300, G (2015) and did not change the determination to exclude these alternatives from full analysis. Appendix B contains the details for their elimination. See Minn. R. 4410.2300, G (2015).

### *Environmental Effects*

69. Based upon the SEIS scoping process outlined in ¶¶ 14 through 21, the DNR identified the following key topics and potential environmental effects associated with the proposed Plan B and evaluated these topics and potential environmental effects in the SEIS process:

- Hydrology and Hydraulics
- FEMA Regulations and the Conditional Letter of Map Revision (CLOMR) Process
- Wetlands
- Aquatic and Terrestrial Resources
- Cultural Resources
- Infrastructure
- Land Use Plans and Regulations
- Minnesota Dam Safety and Public Waters Regulations and Permitting
- Socioeconomics

Each of these topics is discussed in more detail below in ¶¶ 70 through 96.

### Hydrology and Hydraulics

70. If the proposed Plan B were constructed, hydraulic changes in the Project Area would increase the area, duration and depth of floodwater inundation in the staging area compared to existing conditions. The actual areas, durations and depths of floodwater inundation would vary depending on the specific timing and severity of any flood event. The total inundation within the Project Area during the 100-year flood would be 123,954 acres, of which 12,049 acres are on land that currently does not flood during a 100-year event. Plan B includes an Eastern Tieback Embankment that would cross Wolverton Creek approximately two miles south of the city of Comstock, Minnesota. A non-gated culvert structure within the embankment would allow flow from Wolverton Creek to pass under the Embankment. During the 100-year flood, there would be a small increase of 0.11 feet (1.32 inches) in water surface elevation immediately upstream

of the Tieback Embankment. With the Plan B project, the Benefitted Area would see a reduction or elimination of inundation during most flood events. Local drainage could result in some isolated inundation within the Benefitted Area. Plan B would protect 56,882 acres from inundation that would be flooded under existing conditions. Hydrologic changes in the Project Area could impact a number of natural and socioeconomic resources. Final SEIS § 3.2.

71. Hydrologic and hydraulic modeling for project operation identified increased flood levels downstream of the Fargo-Moorhead area. The largest downstream increase during a 100-year event was 0.14 feet (1.68 inches) at Georgetown, Minnesota and the largest increase during a 500-year event was 0.58 feet (6.96 inches) at Grand Forks, North Dakota.
72. Hydrologic and hydraulic analysis used the Period of Record hydrology rather than the Expert Opinion Elicitation Panel hydrology that was used for the previously-proposed Project.
73. There are no specific "Hydrology" mitigation measures. For areas inundated by the proposed Project, proposed mitigation is resource specific and discussed under multiple headings below. Proposed and recommended mitigation and monitoring is summarized in Ch. 6, Table 6-1.

#### FEMA Regulations and the CLOMR Process

74. The areal extent of 100-year flood inundation required for Project operation in the staging area would be mapped as floodway. Any additional flood inundation area beyond the staging area but within the FEMA revision reach would be mapped as floodplain. A FEMA-approved Conditional Letter of Map Revision (CLOMR) would be required. After Project completion, a Letter of Map Revision (LOMR) would be submitted.
75. In accordance with the National Flood Insurance Program, mitigation would be required for Plan B for structures that are subject to increases in base flood elevations (BFEs) greater than the tolerances set in 44 CFR 60.3(c) and (d) in which FEMA interprets this increase in BFE as any increase greater than 0.00 feet for areas newly inundated on the FIRM. Based on the requirements in the NFIP regulations, appropriate mitigation would be determined through the CLOMR process. Because of the magnitude of structure impacts under Plan B, FEMA has entered into an agreement with the USACE, and in the USACE/FEMA Coordination Plan discusses interpreting standards so that the CLOMR, issued prior to Project completion, would identify the properties that would be mitigated, but allowing mitigation of those properties to be delayed until the Project affects the flood risk of the identified properties. See Final SEIS § 3.3.3 and App. E.
76. As discussed in the Final SEIS, the USACE coordinated with FEMA and developed a FEMA/USACE Coordination Plan (Coordination Plan) outlining the floodplain management requirements for Plan B. Final SEIS § 3.3.3.
77. The mitigation discussed within the Coordination Plan is defined primarily by the FEMA revision reach. The FEMA revision reach extent is defined by an effective tie-in for the 100-year flood at the upstream and downstream limits for each flooding source impacted by Plan B. Final SEIS § 3.3.3.

#### Wetlands

78. The Project footprint and the Oxbow-Hickson-Bakke (OHB) ring levee are estimated to create 1,761 acres of direct, non-forested impacts to wetlands. The majority of wetlands impacted would be 1,468 acres of seasonally flooded basins. Wetland impacts from the Dam/Southern Embankment is estimated at 244 acres with 39.5 acres of these wetlands within Minnesota. Final SEIS § 3.4.2.1.

79. Indirect impacts, not caused directly by the Project footprint, could be caused by changes in hydrology that increase the inundation of these wetlands. The increased inundation could result in sediment deposition within wetlands that could change wetland type, or eventually convert the wetlands to upland. Using the National Wetlands Inventory dataset, there are 253 acres of wetland that would experience increased inundation. It is unlikely that all of these wetlands would be measurably impacted. Wetlands near the Southern Embankment that would experience the greatest inundation increase and slow moving water would be the most likely to be indirectly impacted. *Id.*
80. Determining wetland mitigation requirements for impacts associated with the diversion channel and OHB ring levee is the responsibility of wetland regulatory authorities as part of the permitting process. Mitigation for these impacts is proposed through the creation of wetlands within the diversion channel. The State FEIS estimated that approximately 2,000 wetland credits could be created within the diversion channel. Construction of the water control structures and the Southern Embankment for Plan B would require 244 acres of wetland impacts to be mitigated. Additional mitigation is also proposed from surplus wetland mitigation credits associated with wetland creation within the Diversion Channel. The majority of the wetland creation credits within the Diversion Channel are needed to mitigate wetland impacts from construction of the Diversion Channel. Any surplus wetland creation credits could be available for mitigation of other Project component wetland impacts. These potential surplus wetland creation credits would not be available for mitigation of wetlands in Minnesota under the Wetland Conservation Act (WCA) because all of these credits are in North Dakota. Under current WCA rules, mitigation would need to be located within a defined area in Minnesota and possibly of a defined wetland type, depending on whether mitigation banking is used or a Project-specific mitigation plan is developed. Currently, there are wetland bank options in Minnesota that would provide the necessary credits for Project impacts occurring in Minnesota. The USACE Regulatory In-lieu Fee and Bank Information Tracking System identifies 53.79 acres of wetland credit available for purchase within the primary service area of the project. Final SEIS § 3.4.3.
81. The project proposers have not identified any mitigation for indirect wetland impacts. Although Project operation would increase the depth and duration of the inundation of these wetlands, attributing any wetland change to this increased inundation is very subjective and difficult to separate from other impacts, such as flooding under existing conditions, and existing landscape stressors, such as agriculture and its associated drainage and erosion. DNR has recommended that a technical wetland group be assembled to assess which wetlands are most likely to be indirectly impacted by sedimentation to refine the mitigation requirement for these wetlands. Final SEIS Ch. 6.

#### Aquatic and Terrestrial Resources

82. Impacts to Aquatic and Terrestrial Resources include fish passage and biological connectivity, aquatic habitat, wildlife and wildlife habitat, and stream stability. The proposed Project, if constructed, would alter the natural flow of water through the floodway. Construction of the Project would result in a loss of 46 total acres of aquatic habitat and abandon both Wild Rice River and Red River meander channels. Final SEIS § 3.5.2.1.1.
83. Water velocities through the Wild Rice River Control Structure, Red River Control Structure, and the Wolverton Creek culvert would be increased during smaller flood events, when the diversion channel is not operating. These higher velocities would hinder fish passage through the structures/culvert. The structures could also limit biological connectivity by changing the riverine physical environment within each structure. *Id.*

84. Project operation would result in higher flood flow velocity, modify the existing floodplain and the Sheyenne and Maple Rivers (resulting from operation of aqueducts). These changes in hydrology and inundation could alter geomorphology, and result in overall stream instability. The loss of floodplain function downstream of the Southern Embankment would also affect aquatic and terrestrial resources. Final SEIS § 3.5.2.1.2.
85. Mitigation, monitoring and adaptive management would be necessary. Proposed monitoring would track before and after changes to the Project Area, including impacts to aquatic habitat, forests, direct wetland impacts, changes to stream geomorphology, indirect wetland impacts, biological connectivity and fish stranding. Final SEIS § 3.5.3. USACE has not committed to specific mitigation; however, they have proposed potential mitigation, including restoration of the Bois de Sioux River, Lower Otter Tail River, or Sheyenne River; various fish passage projects (unspecified); and habitat features in constructed channels. Final SEIS App. G. The Final SEIS recommends the Proposer complete a more robust assessment of habitat impacted to ensure mitigation is suitable, adopt an alternative method to guide stream habitat mitigation that does not rely upon site-specific Index of Biotic Integrity (IBI) scores, and commit to a specific mitigation project. Final SEIS Ch. 6, Table 6-1. Permitting will consider mitigation and monitoring commitments and satisfactory completion of proposals from the AMMP.

#### Cultural Resources

86. Construction of the proposed Project would cause flood impacts to National Register of Historic Places (NRHP) or NRHP-eligible properties and cemeteries, cemeteries not eligible for listing on the NRHP, and cemeteries outside the staging area. Final SEIS § 3.6.2.
87. Because the Project would be undertaken by the federal government and local governmental units, the USACE and Diversion Authority would be required to comply with the requirements of Section 106 of the National Historic Preservation Act prior to impacting any property on or eligible for listing on the NRHP. The USACE and Diversion Authority would comply with Section 106 through consultations and Programmatic Agreements with North Dakota and Minnesota State Historic Preservation Officers (SHPOs). The scope of permissible impacts on historic properties would be more precisely delineated through Section 106 consultations. Final SEIS § 3.6.3. Proposed cemetery mitigation is addressed under the socioeconomic SEIS topic in ¶ 96.

#### Infrastructure

88. The proposed Project would impact roads, bridges, culverts, ditches and water treatment plants, as well as change traffic patterns. Final SEIS § 3.7.2.1.
89. The construction of road bridges over the embankments and diversion channel would be completed during Project construction to mitigate transportation connectivity impacts. Interstate Highway 29 would be raised in the staging area to prevent inundation during Project operation. Small portions of Cass County Highway 81 and Cass County Road 18 would be raised to maintain access to OHB. All other roads in the staging area would be allowed to flood under Project operation. Utilities that cannot withstand occasional flooding in the inundation area would be abandoned, modified, or relocated. Within the Benefitted Area, some roads would need to be raised so they could remain open as flows through town reach up to 21,000 cfs. Proposed mitigation for impacts to roads, culverts and ditches includes a post-operation debris clean-up and repair program, which would allow for reimbursement of clean-up and repair costs. The Cass County water treatment plant would have to be removed, and may require

construction of a new facility or a regional water system solution. Final SEIS § 3.7.3, Table 6-1, and App. F.

#### Land Use Plans and Regulations

90. Local Government Units (LGUs) in the Project Area would experience varying impacts due to different Project features and different degrees of inundation and flood protection. DNR asked LGUs in the Project Area how Plan B would interact with land use plans and regulations. The Final SEIS addresses plan compatibility and rules specific to these LGUs as noted in the summary below. Final SEIS § 3.8.2.1.

- Wilkin County Zoning Ordinance requires a zoning amendment for any water impoundment greater than 640 acres in size. Wilkin County also states that Plan B is inconsistent with Objective (d) of Goal 1 of their Comprehensive Plan, to minimize loss of agricultural lands. It is uncertain if impacts from inundation would be significant enough to result in a loss of, as opposed to an impact to, agricultural land.
- The City of Horace addressed the City's plan to improve economic development and land use diversity, including plans to develop along County Road 14. They expressed concern that likely recommendations included in a Minnesota Dam Safety and Public Waters Work permit could limit development along County Road 14 as planned.
- The Buffalo-Red River Watershed District expressed some concerns over consistency with their watershed management plan with respect to floodplain management, wetland impacts, water quality, and plan development.
- The cities of Fargo and Moorhead indicate the Project is compatible with related ordinances and Comprehensive Plans.
- Cass County and Cass County Joint Water Resource District do not indicate concerns or incompatibility with the proposed Project, but do state that specific zoning and floodplain ordinances would be considered during permitting.

91. The proposed Project would increase flooding in the Unbenefited Area. Final SEIS § 3.8.2.1. Increased flooding within the Unbenefited Area has the potential to restrict development and/or land use options in the Unbenefited Area. Various permits and other governmental approvals will, or may be, required for the Project, and are discussed in the Final SEIS §§ 1.5, 3.8.3.3 and 3.9. Additionally, changes to regulatory floodways, BFEs or extents of Special Flood Hazard Areas caused by the construction and operation of the Project would require updates to the existing Flood Insurance Study Map.

92. In order to begin construction in Minnesota (including construction on the Red River), the proposed Project needs a DNR Public Waters Work and Dam Safety Permit. Minn. Stat. § 103G.245 (2018) and Minn. R. 6115.0220 (2015). A project requiring a Dam Safety Permit must be consistent with applicable floodplain and shoreland standards and ordinances as well as with local water-related land management plans. Minn. R. 6115.0220, subp. 5 (2015). The Final SEIS provides information on applicable land management plans and related standards. Final SEIS § 3.8.

## Minnesota Dam Safety and Public Waters Regulations and Permitting

93. The proposed Project requires the construction of a Class 1 dam on the Red River and, pursuant to Minn. Stat. § 103G.245 (2018), requires a Dam Safety and Public Waters Work permit from DNR. Final SEIS § 3.9.1.
94. The specific requirements for a Dam Safety permit are found in Minn. R. 6115.0300 *et. seq.* Minnesota Rule 6115.0410 sets forth the specific requirements and standards, including applicable engineering studies and potential mitigation, which must be analyzed before the DNR can make a decision on a Dam Safety permit application. The specific requirements for a Public Waters Work permit are found in Minn. R. 6115.0150—6115.0280 (2015) that sets forth specific requirements and standards which must be analyzed before the DNR can make a decision on a Public Waters Work permit application. The DNR Dam Safety and Public Waters Work permit, if granted, would include any necessary design, mitigation, and operating conditions for the Project. The Final SEIS acknowledges that the DNR has received a combined Dam Safety/Public Waters Work permit application and lists those permit-related studies or information included with the application. Final SEIS Ch. 1 and § 3.9.3.1. The Final SEIS is not, however, a decision-making document and any decision on whether to issue permits for the Project will be addressed in the permit decision-making process.
95. The applicable permit decision-making process for the Dam Safety and Public Waters Work permit is found in Minn. R. 6115.0150 – 6115.0520 (2015), which provides for the orderly and consistent review of permit applications in light of the state’s interest in conserving and using the water resources of the state to further public health and welfare. Additionally, the permit application will be evaluated in a manner consistent with the goals and objectives of applicable federal, state, and local environmental quality programs and policies, such as Minnesota’s shoreland management and floodplain management programs and policies.

## Socioeconomics

96. The State FEIS and Final SEIS contain extensive discussions of potential impacts to and mitigation for socioeconomic impacts. See State FEIS §§ 3.16.2, 3.16.3, Table 6.19 and App. L; Final SEIS §§ 3.10.2, 3.10.3, Table 6.1. Key impacts evaluated in the SEIS and corresponding mitigation or monitoring measures include:
  - Geographic Extent of Impacts: Under project operation for a 100-year flood event, based on period of record hydrology, the Project Area would experience 123,954 acres of new or additional inundation and 56,882 acres would be removed from flooding. Minnesota would have 33,545 acres (27%) of inundation and 9,635 acres (17%) removed from flooding. North Dakota would have 90,409 acres (73%) of inundation and 47,247 acres (83%) removed from flooding. Of the total 123,954 acres of new or increased inundation from the Project, 12,050 acres would be newly-inundated. Minnesota would experience 3,677 acres of new inundation and North Dakota would experience 8,374 acres of new inundation. Wilkin County would experience 409 acres of new inundation and Richland County would experience 576 acres of new inundation area. Final SEIS § 3.10.2.
  - Structures: Project operation would result in flood inundation of residential and nonresidential structures in the Unbenefited Areas, including the staging area.
    - The 2018 FEMA/USACE Coordination Plan provides that all impacted insurable structures within the FEMA map revision reach would be mitigated through

agreed methods that are consistent with mitigation methods specified by the NFIP for individual structures based on depth of flooding at each structure. Final SEIS App. E. Section 3.10.3 of the Final SEIS also outlines the proposed mitigation options available for structures and lands not included in the FEMA/USACE Coordination Plan. The Diversion Authority proposes to obtain property rights up to the maximum pool elevation (i.e., above the 100-year event). Final SEIS App. F. Mitigation would vary based on zone and category of impact. Final SEIS § 3.10.3. Additional recommended mitigation measures are outlined in Chapter 6 of the Final SEIS.

- Land: Project operation would result in flood inundation of extensive acreage, including traditional and organic agriculture.
  - As outlined in the FEMA/USACE Coordination Plan, the areal extent of flood inundation within the staging area would be mapped as FEMA floodway; other inundated areas outside the staging area would be mapped as FEMA floodplain. Final SEIS App. E. The acquisition of flowage easements is required for operation of the Project in these areas. Land mitigation would vary based on zone of impact. The Diversion Authority also proposes a post-operation debris clean-up and repair program for public land. Private land clean-up would include pick-up, but not reimbursement. An organic farm early-buy-out option is also proposed. Final SEIS § 3.10.3 and App. F. The Final SEIS also recommends that the Project Proposers obtain rights or interests prior to construction or operation of the Project, and consider Minnesota’s “Loss of Going Concern” and state takings law for Minnesota businesses and land impacted by flooding. State FEIS Table 6-1.
- Cemeteries: Project operation and/or construction would result in cemetery impacts. Cemetery mitigation includes flowage easements and a post-operation debris clean-up program within the property rights area. Final SEIS § 3.10.3 and App. F. The USACE completed a 2015 Draft Cemetery Mitigation Plan that includes potential mitigation measures, but none of these measures have been proposed at this time. State FEIS App. H. Mitigation for each cemetery would be considered on an individual basis. Final SEIS App. F. The State FEIS recommends that the USACE and Diversion Authority adopt SHPO recommendations. See State FEIS Table 6-1.

#### *Cumulative Potential Effects*

97. In compliance with Minn. R. 4410.1200, E (2015), Minn. R. 4410.2300, H (2015) and as described in Final SEIS § 4.1, potentially affected resource categories were identified, the environmentally relevant area was defined for each resource category, reasonably foreseeable projects were identified within the environmentally relevant area, and a cumulative potential effects screening analysis was conducted. Cumulative impacts identified in the USACE’s FFREIS were reevaluated applying applicable criteria. Final SEIS Table 4-1.
98. DNR identified two reasonably foreseeable future projects that would result in relatively minor contributions to environmental effects when viewed in conjunction with the proposed Project. Some of these effects were positive contributions and some were negative. None of these contributions appreciably changed the assessment of potential environmental or social effects of the Project in the environmental review process. See Final SEIS § 4.2.1.
99. The Wolverton Creek culvert would create flow velocities that are problematic for fish passage. There are road culverts on Wolverton Creek that currently have flow velocities that are

problematic for fish passage. Adding a culvert that limits fish passage on Wolverton Creek would increase this cumulative effect. Final SEIS § 4.2.1. The DNR has recommended modifying the location of this culvert to coincide with the nearest road culvert, which would avoid this cumulative effect. Final SEIS § 6.1.1.

### *Permits*

100. All known federal, state and local permits, approvals, and regulatory programs related to and potentially required for the Project were identified. Final SEIS § 1.5 and Table 1-1.
101. The Diversion Authority submitted an application for Dam Safety/Public Waters Work permit for Plan B on March 16, 2018. The DNR conducted permit review concurrently with the environmental review process. Pursuant to Minn. R. 4410.2900, A (2015), a final determination on this application is anticipated within 30 days of completing the environmental review process.

### *Mitigation*

102. Proposed mitigation and monitoring are discussed in each topic category of Chapter 3 of the Final SEIS. A summary of proposed mitigation for the project is listed by impact category in Final SEIS Table 6-1.
103. Additional recommendations for mitigation or monitoring were identified through public comment, discussion with the project proposer and analysis during SEIS development. A summary of these recommended mitigation measures is discussed in Chapter 6 of the Final SEIS and include both environmental and land use strategies. Final SEIS § 6.1 and Table 6-1.

## **I. Determination of Adequacy**

104. Upon conclusion of the Final SEIS comment period, the DNR as RGU is responsible for determining the adequacy of the Final SEIS in accordance with the requirements of Minn. R. 4410.2800, subp. 4 (2015).
105. To find the Final SEIS adequate, the DNR must find that the Final SEIS:
  - Addresses the potentially significant issues and alternatives raised in scoping;
  - Provides responses to the substantive comments received during the Draft SEIS comment period concerning issues raised in scoping; and
  - Was prepared in compliance with the procedures of the act and part 4410.0200 to 4410.6500.Minn. R. 4410.2800, subp. 4 (2015).
106. Pursuant to Minn. R. 4410.0300, subp. 3 (2015), the Final SEIS contains information that addresses the significant environmental issues of the Fargo-Moorhead Flood Risk Management Project Plan B. This information is available to governmental units, the Proposer, and citizens early in the decision-making process. The DNR finds that the Final SEIS “addresses the potentially significant issues and alternatives raised in scoping” as required by Minn. R. 4410.2800, subp. 4A (2015).
  - Potentially-significant issues are documented in ¶¶ 69 through 99.

- Alternatives raised in scoping are documented in ¶¶ 21, and 64 through 68.
107. The DNR finds that the Final SEIS “provides responses to substantive comments received during the Draft SEIS comment period concerning issues raised in scoping as required by Minn. R. 4410.2800, subp. 4B.
- Responses to comments made on the Draft SEIS are documented in ¶ 39 through 47.
108. The DNR finds that the environmental review process used to prepare the Final SEIS complied with the applicable procedural requirements of the Minnesota Environmental Policy Act as required by Minn. R. 4410.2800, subp. 4C (2015). Specifically the DNR finds:
- Projects Requiring a SEIS – Minn. R. 4410.3000, subp. 3 (2015). DNR’s compliance with the requirements of Minn. R. 4410.3000, subp. 3 (2015) is documented in ¶¶ 1 through 2 and 5.
  - SEIS Scope – Minn. R. 4410.3000, subp. 5 (2015). DNR’s compliance with the requirements of Minn. R. 4410.3000, subp. 5 (2015) related to SEIS scope is documented in ¶¶ 14 through 21.
  - Content of Draft SEIS – Minn. R. 4410.3000, subp. 5C (2015) refers to Minn. R. 4410.2300, D to J, 4410.2400, 4410.2500, and 4410.2600, subp. 2 to 10. DNR’s compliance with the requirements of Minn. R. 4410.3000 subp. 5C (2015) is documented in ¶¶ 22 through 37, 48, and 64 through 103.
  - Final EIS – Minn. R. 4410.3000, subp. 5D (2015) refers to Minn. R. 4410.2700 (2015). DNR’s compliance with the requirements of Minn. R. 4410.3000 subp. 5D (2015) is documented in ¶¶ 39 through 52.
  - Determination of Adequacy – Minn. R. 4410.3000 subp. 5E (2015) refers to Minn. R. 4410.2800 (2015). DNR’s compliance with the requirements of Minn. R. 4410.3000 subp. 5E (2015) is documented in ¶¶ 53 through 63 and 104 through 109.
109. Minnesota Rules 4410.3000, subp. 5E (2015), refers to Minn. R. 4410.2800, subp. 3 (2015), which requires the RGU to determine the adequacy of the Final EIS at least ten days after publication in the *EQB Monitor* of the notice of availability of the Final SEIS.
- The Final SEIS was published in the EQB Monitor on November 13, 2018, as documented in ¶ 52. The date of this record of decision occurs more than ten days following publication of the Final SEIS.

## II. CONCLUSIONS

- A. The DNR is charged with determining the adequacy of the Final SEIS for the Fargo-Moorhead Flood Risk Management Project. The Final SEIS meets the content requirements of Minn. R. 4410.3000 and 4410.2300 (2015).

- B. The DNR prepared the Final SEIS in compliance with the procedures set forth in Minn. Stat. § 116D.04 (2018) and Minn. R. 4410.0200 to 4410.6500 (2015).
- C. The public has been afforded opportunities to review and comment on the scope of the SEIS, the content of the Draft SEIS, and the adequacy of the Final SEIS in accordance with all applicable provisions of Minn. Stat. § 116D.04 (2018) and Minn. R. Ch. 4410. The Final SEIS includes responses to all substantive comments received during the public comment period on the Draft SEIS.
- D. The information presented in the Final SEIS adequately addresses the issues identified in the Preparation Notice.
- The proposed action is described in sufficient detail.
  - The Final SEIS adequately analyzes significant environmental impacts.
  - The Final SEIS adequately considers alternatives to the proposed action and their impacts.
  - The Final SEIS adequately presents methods by which adverse environmental impacts can be mitigated.
  - The Final SEIS adequately presents the economic, employment, and sociological effects that cannot be avoided should the proposed action or an alternative be implemented.
- E. As set forth in ¶¶ 104 through 109, the Final SEIS meets the criteria set forth in Minn. R. 4410.2800, subp. 4 (2015), which require that a Final SEIS be determined adequate if it:
- addresses the potentially significant issues and alternatives raised in scoping so that all significant issues for which information can be reasonably obtained have been analyzed in conformance with Minn. R. 4410.2300, G and H (2015);
  - provides responses to the substantive comments received during the draft EIS review concerning issues raised in the scoping process; and
  - was prepared in compliance with the procedures of the Minn. Stat. § 116D.04 and Minn. R. 4410.0200 to 4410.6500.
- F. Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

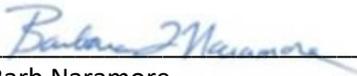
### III.ORDER

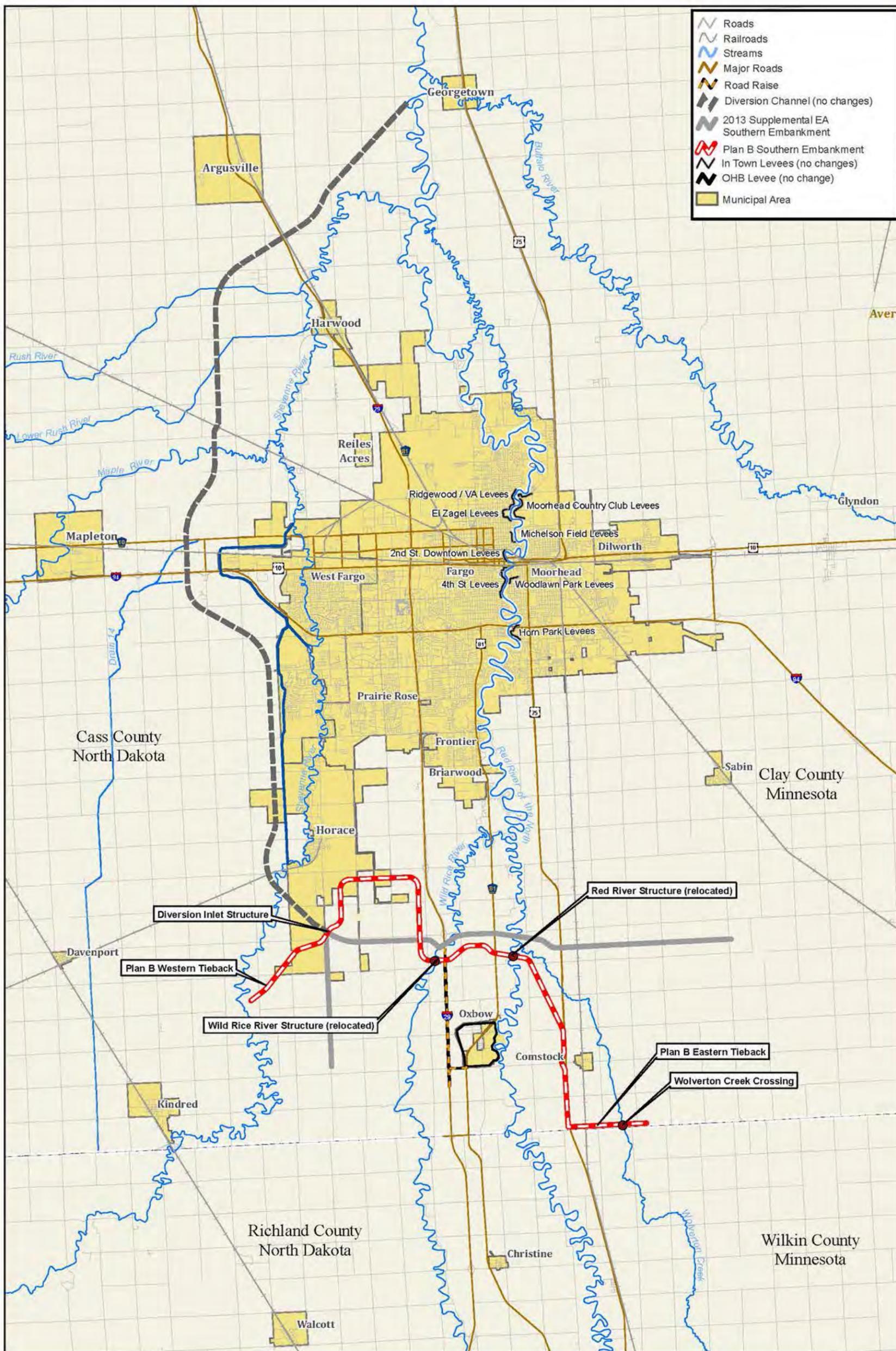
Based upon the Findings of Fact and Conclusions contained herein and the entire record of the proceedings:

The Minnesota Department of Natural Resources hereby determines that the Final Supplemental Environmental Impact Statement for the proposed Fargo-Moorhead Flood Risk Management Project, in Clay and Wilkin Counties, Minnesota, and Cass and Richland Counties, North Dakota, is adequate.

Approved and adopted this 26th day of December 2018.

STATE OF MINNESOTA  
DEPARTMENT OF NATURAL RESOURCES

  
\_\_\_\_\_  
Barb Naramore  
Assistant Commissioner



Project Change Map - June 2018  
 Fargo Moorhead Metro Area Flood Risk Management

Figure 1. Proposed modifications to the Project since the 2013 Supplemental Environmental Assessment.  
 Draft Supplemental Environmental Assessment #2  
 Fargo-Moorhead Flood Risk Management Project

# Attachment B

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Public Comment Letters Received for  
Final Supplemental  
Environmental Impact Statement

Public Comment Period  
November 13 – November 29

## Commenter 01

**From:** valleyebrooks@aad.com  
**To:** [MN Review, Environmental \(DNR\)](#)  
**Subject:** Flood diversion project  
**Date:** Tuesday, November 13, 2018 8:00:44 PM

This much money could be used to break some tiles, plug some ditches ect. Restore some wetlands. We are paying to do that anyway! With little to no success! Hold the water instead of drain it! You even say that! Problem only moves downstream with this project. [ Up north witch is a unique problem.] Next we move the problem to a new area and start this all over again. Let's make MN a duck hunter destination instead of a place to pass thru on our way to ND. ND do the same! Crops ain't worth putting in the ground and harvesting. Yet we pay them to do it! We pay for ditches. We pay for water quality improvements. We keep paying! Stop the madness! If we wouldn't have let them build the ditches and drain everything we wouldn't have this problem. I can't believe how much drain tile I see being ready to be laid every year on my way to Iowa, Nebraska and Southern MN. You should be ashamed of your selves for letting it happen in the first place! There is no environmental benefit to this plan. We can't rush water to a frozen area up north and not expect it to cause problems further down stream! [ Upstream?] Time for someone to Talk to Trump!

## Commenter 02

**From:** Elaine Wiegand  
**To:** [MN Review, Environmental \(DNR\)](#)  
**Subject:** FARGO MOORHEAD DIVERSION PROJECT  
**Date:** Tuesday, November 13, 2018 11:47:11 AM

Why should they divert water to somewhere else. These people built in the flood plain they should have to deal with it at their expense

Commenter 03

**From:** mike nelson  
**To:** MN\_Review\_Environmental (DNR); Margaret A. Nelson  
**Subject:** Re: Request for Comment on Final Supplemental EIS, Fargo-Moorhead Flood Risk Management Project  
**Date:** Tuesday, November 13, 2018 6:02:12 PM  
**Attachments:** image001.png  
image003.png  
image002.png

[Sent from Yahoo Mail on Android](#)

On Tue, Nov 13, 2018 at 4:09 PM, MN\_Review, Environmental (DNR) <environmentalrev.dnr@state.mn.us> wrote:

The Department of Natural Resources (DNR) has prepared a Final Supplemental Environmental Impact Statement (Final SEIS) for the Fargo-Moorhead Flood Risk Management Project. The document is available for download on the [DNR Fargo-Moorhead Flood Risk Management Project webpage](#)

The document describes potential environmental impacts from a new project alternative (Plan B, as described in the Draft SEIS) and any changes to the Draft SEIS as noted in response to comments received during the Draft SEIS public comment period.

The Final SEIS is not a decision document, but rather evaluates and discloses potential project impacts and proposed mitigations for those impacts. Decisions about whether to permit the Project can only be made following completion of the Final SEIS.

The Final SEIS will be available for a 10-day public comment period beginning on November 14, 2018 and ending on November 29, 2018 at 4:30pm. Comments should focus on the adequacy of the Final SEIS. Three criteria determine adequacy:

1. Does the Final EIS analyze topics identified in scoping?
2. Does the Final EIS respond to substantive comments received on the draft?
3. Did DNR follow the process established in state statute and rule for preparing an EIS?

Written comments on the adequacy of the Final SEIS must be received by Thursday November 29, 2018 at 4:30PM. Comments may be mailed, e-mailed, or faxed as follows:

**Mail:** Jill Townley  
Minnesota Department of Natural Resources  
500 Lafayette Road, Box 25  
St. Paul, MN 55155-4025

**Email:** [environmentalrev.dnr@state.mn.us](mailto:environmentalrev.dnr@state.mn.us)  
**Subject Line:** "Fargo-Moorhead FSEIS"  
Please include your name.

**Fax:** ATTN: Jill Townley, Project Manager  
(651) 297-1500

Thank you for your interest.

**Jill Townley**  
Planner Principal | Communications and Planning Unit

**Minnesota Department of Natural Resources**  
500 Lafayette Road, Box 25  
St. Paul, MN 55155  
Phone: 651-259-5168  
Fax: 651-296-1811  
Email: [jill.townley@state.mn.us](mailto:jill.townley@state.mn.us)  
[mndnr.gov](http://mndnr.gov)



## Commenter 04

**From:** Teanna Limpy  
**To:** [MN Review, Environmental \(DNR\)](#)  
**Subject:** Fargo-Moorhead FSEIS - Teanna Limpy  
**Date:** Thursday, November 15, 2018 4:48:51 PM

The Northern Cheyenne THPO has the following additional comments to the Final SEIS for the Fargo-Moorhead Flood Risk Management Project:

"While the ACOE and Diversion Authority acknowledges our request for participation in future survey work, our office also requests that an additional work plan be created for an undertaking this size. A workplan for inadvertent discoveries and NAGPRA process should be included as an appendix, as well as a formal process of notification for consulting tribes in cases of potential such inadvertent discoveries. This should be done in further consultation with tribes as this plan is a multi-year project that has additional potential impacts not mentioned in the final SEIS. This may also be done as a separate process but still included in the overall plan, as well."

Respectfully,

Teanna Limpy, THPO  
Tribal Historic Preservation Office  
Northern Cheyenne Tribe  
14 E. Melaine Lodge Drive  
P.O. Box 128  
Lame Deer, MT 59043  
Work: (406) 477-4839/4838  
Cell: (406) 850-7691

## Commenter 05

**From:** Mary Lou Ohman  
**To:** [MN Review, Environmental \(DNR\)](#)  
**Subject:** Flood Plain  
**Date:** Friday, November 16, 2018 9:12:11 AM

Good Morning

This email is asking that you please do not approve the requested Flood Plan that is planned by the DNR. My daughter and her boys are one of the homes in the County Road 20 area that are up for buyout. There are 6 homes in that area that are slated for removal. I feel that this is overstating the flood zone. She has a beautiful home with a very large yard as do all those up for removal. One family just moved into the neighborhood in June. These are beautiful homes. The area that is projected is home as well to many wildlife and it will destroy their home as well. Every evening and morning there are multiple deer in her yard and her neighborhood. There are beavers, squirrels, raccoons to name a few. You will be destroying both beautiful homes and neighborhoods as well as the home to wildlife. I ask that you PLEASE reconsider your options and leave these neighborhoods intact. I truly believe that both State and Local government have over reacted to the Flood issue. She has lived in her home for 8 plus years and has never had one worry about flooding. Again I ask you PLEASE leave all these neighborhoods intact.

Sincerely

MLO

**Mary Lou Ohman**  
SENDCAA  
Administrative Officer  
3233 University Drive South  
Fargo, ND 58104  
701-232-2452 ext.106  
marylou@sendcaa.org

**Commenter 06**

**From:** Tara Shilling  
**To:** [MN Review, Environmental \(DNR\)](#)  
**Subject:** Fargo-Moorhead SEIS  
**Date:** Friday, November 16, 2018 9:42:17 AM

**From:** Tara Shilling  
**To:** [MN Review, Environmental \(DNR\)](#)  
**Subject:** Fargo-Moorhead SEIS  
**Date:** Monday, November 26, 2018 1:02:31 PM

**Commenter 06**

Good Morning!

My name is Tara Shilling and I am writing in regard to the Fargo-Moorhead SEIS. I am a resident in the Riverwood Addition in North Fargo. My house has been tagged as part of the buy-out plan for Plan B. I am writing to let you know that I am NOT in favor of Plan B. There are a few reasons that I am against this plan and feel like there needs to be another option. The acquisition of my home is probably the biggest reason, but also the wild life that I see around my home is also a significant reason to find a different way.

My house is located in the first cul de sac in Riverwood. My family has lived in this home for 7 years. We missed the 2009 flood, where sandbags were laid for flood protection. In 2011, there weren't any sandbags put down and the river only reached to about the middle of my yard. Hence, the reason we decided to purchase a house on the river. Since that time, there has been NO worry about water. In fact, even when sandbags were laid down in the past, they were to help with overland flooding. My house sits higher than most of the neighbors and the sandbagging that has been done in the past, has been done to protect the neighbors, not my house in particular. From my house, the river sits back about 150 yards from my back deck. There is quite a bit of yard and woods that is situated between my home and the river. In 7 years, there hasn't been a single spring that I have worried about the potential of river/overland flooding, affecting my home.

Across the river from my home is Oakport Township. I know that Oakport has done MANY things to get better flood protection. They have bought out homes on the other side of the river from me. There is wide open spaces. To me, it would make better sense to put money into forcing the river to head east. On the east side of the river, there already are no homes, things have been cleared out. Perhaps there is a way to shift the water east into the Oakport open land, rather than buyout and tear down 6 beautiful homes. As mentioned in above paragraph, there is plenty of tree and land between my house and the river, perhaps a dike would be more reasonable and save the city money by putting it closer to the actual river.

On any given day, we see many deer come through our backyard. They come near the house and eat berries off the trees all winter long. In the fall, we can hear them bedding down and running through the leaves in the morning. I wonder what will happen to the wildlife when we are tearing down trees and moving dirt around the place they have called home. We have a bald eagle that comes back every spring to make his nest in the trees in my backyard. Where will these animals go when everything is uprooted?

I hope that the Minnesota DNR and the City of Fargo can come up with other options before moving forward with Plan B.

Thank you for your time!

[Tara Shilling](#)  
[701-446-1700](#)  
[Carl Ben Eielson](#)  
[6th Grade-Falcons](#)  
[Language Arts/Math/Social Studies](#)

[Tara Shilling](#)  
[701-446-1700](#)  
[Carl Ben Eielson](#)  
[6th Grade-Falcons](#)  
[Language Arts/Math/Social Studies](#)

## Commenter 07

**From:** Brad Berger  
**To:** [MN Review, Environmental \(DNR\)](#)  
**Subject:** Fargo-Moorhead SEIS  
**Date:** Saturday, November 17, 2018 10:32:13 AM

Please oppose any version of the diversion boondoggle. Thank you from a concerned Fargo resident and taxpayer. Brad Berger 920 5<sup>th</sup> st so Fargo N.D. 58103

## Commenter 08

**From:** Trana Rogne  
**To:** [MN Review, Environmental \(DNR\)](#)  
**Subject:** Fargo Moorhead FSEIS  
**Date:** Monday, November 19, 2018 4:47:13 PM

impactful activities?

Comment;

The very construction is a impactful activity. If the project is constructed without all property acquired or mitigated there is no reason to assume that the project would not operate in the event of a major flood. The project would operate and the fall out resolved later.

Transportation, Utility and Drainage Features

'Portions of the remaining roads within the staging area would be inundated for a period of time during project operation.'  
All roads except I29.

Comment;

With these remaining road closed occupancy of home and farms would be not possible as access would not be available. Ring dike or other mitigation would be of no use. Total buyouts would be required of all farms , homes in the staging area. HWY 46 major road would be closed.

I,4 PURPOSE AND NEED

'The Project will reduce flood risk for the lives and property of people within the Fargo-Moorhead metropolitan area, as well as reduce the frequency of the disruptions and risks associated with emergency flood fights.'

Comment:

The metropolitan area does not have a reduction in flood risk, the metro area is larger than the F-M Area. Many towns that are in the "metro area " have a increased flood risk from a major flood.

Trana Rogne  
5477 Co Rd 1  
Kindred ND 58051  
701 367 8911

Commenter 08

**From:** Trana Rogne  
**To:** [MN\\_Review\\_Environmental \(DNR\)](#)  
**Subject:** Fargo-Moorhead SEIS  
**Date:** Monday, November 19, 2018 7:29:47 PM

In the following response to a question someone in the DNR responded as follows;

There must have been a mistake in the drafting of this document.

"Also, it should be noted that the Project would not be allowed to operate until all upstream property rights (flowage easements or, as required, full acquisitions) and mitigation of structures is completed."

[https://files.dnr.state.mn.us/input/environmentalreview/fm\\_flood\\_risk/fm\\_fseis\\_app-a.pdf](https://files.dnr.state.mn.us/input/environmentalreview/fm_flood_risk/fm_fseis_app-a.pdf)

page 93

Comment:

It is not reasonable for DNR to assume that a when a major flood is to occur that the operation of the project will not be allowed.  
What judge would allow the project not to operate in time of a flood? It is likely the judge would allow the operation of the project to proceed. To allow the project to be built and be operational without completion of property acquisitions and mitigation would be a complete failure of the MN DNR's duty to review the permitting of the project.

--

Trana  
"The middle of the road is for yellow lines and dead armadillos."  
Jim Hightower

Commenter 08

**From:** Trana Rogne  
**To:** [MN\\_Review\\_Environmental \(DNR\)](#)  
**Subject:** Re: Fargo-Moorhead SEIS  
**Date:** Monday, November 19, 2018 7:32:18 PM

On Mon, Nov 19, 2018 at 7:29 PM Trana Rogne <[tranarogne@gmail.com](mailto:tranarogne@gmail.com)> wrote:  
In the following response to a question someone in the DNR responded as follows;

There must have been a mistake in the drafting of this document.

"Also, it should be noted that the Project would not be allowed to operate until all upstream property rights (flowage easements or, as required, full acquisitions) and mitigation of structures is completed."

[https://files.dnr.state.mn.us/input/environmentalreview/fm\\_flood\\_risk/fm\\_fseis\\_app-a.pdf](https://files.dnr.state.mn.us/input/environmentalreview/fm_flood_risk/fm_fseis_app-a.pdf)

page 93

Comment:

It is not reasonable for DNR to assume that a when a major flood is to occur that the operation of the project will not be allowed.  
What judge would allow the project not to operate in time of a flood? It is likely the judge would allow the operation of the project to proceed. To allow the project to be built and be operational without completion of property acquisitions and mitigation would be a complete failure of the MN DNR's duty to review the permitting of the project.

Trana Rogne  
5477 Co RD 1  
Kindred ND 58051

--

Trana  
"The middle of the road is for yellow lines and dead armadillos."  
Jim Hightower

## Commenter 09

From: Arden Breimeier  
To: [MN\\_Review\\_Environmental \(DNR\)](#)  
Subject: Fargo-Moorhead FSEIS  
Date: Wednesday, November 21, 2018 10:30:51 AM

To: Jill Townley, Project Manager  
From: Arden Breimeier, Oxbow  
Re: Fargo-Moorhead FSEIS

I would like to reiterate and clarify my concerns as they relate to comment 74C from the Draft SEIS (Appendix A), the phased construction of the FM Diversion project. As mentioned in my original comments, the Diversion Authority intends to construct the north segment, from Interstate 94 to the outlet into the Red River, and the south segment, which involves the dam and impoundment area (stages one and two of the project), either sequentially or simultaneously. The third segment (or stage), the portion of the diversion channel that connects the north and south segments, is to be constructed last.

I have suggested that the third stage is unlikely to ever be constructed if the impoundment is permitted for use prior to the completion of the overall diversion channel. I continue to hold this belief. Project costs will almost certainly far exceed the estimates (a doubling would not surprise) so it will be easy for the Diversion Authority to initiate operation of the north drainage and south impoundment while blaming lack of funding for the shelving of the channel connecting them. The Diversion Authority basically gets what it needs from construction of two-thirds of the project: drainage for the north and storage for the south. So, facing economic headwinds, it will be easy for them to accept that much as a proxy for a completed diversion.

The Diversion Authority has requested a permit from Minnesota to dam the Red River and has surely submitted its overall vision of a fully completed diversion channel as part of the permit application. The MN DNR is being asked to issue said permit based upon the project as outlined in the application. If the decision is made to issue the permit, said permit should stipulate that it is applicable only to the completed project as laid out in the permit application.

If the issued permit does not adequately specify/restrict the conditions under which it applies, rest assured that the 'two-thirds project' described above is what both North Dakota and Minnesota will get and will have to live with. Would the MN DNR permit such a project, one that has an impoundment area but no diversion channel to carry water around the FM area? If not, then it is critical that any permit specify, in no uncertain terms, the nature of the project for which the permit is being granted.

That said, I continue to believe that the plan as submitted for permit is not the least impactful and that the permit should not be granted. However, if the MN DNR decides to grant a dam permit, it must do so with all project operation possibilities in mind. The diversion project, if permitted, should be constructed from north to south, with the impoundment area completed last. If the Diversion Authority's current plan

for phased construction goes forward, there will be intense pressure to use the impoundment area in the absence of a connecting channel. The MN DNR must weigh and consider this carefully.

Thank you for your time and attention.

Arden Breimeier  
614 Evergreen Cir  
Oxbow, ND 58047

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**Commenter 10**

**Eddie Bernhardson**  
**1318 S 19<sup>th</sup> St**  
**Moorhead, MN 56560**

I have lived my entire life in this area except for two years in the army, 1952-1954, including a year in Korea (1953). I was the Clay County Agriculture Extension Agent for 30 years. Since my retirement I have served as an appraiser/viewer for watershed districts in the Red River Valley.

Sincerely yours,

Eddie Bernhardson

Minnesota Department of Natural Resources  
500 Lafayette Road, Box 25  
St. Paul, MN 55155-4025

Dear Jill Townley and Minnesota Department of Natural Resources,

I am writing regarding the FM Diversion Plan. Initially, as I recall, the FM Diversion was to protect the current cities of Fargo and Moorhead. It seems Fargo changed the emphasis of the diversion to protect their future expansion area, which is mostly or entirely flood prone. As an example, I understand, Davies High School, which is in this area has their mechanical and electrical facilities on the second floor.

Protecting this area severely impacts areas that have never had flooding problems. Plan "B" contains a levee on US Hwy 75 south of Moorhead, this could severely impact land that some claim has flooding problems. This claim is untrue.

My great grandparents homesteaded in Sec. 7 Holy Cross Township in 1869. In 1870 they constructed a log cabin on the banks of the Red River. This is the second oldest building on the banks of the "Red" in Minnesota and is on the National Register of Historic Buildings. Only once since it was built has high water gotten close to the cabin.

Also, in this area is the "Clara Cemetery, which is in the SW corner of Sec. 17, Holy Cross Township. This site has never had flooding.

There are natural watercourses in this area draining into the "Red" but overland flooding has never been a problem. There are several farmsteads in the area but none of them have "ring dikes" as they have not been necessary.

The term "mitigate" is mentioned in the diversion description. Shouldn't some of this be done early in the process so individuals can have a part in it; not wait until late in the process and funding is low, so they get short changed in the process? The word "mitigate" has a broad meaning, but I feel it should be done sooner instead of later. I have had two communications with the "Corps" regarding our log cabin and both contained the word "mitigate" but have heard nothing more as to what mitigate might mean.

Also received a hard copy of same letter via USPS on 11/29

## Commenter 11

**From:** Jon Rich  
**To:** [MN Review, Environmental \(DNR\)](#)  
[Fargo-Moorhead FSEIS](#)  
**Subject:**  
**Date:** Sunday, November 25, 2018 4:56:23 PM

Jill Townley  
Minnesota DNR  
500 Lafayette Rd Box 25  
St Paul, Mn 55155-4025

I was born and raised in Kindred, ND and now live in Anoka, MN I have many friends, relatives, and classmates with farmland in the area affected by this FM Dam project. These farms have been in the family for 3<sup>rd</sup> or 4<sup>th</sup> generations and 100 year old farmsteads with some of the best farmland in the country. The compensation that would be given can't replace the value of a family farm and where could they find suitable land and homes. About a thousand people will be forced to relocate so Fargo can build in the flood plain which violates Executive order 11988 which says Federal funds will not be used to flood plain development. They want to flood an area which is flood free to build in the flood plain which totally makes no sense. There must be a better plan but the Corp on Engineers and Fargo Dam people will not listen. Plan B does not have a good plan for mitigation and impact to environmental land owners. There has been a lot of money spent needlessly (tax dollars) for many bad decisions and court and lawyer's fees. This Plan B for south of Fargo is for big money to develop in a flood plain and does nothing for flood protection in fact makes it worse. Did the Army Core evaluate the ES fully? The authorities in Fargo have not treated landowners equally giving large amounts of money to some and very little to others. Every citizen should be treated equally and also give a voice in the decision to make a fair and suitable decision. Fargo claimed they did not need Minnesota permits and indeed started constructions on the project in the dark and without authorization. Many of the committee decisions were made without public meetings by e-mails, phone calls or informal meetings out of public view. Plan B has not had one public meeting to inform local property owners the scope of this plan. A breach of the dam or diversion would devastate residents of Horace a growing and affordable living area with socio-economics issues as well. So Horace is not in favor of the Plan B. Also, the dam planned on the Wolverton Creek on the Clay Wilkin county border raises concerns about the height of the Fargo dam west of the Red River Wolverton creek. The Wolverton Creek dam isn't intended to hold back water but to stage water and create problems elsewhere where none existed. I have grandparents relative who live and farm in Richland County and this dam is not in their best interests. We own farmland in the Kindred area and do not want our tax dollars spent on this FM dam reservoir system and they have already wasted many millions of dollars. Quit building on a flood plain and put the dikes up to 43.5 feet and get a plan for the whole basin for the 100 year flood and get out of FEMA insurance requirements.

I am very disappointed in the way Fargo board are treating the citizens of my home state. There is a lack of caring from the FM authority for all land owners. I am also very proud to live in Minnesota where we have vigorous flood plain management and environmental protection standards to protect water, land, and wildlife. We in Minnesota are setting our standards high to protect this great land for future generations. Please reject this Plan B the Fargo commission cannot be trusted. It is the way or the highway for them. Grand Forks and Moorhead solved the flood problems with much less expense.

Sincerely, Jon and Nancy Rich

20891 Aztec St NW  
Anoka, MN 55303

## Commenter 11

**From:** Jon Rich  
**To:** [MN Review, Environmental \(DNR\)](#)  
[Fargo-Moorhead FSEIS](#)  
**Subject:**  
**Date:** Wednesday, November 28, 2018 7:21:09 PM

To Jill Townley Mn DNR  
I have very recently talked with my high school classmates who own a farmstead in the area affected by this dam. The FM Dam authority has not addressed the issue of farmstead buy outs and where is the money coming from? The authority has not come to or talked with my friends who will be affected. Please say no to the high hazard dam which would flood many century old farms, cemeteries, and villages. The Fargo dam authority is not trustworthy they have had secret meetings without public input and also went ahead with this project in the dark of night when the court said they were to stop. We are Minnesota residents and own farmland in North Dakota so we do not want our tax dollars to pay for this terrible project. The cities of Moorhead and Grand Forks have solved their flood protection plans so have Fargo raised their dikes and no development in the flood plane.  
Jon and Nancy Rich and sons Geoff, Ben, and Kris Anoka, Mn 55303

Commenter 12

To Jill Townley  
 My name is Larry Ness, I live along the Red River, in the S.W. corner of Clay County. The land I own in sec 31 + 32 of Holy Cross does not have a Flood Problem. IF they put a dike along Hwy 75, it will flood my land, plus other neighbors land.  
 IT will also flood my farm place along with my neighbors homes.  
 Please don't give a permit for plan B.

Yours Truly  
 Larry Ness

Commenter 12

From: Larry Ness  
 To: MN Review, Environmental (DNR)  
 Subject: Fw: Fargo-Moorhead FEIS  
 Date: Thursday, November 29, 2018 10:30:28 AM

On Wednesday, November 28, 2018 11:17 PM, Larry Ness <ljness@att.net> wrote: Note: re-sending because letter above not delivered because misspelled (environmentalrev) email address. Only use this message. Thanks.

Jill Townley  
 EIS Project Manager  
 DNR Division of Ecological and Water Resources

Dear Ms Townley:

We wish to submit comments on the Final SEIS.

It seems as though this proposed plan B shifts the flooding burden from one sparsely developed rural area to a different rural area. Proposed plan B actually protects MORE North Dakota natural floodplain acres (causing more flooding) than original plan A. The natural flood plain storage plays an important role in flooding situations. The plan B floods MORE rich Red River land and causes more flooding in Cass and Clay Counties.

Proposed plan B severely impacts new areas of Minnesota's "high land", now currently out of flood plain that does not currently flood, for growth and development should not be considered. We do not agree with the expansion and protection of a flood plain for growth and development such as Fargo has done and continues to do. The severe losses of everyone impacted in Minnesota and North Dakota are not justified for Fargo's development in a natural flood plain.

The severe impacts to the state and people of Minnesota of proposed plan B would be much greater than the benefits. We request proposed plan B not be permitted.

Thank you for the opportunity to comment.

Larry and Judith Ness  
 17666 3rd St S  
 Moorhead, MN 56560

Commenter 13



Nov. 23, 2018

To: Jill Lowrey:  
We do not think that this proposal is cost effective. It is not good stewardship to flood the highest and best farm land in Casper, in order to develop some of the lowest water storage area south of Targa.  
Sincerely,  
Sylvia Atkinson

Commenter 14

# THE Sheyenne: A RIVER IN PERIL



Erosion along the Sheyenne River is increased by outfalls from Devils Lake (below) that flow into the Sheyenne River.



Since 1993 Devils Lake rose about 29 feet, from 1423 feet above mean sea level to a height of 1452 feet above msl in the spring of 2010. The lake will have to rise over six feet more before it overflows into the Sheyenne River through the Tolna Coulee at 1458 feet. One must remember that the Devils Lake rise is a mixed blessing, and that Devils Lake area residents only object to the top five or six feet of water on the lake, the first 23 feet of rise being beneficial and producing the fishing and recreation industry that drives much of the local economy. When the lake falls to a height of 1445 no further outlet pumping will be used or permitted.

In other words, over a billion dollars has been spent attempting to keep most of the water in the lake while dumping some of the worst quality water onto people downstream along the Sheyenne River. Poor water quality-

-which progressively deteriorates from West Bay and Stump Lake-and quantity concerns fuel downstream objections. Threats of flooding along the Sheyenne River and damage to the river ecosystem grow. Those opposed to using the Sheyenne as a drainage ditch for Devils Lake water insist that outlets will only add to downstream damage and shift the water burden from the Devils Lake basin onto downstream communities and landowners.

A complete Environmental Impact Statement (EIS) needs to be completed on the Devils Lake situation to determine what causes higher inflows into the lake and what can be done to prevent that. Instead of using science, however, political methods have been used to avoid all outlets, and the Environmental Protection Agency (EPA) has agreed to allow that to happen.

PRODUCED BY

PEOPLE TO *Save* THE SHEYENNE

Box 252  
Valley City, North Dakota 58072  
Winter 2010  
[www.saveitbesheyenne.org](http://www.saveitbesheyenne.org)

From: Doreen Welch  
To: JN\_Review\_Environmental\_DNR  
Subject: Fw: Fargo-Moorhead FSEIS  
Date: Tuesday, November 27, 2018 11:20:43 AM

Subject: Fargo-Moorhead FSEIS  
Flood Risk Management Project  
Attn: Jill Townley, Project Manager  
651-297-1500

David & Marilyn Tessier  
4108 100th Ave S  
Horace, ND 58047

Plan B – of the dam will be five miles long right up to our homestead and others. On the north side of the dam will be about 4 miles of open farmland. What this means is, when it blizzards, all the snow is going to pile up for 5 miles in front of the dam. (Believe me when I say the snow can pile up, we have had snow all the way up our large barn doors.) Which will cause flooding in the spring to the north.

The soil that they will be digging into is lake-bottom soil. Meaning when you dig down 12'-15', the soil is like grease. We have a pile on our farm from a controlled burn 17yrs ago and that pile is still like grease. How good do you think that soil would be to build a dam on?

We will lose our water and septic tank drain fill rights. We can not hook up to rural sewage because Horace can not handle anymore. The industrial park across the road from us had to put in a large septic tanks and has to have them emptied weekly.

Fargo should think about cleaning all the trees and debris out of the river and digging it down so that the water can flow naturally.

How do you have a staging area for water, that now has signs "for future development" @ 112th Ave & 45th St. Is this all just a plan to take the farm land??



# North Dakota State Water Commission

900 EAST BOULEVARD AVENUE, DEPT 70 • BISMARCK, NORTH DAKOTA, 58506-0650  
(701) 328-2750 • TTY 1-800-966-6888 or 711 • FAX (701) 328-3696 • <http://ewc.nd.gov>

November 27, 2018

Jill Townley  
Minnesota Department of Natural Resources  
500 Lafayette Road, Box 25  
St. Paul, MN 55155

Dear Ms. Townley,

This is in response to the public review period for the Minnesota Department of Natural Resources (MN DNR) Final Supplemental Impact Statement (SEIS) for the Fargo-Moorhead Flood Risk Management Project.

The proposed project has been reviewed by State Water Commission (SWC) staff, and the following comments are provided:

- Section 1.5, Table 1-1 "Waters Drain Permit" is likely a Conditional Water Permit (similar to a Water Appropriations Permit from MN DNR) issued by the Office of the State Engineer (OSE), not by the SWC as listed. This should be clarified.

Comment 110c response to potential requirements for a Conditional Water Permit refers to the North Dakota Department of Health. Water permits are issued by the OSE.

Comment 110d does not address the potential need for a Conditional Water Permit if water will be stored beyond normal flood control operations, or if operations change to permanently store water.

- Through the National Flood Insurance Program (NFIP), a floodplain permit is required for all development that takes place within a Special Flood Hazard Area, as identified by FEMA. The minimum NFIP requirements can be found in Chapter 44 of the Code of Federal Regulations (mostly within Parts 59 and 60). Please work with the local floodplain administrators for additional information and permit requirements.

In addition, projects located within the regulated floodway must meet the requirements of North Dakota Century Code § 61-16.2-14. Before authorizing any development, the community responsible for permitting such use shall request a floodway review from the OSE. The application form may be downloaded from our website under "Regulation & Appropriation, Floodplain Management." Please contact Dionne Haynes with questions regarding this process at 701-328-4961 or [dhaynes@nd.gov](mailto:dhaynes@nd.gov).

- The OSE Engineering and Permitting Section staff have reviewed the Final SEIS and have no additional comments to those submitted in our letter to the MN DNR dated September 27, 2018 (attached). Please contact the OSE Engineering and Permitting Section at 701-

DOUG BURGUM, GOVERNOR  
CHAIRMAN

GARLAND ERBELE, P.E.  
CHIEF ENGINEER-SECRETARY



# North Dakota State Water Commission

900 EAST BOULEVARD AVENUE, DEPT 770 • BISMARCK, NORTH DAKOTA, 58505-0880  
(605) 328-2750 • TTY 1-800-365-6888 or 711 • FAX (701) 328-3688 • <http://www.nd.gov>

September 27, 2018

Jill Townley, EIS Project Manager  
DNR Division of Ecological and Water Resources  
Environmental Review Unit  
500 Lafayette Road, Box 25  
St. Paul, MN 55155

Dear Ms. Townley:

This is in response to your request for a review of the environmental impacts associated with the draft Supplemental Environmental Impact Statement for the Fargo-Moorhead Flood Risk Management Project.

The document has been reviewed by State Water Commission and Office of the State Engineer staff, and the following comments are provided:

- A Sovereign Land Permit will be required if any portion of the project is constructed below the Ordinary High Water Mark of the Red River or the Sheyenne River. Please contact Ashley Persinger at 701-328-4988 or [apersinger@nd.gov](mailto:apersinger@nd.gov) with questions regarding this process.
- Through the National Flood Insurance Program, a floodplain permit is required for all development that takes place within a Special Flood Hazard Area, as identified by FEMA. Please work with the local floodplain administrator(s) for additional information and permit requirements.
- In addition, projects located within the regulated floodway must meet the requirements of North Dakota Century Code § 61-16.2-14. Before authorizing any development, the community responsible for permitting such use shall request a floodway review from the State Engineer. The application form may be downloaded from our website under "Regulation & Appropriation, Floodplain Management." Please contact Dionne Haynes at 701-328-4961 or [dhaynes@nd.gov](mailto:dhaynes@nd.gov) with questions regarding this process.
- If surface water or groundwater will be diverted for construction of the project, a water permit will be required per North Dakota Century Code § 61-04-02. Please consult with the Water Appropriations Division of the Office of the State Engineer at (701) 328-2754 or [waterpermits@nd.gov](mailto:waterpermits@nd.gov) if you have any questions regarding this comment, or the comments that follow.

Cass Rural Water District holds perfected water permit nos. 2293 & 4485 with an approved point of diversion in the NW1/4 of Section 3, Township 137 North, Range 49 West. Their well field appears just south of the Plan B southern embankment.

328-4288 if you have questions regarding this comment.

- The OSE Sovereign Lands staff have reviewed the Final SEIS and have no additional comments to those submitted in the September 27, 2018 letter. Please contact Ashley Persinger at 701-328-4988 or [apersinger@nd.gov](mailto:apersinger@nd.gov) with questions regarding Sovereign Lands.

Thank you for the opportunity to provide review comments. Should you have questions for any SWC staff not listed above, please contact me at 701-328-4967 or [jhulbregtse@nd.gov](mailto:jhulbregtse@nd.gov).

Sincerely,

Jared Hulbregtse  
Water Resource Planner

JH:ac:pf/ge/1570

DOUG BURGUM, GOVERNOR  
CHAIRMAN

GARLAND ERBELE, P.E.  
CHIEF ENGINEER-SECRETARY

**NORTH DAKOTA SENATE**



STATE CAPITOL  
600 EAST BOULEVARD  
BISMARCK, ND 58505-0360

**Senator Larry Luick**  
District 25  
17945 101st Street SE  
Fairmount, ND 58030-9522  
Residence: 701-474-5959  
Business: 701-474-5959  
lluick@nd.gov

**COMMITTEES:**  
Agriculture  
Judiciary

Ames Construction holds conditionally approved water permit no. 6916 for industrial use. The approved point of diversion is in the SW1/4 of Section 32, Township 138 North, Range 49 West just south of the Plan B south embankment. The purpose for the water is for concrete batching during F-M Diversion construction.

A Water Permit will not be required for the proposed flood control operations proposed by the Plan B operations as long as the intentions of holding back water remain in detention capacity for short periods of time and there is no beneficial use of the detained water proposed. If, however, the intention of Plan B changes to a retention capacity of water for long periods of time or there is a proposed beneficial use of the detained or retained water, then a flood control or other corresponding beneficial use Water Permit will be required under North Dakota Administrative Code § 89-03-01-01.3.

A water permit may authorize the storage of water for flood control or other reasons deemed necessary by the State Engineer. However, authorization to store water for flood control or other reasons does not create a water right. If stored water will be put to beneficial use, a water permit must be obtained.

- As State Engineer staff have stated on numerous prior opportunities to comment on the Fargo-Moorhead Flood Risk Management Project, since the proposed project route traverses over and through surface water resources such as watercourses (i.e. streams or rivers), agricultural drains, and wetlands (i.e. ponds, sloughs, lakes, or any series thereof), any alterations, modifications, improvements, or impacts to those water resources will require authorization through the construction and drainage permitting processes. Additionally, any stream crossing (or opening to permit the flow of water under, adjacent to, or because of a highway, street, or road) proposed to be replaced along the project route must meet North Dakota Stream Crossing Standards. Please contact the Engineering and Permitting Section at 701-328-4288 if you have any questions.

Thank you for the opportunity to provide review comments. The point of contact for this letter is Jared Hlubregise at 701-328-4967 or jhlubregise@nd.gov.

Sincerely

  
Steve Best  
Water Resource Planner

JH-sb:pf/1570

11-27-2018

Dear Ms. Townley:

My thoughts and comments about this SEIS is not about technical review or challenging the content of the report. I am quite sure that you have evaluated the information that you have very sincerely and with thorough thought. The problem that I have with the report is that I believe the information that you have, is not truthful, accurate, or for sure not complete. I feel the efforts that you are attempting are very hard to achieve and I sure would not appreciate having to analyze all that you need to consider.

A few of the misses that I saw quite easily in the report are these:

1. Why is it that we are constantly comparing maps of a 100-yr. flooding event to the inundation of land from when the proposed dam would be used? This area has never seen a 100-yr. event, we have only seen a 50-yr. event so stop using the slight amount of inundation difference between the 100-yr. event and the "functioning" inundation. It is quite different. The flood risk transfer is not equitable and is even more egregious using proper scaling methods.
2. I have always been vocal about the need for a complete different scope to what is being proposed. I hope that you remember these efforts and give some thought to why I feel and believe we need to do this. Basin-wide water management is by far a better solution to what is being proposed by the DA and the city of Fargo. If you have any curiosity of climate change and what is proposed for the upper plains area, you will find that the predictions are that we will see a trend of desertification rather than a consideration of wet conditions. I know that this does not preclude the fact that we could see a large weather event that could result in flooding, but through the proper alternative structuring, we can set ourselves up to win under both possibilities using my alternative methods of water management and protect people and property on a much bigger scale that is basin-wide.
3. To be honest with the majority of the involved people and with integrity of how a project like this is paid for, all pertinent information is needed to make correct

determinations about just what you are trying to figure out today. Don't fall for a standard idea that only does about, in my opinion, one tenth of what we could be achieving. Does looking further and more in depth create more work? Yes. But I know it would be very much worth it.

4. Under the topic area of Project Purpose, why are public dollars being used to support the development of a flood plain in the first place? I know for a fact that there are plenty of areas that could be developed on higher ground in Moorhead, Dilworth, Comstock, Kindred, Mapleton, and so forth. There is no law that we must bow to the wishes of the city of Fargo and to Cass County so that this community can continue to grow. The surrounding communities can take care of expansion.

5. To gather the necessary information for the MNDNR to make all the needed decisions for this project, an engineering firm is needed to design a water management plan that can provide the needed protection for Fargo-Moorhead without the proposed dam in the scope. Then, and only then, will we have all the important information to figure out how to proceed. We are making headway, the very first part of my 5-step plan of alternatives is nearly complete. That was the construction of the permanent levees and dikes through Fargo. Number 2 was the detention facilities in ND, SD, and MN. MN is doing very well at this, the others, not so well. Thirdly is the agricultural field tiling of farmland. Rep. Colin Peterson and now Senator Kevin Cramer are hopefully continuing for push the project north of Fargo, so we can learn about how that can help basin-wide.

6. In relating to how this information is so important, I am confused as to fact that in a conversation I had with a FEMA representative in Denver, I was told that FEMA was asked to "raise" the elevation of concerned flood levels for the purpose of including more households and property into the formula to make the cost-to-benefit ratio look better by Fargo. The concern also continues with just why it is that we rely so heavily of FEMA's information and not from our own people that live here and experience what happens here. I do not believe that FEMA can understand the full benefits of the alternatives needing to be considered. I wish I had the documentation and the research results from the findings of how these alternatives will or will not work that they can make their determinations. That is another area of "false information" at its best.

7. You are so correct in the statement of "takings". No person, business, government entity, township, county, municipality, or state should have any right to "take" property from someone else by force, until there is a complete and clear title for that property. By that I mean that an approved purpose has been put into place, all parties involved are properly notified, all proper permitting for the project is in hand, and there is no other way to avoid the "taking". The individuals that are working on the "takings" of this project should be ashamed of their work.

There are more comments, but I hope by now you understand where I come from and how I perceive the path of this project needs to focus on basin-wide concerns, not just one community.

Please don't feel that a permit needs to be issued right away, the city of Fargo is extremely better protected today than they ever have been, and we can use these dollars that are available for a better good for many more people and property.

Please deny the permit. We can do better.

Sincerely,

Senator Larry Luick

**Commenter 18**

From: Only Hertzgaard  
 To: State of North Dakota  
 Subject: Fargo-Moorhead SEIS  
 Date: Wednesday, November 28, 2018 6:07:16 PM  
 Attachments: [31000001200](#)  
[31000001200](#)  
[31000001200](#)

Jill Townley

Below are comments on the Final Supplemental Environmental Impact Statement (Final SEIS) for the Fargo-Moorhead Flood Risk Management Project. They concern comments to the draft SEIS and the responses to those comments.

Comment #1

General Topic	Alternatives, Downstream Impacts	Comment Summary	Comment Response	Impact on Final SEIS
332-600	Commenters suggest an alternative or options for the Red River levee at Plan B and additional downstream stage increases	As proposed, Plan B retained downstream impacts on the Red River levee at the Canadian border. Allowing additional downstream impacts greater than what is proposed would result in stage increases at the Canadian border. Any project, which proposes stage increases at the Canadian border, would face significant regulatory challenges and would, thus, be infeasible.	No change.	

On more than one occasion during the Task Force, DNR officials stated that there were no international agreements or laws that prevented a raise in river levels at the Canadian border at times of flooding. In addition, I believe they modeled an impact of less than half an inch at the Canadian border from allowing 6 inches of impact downstream. The DNR's comment was that was not a measurable impact at the border. A statement was also made saying that all they had to do was to inform Canadian officials of the expected impacts. There was no regulatory approval necessary.

Comment #2

Another statement in the SEIS is that the newly impacted acres in Wilkin County is 400 acres. Attached is a collection of data from the Army Corps' original floodplain impacts and those contained in the DNR's report. The slope of the valley surrounding the Red River is generally one foot per mile. If the water level at the Richland/Cass county line is raised 3.6 feet above the normal 100 year flood, it seems unreasonable that the newly impacted acres would be less than three quarters of a section. It seems likely that the impacts would be much closer to the impacts from Plan A, than having no effect.

Comment #3

The project sponsor's comments to the Draft Supplemental Impact Statement were misleading in their assessment of North Dakota Century Code provisions regarding the powers of local water resource districts. The North Dakota Century Code (N.D.C.C. 61-16.1-0915) says each water resource district has the statutory right to control and regulate all reservoirs, artificial lakes, and other water storage devices within the district.

**61-16.1-09 Powers of water resource boards.**

Each water resource board shall have the power and authority to:  
 5. Plan, locate, relocate, construct, reconstruct, modify, maintain, repair, and control all dams and water conservation and management devices of every nature and water channels, and to control and regulate the same and all reservoirs, artificial lakes, and other water storage devices within the district.

Nowhere does it state that their requirement may be super ceded by the Water Commission. In fact, it specifically states that water resource boards have the right of control.

The second issue is that N.D.C.C. 89-08-02-02 requires that at the time the dam construction permit application is made, the applicant must show "evidence establishing a property right for the property that will be affected by the construction of the dam." Fargo's city attorney argued to the State Engineer that the Cass Water Resource District can exercise eminent domain in Richland County. The need for eminent domain can't be established without a permit from the Richland Water Resource District.

Steam rolling in environmental laws has been addressed by the courts. In granting the injunction to stop the Obowring dikes, Federal Judge John Tunheim ruled that "if political subdivisions seek to evade the environmental review of one state, they can begin construction in the other, generating momentum that renders the first state's review." This ruling was upheld by the 8<sup>th</sup> Circuit Court in 2016. The Appeals court cited previous rulings that said "the difficulty of stopping a bureaucratic steam roller, once started, as proper factors for district court to take into account." The same principle applies to Richland County. The State Century Code and the responsibility of the Richland Water Resource District to regulate water uses in its district are nullified by issuing a construction permit before Richland County signed off. Judge Tunheim's ruling that stopped construction on the inlet structure stated that WRDRA required the local sponsor to comply with all federal and state laws.

Thank you for the opportunity to comment on the study.

Craig Hertzgaard  
 5530 165<sup>th</sup> Ave SE  
 Kindred, ND 58051

Inundation depth calculations at Richland/Wilkin County Line

Table B-4. Elevations by Flood Event for Existing Conditions, Plan B and Alternative C

Phase 9 HEC-RAS Model Location	100-year Existing	100-year Plan B	100-year Alt. C	500-year Existing	500-year Plan B	500-year Alt. C	PMF Existing	PMF Plan B	PMF Alt. C
Red River Upstream from Dam (RS 2531315)	914.1	921.0	917.9	915.7	922.7	919.8	917.8	923.7	933.5
Red River at Cass/Richland County Line (RS 2578502)	918.3	921.9	919.8	922.3	923.8	922.7	924.9	926.3	926.2

Fargo-Moorhead Supplemental Draft EIS, Appendix B

This information is from the Army Corps original analysis of Plan A.<sup>1</sup>

**Cass/Richland County Line Water Elevation**

919.1 Feet above Sea Level  
 923.1 Feet above Sea Level  
**4 Feet**

**100 Year Flood EOE**  
**Plan A Staging Area**  
**Increase in Water Level do to project**

This second table is data from the DNR's analysis of Plan B currently under review.<sup>2</sup>

**Cass/Richland County Line Water Elevation**

918.3 Feet Above Sea Level  
 921.9 Feet Above Sea Level  
**3.6 Feet**

**100 Year Flood Historical**  
**Plan B Staging Area**  
**Increase in Water Level do to Project**

<sup>1</sup> Appendix B Hydraulics USACE Final Feasibility Report and Environmental Impact Statement, Attachment 2, Response to Richland County Drain Comment, page 2.  
<sup>2</sup> Fargo-Moorhead Flood Risk Management Project Supplemental Draft EIS (SDEIS) Alternative Screening Exercise Report, Appendix B, page 11. (8/17/2018).

## Commenter 19

**From:** Don Nelson  
**To:** [MN\\_Review\\_Environmental \(DNR\); Townley, Jill \(DNR\); Don Nelson](#)  
**Subject:** Fargo-Moorhead FSEIS  
**Date:** Thursday, November 29, 2018 12:21:51 AM

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MN DNR / Jill Townley,

Below are my Comments regarding the adequacy of the Fargo-Moorhead Flood Risk Management Project - Final SEIS. Comments are mainly from the Executive Summary, fm\_fseis\_app-a and fm\_fseis\_app-a-attachment documents.

Page 6 This is the same comment I made previously that was labeled as 107a in my document in the fm\_fseis\_app-a-attachment document but then was never addressed in the DNR Response document (and then never got fixed). The comment is regarding the statement of diverting a portion of the Maple River in the Project Description. It states that it would divert a portion of the Maple Rivers' flow upstream of the F-M urban area. As I stated before the Maple River is NOT upstream of the F-M urban area. It is downstream. Same statement goes for the Sheyenne River. It is also not upstream of the F-M urban area. It is downstream as well.

Page 17 Follow up comment regarding Three National Register-eligible farmsteads I had previously stated the number is greater than 3 that you have listed. The DNR answer to this (in Comment ID 107j) was that since I didn't give the location of the ones that are missing that you couldn't determine if any are missing. The ones I am talking about specifically are located in what would be the proposed staging area on the MN side. I also made this comment during the Scoping comment period specifically regarding the ones on the MN side of the river in the proposed staging area. These need to be added to the EIS before it is considered adequate.

Page 71 In Appendix A has a severe error: typing my comment number of 107b to the comment that says "Commenter suggest moving the Eastern Tieback to be located along the County line road to minimize impacts to prime agricultural lands." This is certainly NOT my comment and must be fixed. Nowhere in my submission will you find anything about a statement related to that. After all these years of submitting comments you obviously know that I am against the original project and against Plan B and have said many times there should NOT be ANY tieback located in MN. So I have definitely NOT suggested any location for a tieback in MN since there should be NONE. Please get rid of the number 107b next to that comment as that is completely in error by the DNR.

Regarding the DNR answer to my Comment ID 107b (this is the 107b that is correct for me on page 77)

My original comment was that 37 feet through town is an insignificant flood which it truly is

now. In 2009 40.82 was ran through with temporary measures. Those temporary measures have become permanent dikes and flood walls to a height of 45 feet. The DNR response was that the levees tie in to high ground at River Stage 39. This was obviously not the case in 2009 when 40.82 ran through town and still had freeboard. There is no reason that 41 feet can't go through town and still have the acceptable freeboard. The DNR needs to fact check the numbers they are using in their responses rather than just accepting the numbers the Diversion Authority gives them. Until this happens the EIS cannot be determined adequate.

Regarding the DNR answer to my Comment ID 107k

This was regarding diverting only the Wild Rice on the ND side. This alternative would keep ALL the impacts on the ND side as any needed staging area would be 100% contained in ND west of Interstate 29. DNR response stated it would be harder for the project to receive FEMA 100-year accreditation so was excluded from further evaluation. There is nowhere that it states an alternative has to be the "easiest" alternative. The requirement is that it is the least impactful solution. The fact is that a Wild Rice alternative would be less impactful than Plan B. The EIS needs to contain the Wild Rice alternative for further evaluation before it can be determined adequate.

Regarding the DNR answer to my Comment ID 107l

While it is true that a response was given, I don't believe the response is reasonable. How is it reasonable that "Once a structure is acquired, it would be up to the previous structure owner to decide where, if any place, to build or purchase a new structure."? Where is this new land located that a person could build a new structure on? How many miles from their current location would this be? Please include a reasonable response for this.

Regarding the DNR answer to my Comment ID 107k

It was on old page 16, now it is on new page 19 where the Holy Cross Township ordinance is definitely still missing. The DNR response to my comment is incorrect. There are actually a few incorrect statements that were made. It states that the DNR contacted the Holy Cross commenter to receive the most recent version of this ordinance. That is an incorrect statement since I was the commenter and I was never contacted by the DNR. The DNR also said in the response that the ordinance has not been updated. This is definitely incorrect. It definitely has been updated. You will find Ordinance 02 and the Holy Cross Township Comprehensive Plan is all available and recorded at the Clay County, MN Courthouse. This needs to be included in the EIS before it is considered adequate. This entire scenario points out a very disturbing issue regarding the DNR doing their due diligence and fact checking. You can see in the comments from the Diversion Authority that they reference the Holy Cross Township Ordinance and specifically state Ordinance #0001 and refer to it as being expired. Yet they cleverly fail to mention that the Holy Cross Township Ordinance was updated. It is disturbing to see that the DNR looks to have taken the word of the Diversion Authority and used their inaccurate information to dismiss my earlier comment regarding the Holy Cross

Township Ordinance.

Regarding the DNR answer to my Comment ID 1070

This is regarding the first 1070 since the DNR used 1070 two times and was 1071 from my document in the fm\_fseis\_app-a-attachment document.

DNR response says impacts of stranding from flooding was not a scoped topic of the SEIS. I had included the comment way back in the Scoping comments of needing to address the issue of wildlife standing and dying in the proposed staging area. It went under comment id 20e in the DNR Response to my Scoping comments. Response then was the issue is covered in Sections 3.4 and 3.5 of the SEIS. Now the response is "impacts of stranding from flooding was not a scoped topic of the SEIS. While such a situation could occur, the upland lands within the inundation area are primarily agricultural and limited in wildlife habitat. Wildlife within the existing floodplain are adapted to periodic flooding. As such, this topic was not addressed in the SEIS, nor is mitigation proposed." The issue of wildlife standing and dying is not adequately covered in the EIS. The DNR statement that wildlife within the existing floodplain are adapted to periodic flooding is probably a true statement. But the huge item being missed here is that the proposed staging area in MN is NOT existing floodplain. It would only become floodplain if the proposed project was allowed to happen. Wildlife from many miles around make their way to the river for the winter. There is an abundance of wildlife along the river at the end of winter and beginning of spring. Never before has this area in the proposed staging area in MN been flooded so the wildlife have never been stranded in this area before resulting in death. This would all be a new issue that should be included in the EIS before it is determined adequate.

In looking through the DNR Comment Responses there are many responses related to the size of the proposed Diversion Channel and that it needs to be large enough to handle all the ND Rivers downstream of Fargo....Sheyenne, Maple, Rush, Lower Rush. What continues to be left out from the EIS and I have mentioned it many times before is that allowing all those ND Rivers to go into the proposed Diversion Channel which creates the need for a proposed Staging Area located in MN which would flood out non-floodplain land in MN while at the same time taking the current floodplain land in ND and falsely making it non-floodplain land is NOT reasonable or practical.

DNR response to comment 34b states the goal of proposed project is not basin-wide flood protection. It states the goal is to protect the Fargo-Moorhead metropolitan area. If that is truly the goal there is NO need to be draining water from the Sheyenne, Maple, Rush and Lower Rush into the proposed Diversion Channel out in the current floodplain land of Rural Cass County. Draining all that current floodplain land in Rural Cass County is causing a proposed staging area in MN on current non-floodplain land and would have severe detrimental effects to MN. This issue is not adequately addressed in the EIS.

As noted in some of the items above, the DNR needs to fact check the numbers they are using

in their documents rather than just accepting the numbers the Diversion Authority is giving them. Until this happens the EIS cannot be determined adequate. My previous comments from previous comment period contain many detailed statements regarding some of the numbers so I will not repeat those all here again. But the one stating 9,635 acres in MN "removed from flooding" does need to be singled out as that one is ridiculous and false. And then that number is used to attempt to claim a false 17% benefit to MN. Nowhere in MN will you find 9,635 acres that was previously below the 100-year floodplain that is now "removed from flooding".

In the end, this proposed project and any proposed project that proposes to have a staging area in MN with a high hazard dam needs to be stopped. MN gets no benefit from this proposed project yet gets severe impacts from this proposed project. Flooding the high ground (current non-floodplain land) in MN for the benefit of draining ND Floodplain for development purposes is not acceptable to MN in any way. It would be completely unreasonable and impractical to allow this project to happen. This proposed project continues to be completely corrupt and beyond unethical. Once all the missing information and incorrect information is fixed in all the documents and the EIS at some point is considered "adequate", the only reasonable and practical outcome during the future permitting decision phase is once again "Permit Denied".

Thanks,

Don Nelson  
5086 130th Ave. South  
Moorhead, MN  
Home: 218-585-4550  
Cell: 701-793-0751  
Email: [donnelson@hotmail.com](mailto:donnelson@hotmail.com)

761438



**HOLY CROSS TOWNSHIP  
CLAY COUNTY, MINNESOTA  
COMPREHENSIVE PLAN: 2016-2026**

**INTRODUCTION AND PURPOSE:**

This Comprehensive Plan: 2016-2026 (the "Plan") fulfills the requirements of discretionary comprehensive planning by a township under Minnesota Statutes Chapter 462. The Plan will serve as the guide for the Holy Cross Township Planning Commission and Holy Cross Township Board to erect appropriate land use controls and plan for future land use activities. The Plan will also serve as a basis for future zoning decisions by the Township. The intent is to continue to protect farm land and sensitive environmental areas and address gaps in the County's ordinance—particularly with respect to water impounding projects within the Township that benefit areas outside of the Township.

Holy Cross Township's goal in adopting this Plan and related zoning ordinances will be to maintain the existing rural character and agricultural based economy and community. The Township will work with the County to protect current agricultural uses by requiring land use permits for uses that alter or disrupt the rural character and agricultural based economy and community. The Township will work with the County to maintain existing commercial and industrial uses in close proximity to urban and suburban areas. The Township will adopt additional controls, as necessary, to avoid harmful development and uses.

**GENERAL CONDITIONS**

**Land.** Holy Cross Township is located in the southwest corner of Clay County on the western edge of Minnesota, bordering North Dakota and the Red River of the North. Holy Cross Township encompasses 33.2 square miles (approximately 21,248 acres). Holy Cross Township encompasses one city – Comstock. Holy Cross Township, since its organization, has remained primarily agricultural and undeveloped.

**Population.** Holy Cross Township has a population of 140 (2010 census) in 53 households. The City of Comstock has a population of 93. The metropolitan area of Fargo and Moorhead is located just five miles to the north with a population of more than 150,000.

**Economy.** The major land use in Holy Cross Township is cropland. The economy of Holy Cross Township centers on agricultural production and related business.

15152-00741706211

**Commenter 20**

**FAX**

**To:** Jill Townley  
EIS (Fargo-Moorhead diversion) Project Manager  
Division of Ecological and Water Resources  
Minnesota Department of Natural Resources

**Fax Number:** 651-296-1811

**Date:** November 28, 2018

**From:** Holy Cross Township [of Clay County, Minnesota]  
(by Shelley Lewis; Cell #: 218-329-6739)

**Number of pages including cover:** 11

**Regarding:** Holy Cross Township ordinance and subsequent  
comprehensive plan for 2016-2026

Jill,  
Please direct any questions regarding this information to Mark Anderson,  
Holy Cross Township Clerk, at 701-361-0998. Thank you.

Shelley Lewis

**PUBLIC WATERS AND WETLANDS**

*Public Waters.* The Red River of the North and Woberton Creek are the only public waters within the Township, as listed in the Minnesota Department of Natural Resources' inventory of public waters. The Red River of the North is a major regional river that is prone to flooding of downstream urban areas of Fargo, Moorhead and Grand Forks. Woberton Creek is a tributary of the Red River of the North and is an important part of agriculture, drainage within the Township.

*Wetlands.* Holy Cross Township is located in Clay County, which is a "less than 50% area" for pre-settlement wetland acres as provided in Minnesota Rule 8420.0117.

**COUNTY WATER PLAN**

Clay County has a Local Water Management Plan that was last updated in 2010. The purposes of the Local Water Management Plan are to identify existing and potential problems or opportunities for protection, management and development of water resources and land resources in the County; develop and implement a plan of action to promote sound hydrologic management of water and related land resources in Clay County; and to work toward effective environmental protection and management in the County. However, Clay County's plan does not adequately address the Township's concerns with respect to water impoundment projects.

**CLAY COUNTY PLANNING AND ZONING**

The entire Township is zoned AG General under the Clay County zoning regulations. This zoning classification is intended to "support the long-term protection of agriculture" and "minimize land use conflicts." Generally, this zoning classification is appropriate and adequately regulates non-agricultural uses. However, Clay County's zoning ordinance and comprehensive plan do not adequately address the Township's concerns with respect to water impoundment projects. The County has also adopted a comprehensive land use plan that, with the exception of water impoundment projects, adequately sets forth planning principles for the Township. The County's comprehensive land use plan can be viewed at <http://claycountymn.gov/329/Comprehensive-Plan>.

**OTHER PLANS AND STUDIES**

The Buffalo-Red River Watershed District has jurisdiction within Holy Cross Township. The Watershed District has adopted a watershed management plan covering Holy Cross Township. The plan can be viewed at <http://www.brrwd.org/revised-watershed-management-plan-2010/>. The Buffalo Red River Watershed District plan was adopted in 2010. The purpose of this plan is to provide guidance on the nature of water projects contemplated for the next decade and to identify the main themes of water management within those districts. However, Buffalo Red River Watershed District's plan does not adequately address the Township's concerns with respect to water impoundment projects.

**2015 MORATORIUM**

On January 6, 2015, Holy Cross Township adopted Ordinance # 0001 establishing a moratorium on water impoundment projects within the Township. The moratorium expired after one year. While studying the issue during the moratorium, the Town Board has determined that permanent zoning regulations are necessary to protect citizens and residents of Holy Cross Township from the deleterious effects water impounding projects within the Township that benefit areas outside of the Township.

**COMPREHENSIVE PLAN**

Agriculture is the predominant land use in Holy Cross Township and preserving such agricultural dominance is the basis for the comprehensive plan and the supplementing of the County's AG Agricultural General District regulations related to water impoundment as they apply to the Township.

This Plan will serve as the Township's guide in determining the appropriateness of, and performance standards for regulating water impoundment projects within the Township. The Plan is not intended to be read in a vacuum. Instead, it should be considered together with the various plans and studies incorporated by reference, and consistent with the zoning ordinance prepared by the Township. The Plan will also serve as the basis of any land development decisions made under such ordinance, with special attention given to agricultural considerations. In particular, the Plan is intended to supplement the County's existing comprehensive land use plan.

The following goals and objectives provide a series of considerations which can be used to guide decision-making processes. Furthermore, the objectives are not absolute directions for the Township Board or Planning Commission. Instead, objectives are guides to assist in decision making and goal achievement. The goals and objectives should be considered and utilized collectively.

- Goal 1: Minimizing the fragmentation and development of agricultural lands.**
- Objective:**  
Control large land uses such as water impoundments to minimize the loss of agricultural lands.
- Goal 2: Minimizing the impacts of water impoundment projects.**
- Objective:**  
Establish additional setbacks and performance standards for water impoundment projects.

**Goal 3: Identification of areas of preference for the location of water impoundment projects.**

**Objectives:**

- A. Encourage the location of water impoundment projects in non-agricultural areas or areas of marginal agricultural lands.
- B. The Planning Commission should annually review the zoning map and zoning ordinance and consider recent developments, infrastructure improvements and land use changes that may necessitate revisions to map or ordinance.
- C. The Planning Commission should annually consult with the County to stay abreast of development activity with the County and report those consultations to the Township.
- D. Monitor the Township for lands that no longer serve a productive agricultural purpose.
- E. Encourage the protection of open space, the environment, and native landscapes.
- F. Foster the investigation new agricultural, drainage, and flood mitigation practices and emerging technology that minimize impacts to the rural character and agricultural based economy and community of Holy Cross Township.

**ZONING ORDINANCE AND MAP**

The Zoning Ordinance shall establish regulations and performance standards for water impoundment projects with the Township. The Holy Cross Township Zoning Map shall be the current zoning map adopted by Clay County for Holy Cross Township.

This Plan is adopted by the Holy Cross Township Board on Sept 27 2016

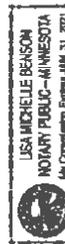
State of Minnesota  
Clay County

By: [Signature]  
Its Chair

By: [Signature]  
Its Clerk

Timothy Lisbeth and Myle K. T. Anderson  
Subscribed and acknowledged before me this  
27th day of September 2016  
Lisa Michelle Benson  
Notary Public

Clay County, Minnesota  
My Commission Expires 1-31-2021



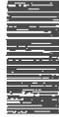
[5526-002/249001]

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Recorded on: 9/27/2018 03:09AM  
By: RECORDER, Deputy

Record by:  
SANDY LEBETH  
NOTARY PUBLIC  
MADISON, WI 53706

DiAnn M Sirefald, Recorder  
CLAY COUNTY, MN

776179



**ORDINANCE NO. 02  
AN ORDINANCE ESTABLISHING A PLANNING COMMISSION  
WITHIN HOLY CROSS TOWNSHIP, CLAY COUNTY, MINNESOTA**

**WHEREAS**, the Holy Cross Township Board (the "Board") is considering the adoption of a comprehensive plan and zoning regulations within the Township;

**WHEREAS**, the Board is authorized to adopt a land use plan and zoning regulations pursuant to Minnesota Statutes Chapter 462; and

**WHEREAS**, the first step in the process of the adoption of a comprehensive plan and zoning regulations within the Township is the establishment of a planning commission.

**NOW, THEREFORE**, pursuant to Minnesota Statute Chapter 462, the Holy Cross Township Board hereby ordains:

**SECTION 1. ESTABLISHMENT OF THE PLANNING COMMISSION**

The Planning Commission is hereby established. The Planning Commission shall be the township planning agency authorized by M.S. 462.354, Subd. 1, as it may be amended from time to time. Except as otherwise provided in this ordinance, the Planning Commission shall be advisory directly to the Township Board.

**SECTION 2. COMPOSITION AND TERMS**

(A) **Composition.** The Township Board shall serve as the Planning Commission.

(B) **Oath.** Every appointed Member shall, before exercising any of his or her duties, take an oath that he or she will faithfully discharge the duties of the office.

**SECTION 3. ORGANIZATION, MEETINGS, MINUTES AND EXPENDITURES**

(A) **Officers.** At the first regular meeting in January, the Planning Commission shall elect a Chairperson and a Vice-Chairperson from among its Members, each for a term of one year. The Planning Commission may create and fill other offices as it may determine necessary.

(B) **Meeting.** The Planning Commission may hold at least one meeting each month as needed at the time and place as they may fix by resolution and file with the Township Clerk. Special meetings may be called at any time by the Chairperson, or in the case of the Chairperson's absence, by the Vice-Chairperson, or as directed by the Township Board.

(C) **Commission Policy on Meetings, Organizational Form and Rules of Order.** The Planning Commission shall adopt rules of order or bylaws for the transaction of business, ordering meetings, adopting findings of fact, and holding public hearings.

(D) **Minutes.** Written minutes of meetings shall be kept and filed with the Township Clerk.

**SECTION 4. STAFF FOR THE COMMISSION**

The Township Clerk, Township Engineer, Township Attorney, and other Township staff may act as staff for the Planning Commission and may be required at times to attend Commission meetings. Township staff may provide the Commission with information as requested by the Commission. The Township Clerk may perform secretarial duties for the Commission, such as the keeping of minutes, and may be responsible for the keeping of records.

**SECTION 5. POWERS AND DUTIES**

(A) **Generally.** The Planning Commission shall have the powers and duties given to Township planning agencies generally by law, including the authority to conduct public hearings as directed by Township Board or Township policy. The Planning Commission also shall exercise the duties conferred upon it by this ordinance.

(B) **Comprehensive Plan.** It shall be the purpose of the Planning Commission to prepare a comprehensive plan for the Township, including a general land use plan and other matters relating to the physical development of the Township. After the Township Board has adopted the comprehensive plan, the Planning Commission may periodically review the comprehensive plan and any ordinances or programs implementing the plan, and recommend any necessary amendments. In accordance with Minnesota Statute § 462.355 Subd. 1., when preparing or recommending amendments to the comprehensive plan, the Planning Commission consider adopting goals and objectives that will protect open space and the environment because Clay County is a county that is not a greater than 80 percent area, as defined in section Minnesota Statute §103G.005 Subd. 10b.

(C) **Means of Executing Plan.** Upon the adoption of a comprehensive plan it shall be the concern of the Planning Commission to pursue reasonable and practical means for putting into effect the plan in order that it will serve as a pattern and guide for the orderly physical development of the Township and preservation of key land uses. Means of

effectuating the plan, among other things, may consist of adoption of zoning ordinance and subdivision regulations.

- (P) Zoning and Subdivision Ordinances. The Planning Commission shall review all proposed amendments to the zoning and subdivision ordinances and their relation to the Township comprehensive plan and other land use controls.
- (Q) Conditional and Interim Use Permits. The Planning Commission shall review all requests for a conditional use permit or interim use permit under the terms of the zoning ordinance.
- (R) Variances and Appeals. The Township Board shall have the powers of a Board of Appeals and Adjustments, and hear variance requests and appeals as provided for in Minnesota Statute § 462.357, Subd. 6.

(C) Official Map. Pursuant to Minnesota Statute § 462.359, Subd. 2, the Planning Commission shall prepare an official map covering the entire township.

(M) Transfer Real Property; Capital Improvements. Pursuant to Minnesota Statute § 462.356, Subd. 2 the Planning Commission shall review all proposed acquisitions or disposals of publically owned interests in real property for compliance with the comprehensive plan.

**SECTION 7. EFFECTIVE DATE**

This ordinance becomes effective upon publication.

FURTHER, the Holy Cross Township Board ordains:

**SUMMARY PUBLICATION.**

At least four-fifths of the Board's members direct the Township Clerk to publish only the title and a summary of this Ordinance as follows:

"AN ORDINANCE ESTABLISHING A PLANNING COMMISSION WITHIN HOLY CROSS TOWNSHIP. It is the intent and effect of this Ordinance to establish a Planning Commission as the first step in adopting a comprehensive plan and adopting zoning regulations to ensure that land uses are appropriately regulated to adequately protect public health, safety, and welfare. Copies of the ordinance are available from the Town Clerk."

25559-0002/04080711

Adopted this 28 day of Dec, 2018.

Passed by the Township Board this 21 day of Dec, 2018.

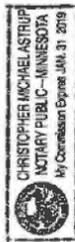
HOLY CROSS TOWNSHIP BOARD

By [Signature]  
Ats Bedford Chair

Attested:  
[Signature]  
Clerk

[Signature]  
Christopher Michael Astrup  
Notary Public

12/28/2017



Transactions: 232788  
RECORDING FEE \$46.00  
776179



Recorded on: 12/28/2017 01:54PM  
By: L.S. DePuy

Return to:  
MARK ANDERSON  
CLAY COUNTY RECORDER  
MUNICIPAL BLDG 300  
CLAY COUNTY, MN

[Signature]  
Dwain M. Sretiefel, Recorder  
CLAY County, MN

25559-0002/04080711



## Commenter 22

Jill Townley  
Minnesota Department of Natural Resources  
500 Lafayette Road, Box 25  
St. Paul, MN 55155-4025

November 29, 2018

Dear Ms. Townley,

Thank you for taking the time to review my submission.

The DA should submit how much additional high ground will actually be flooded. I see no consideration to Kindred, Walcott & Coffax; holding water back on the Sheyenne will have a huge effect of them, with no affect to Fargo. Fargo's DA has zero concern for anyone other than Fargo and their projected growth from this project.

The DA previously had caps added to nearly all the culverts from highway 46 going North, project or not they intend and have always intened to flood someone else.

I oppose Plan B because much of what the DA submittid s as fact has been scewed in their favor. Simply because they are pushing for it doesn't mean it can only be built their way. Similar to a child's game "my ball my rules".

1. The NED was designed to arrive at a cost-effective solution: intentional flooding across Cass and Clay County unnecessarily submerging prime farm land, homes, and cemeteries is not a cost effective option.
2. There has been virtually no conversation with the affected landowners, I have sincere doubt there ever will be since no effort has been made to date.
3. Plan B promotes unwise and unnecessary development of the floodplain.
4. A floodplain is not benefitted by developing it; taking prime farm land which is above the floodplain to develop the actual floodplain is inconcievable!
5. Other options that include water storage should be considered to reduce cost and solve valley wide flood issues.
6. It appears the actual structures and actual residents have not been fully counted by the DA; an accurate count is necessary for projected buyouts and to forwarn taxpayers of the enormous effects of this project along with their costshare.
7. Plan B is designed to expand Fargo's city limits by 40 to 50 square miles, allowing them to build into the floodplain, creating their own potential flood risk to themselves in the event of a breach in the diversion.
8. Less expensive options do exist; please do not permit this project.

Thank you,

Sincerely,

Colleen Israelson

## Commenter 23

**From:** draelson@lampabay.r.r.com  
**To:** [MN Review Environmental \(DNR\)](#)  
**Subject:** Re: Fargo-Moorhead FSEIS  
**Date:** Thursday, November 29, 2018 1:42:32 PM  
**Importance:** High

Dear Ms. Townley,

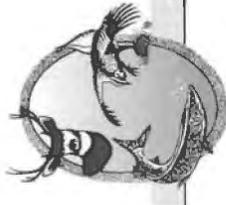
There are other options to protect Fargo and the entire Red River Valley from flooding. I oppose Plan B.

Please do not permit this project.

Thank you

Dallas Israelson

Commenter 24



"A VARIETY IN HUNTING AND FISHING"

NORTH DAKOTA GAME AND FISH DEPARTMENT

100 NORTH BISMARCK EXPRESSWAY BISMARCK, NORTH DAKOTA 58501-5036 PHONE 701-328-6300 FAX 701-328-8362

GOVERNOR, Doug Burgum  
DIRECTOR, Terry Steinhilber  
DEPUTY, Scott A. Peterson

November 28, 2018

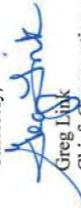
Jill Townley  
Minnesota Department of Natural Resources  
500 Lafayette Road, Box 25  
St. Paul, MN 55155-4025

Subject: Fargo-Moorhead Flood Risk Management Final Supplemental Environmental Impact Statement.

Dear Ms. Townley:

The North Dakota Game and Fish Department (Department) has reviewed Minnesota Department of Natural Resources (DNR) Fargo-Moorhead Flood Risk Management Final Supplemental Environmental Impact Statement. The Supplemental Environmental Impact Statement (SEIS) clearly identifies the percentages of mitigation needed in each state (Section 3.0 Affected Environment and Environmental Consequences, Tables 3.4 through 3.6), and identified mitigation options (Section 3.5.3 Proposed Mitigation) as discussed during the scoping process. The Department supports addressing mitigation projects allocated by the percentages identified in each state. Additionally, the Department supports the SEIS documents stating that the Adaptive Management Monitoring Plan might be insufficient to mitigate fish passage impacts without the modification of the Drayton Dam as previously proposed.

Sincerely,

  
Greg Link

Chief, Conservation and Communication Division

blk

Commenter 25



520 Lafayette Road North | St. Paul, Minnesota 55155-4194 | 651-296-6300  
800-657-3864 | Use your preferred relay service | info.pca@state.mn.us | Equal Opportunity Employer

November 29, 2018

Jill Townley  
EIS Project Manager  
DNR Division of Ecological and Water Resources  
Environmental Review Unit  
500 Lafayette Road, Box 25  
St. Paul, MN 55155-4025

Re: Fargo-Moorhead Flood Risk Management Final Supplemental Environmental Impact Statement

Dear Jill Townley:

Thank you for the opportunity to review and comment on the Final Supplemental Environmental Impact Statement (Final SEIS) for the Fargo-Moorhead Flood Risk Management Project (Project). The Project consists of a flood control project to divert floodwaters around the cities of Fargo, North Dakota and Moorhead, Minnesota.

The Minnesota Department of Natural Resources (DNR) prepared a state Environmental Impact Statement (EIS) for the Project. The EIS process concluded in June 2016 with DNR's EIS adequacy determination. Following discussions and coordination with the DNR and the U.S. Army Corps of Engineers, the Project proposer, the Flood Diversion Board of Authority, has developed a revised version of the Project, referred to as Plan B, which is outlined in the Final SEIS.

The Minnesota Pollution Control Agency (MPCA) has reviewed the Final SEIS and offers the following comments.

**Section 2.2.1.1 Alternative Screening Approach**

The MPCA applauds the use of the updated period of record as a basis of evaluating Plan B hydraulic affects compared with the Expert Opinion Elicitation Panel (EoEP hydrology) used previously in the 2016 EIS. The MPCA would like to note that it would be ideal to expand the modelling data set to extend beyond 2009, as both 2010 and 2011 have been significant flood years.

**Section 3.4.3 Proposed Mitigation and Monitoring Measures**

The MPCA would like to note that with respect to the MPCA Clean Water Act (CWA) Section 401 Water Quality Certification, wetland impacts in Minnesota, including excavation, draining, filling and inundating are regulated and require mitigation under state water quality standards, Minn. R. ch. 7050.0186. These rules have broad applicability, but are normally asserted by the MPCA through the 401 Water Quality Certification. Actions impacting all Minnesota wetland waters, including those that are non-jurisdictional under Section 404 of the CWA, may be potentially subject to mitigation under Minn. R. ch. 7050.0186.



We appreciate the opportunity to review this Project. Please be aware that this letter does not constitute approval by the MPCA of any or all elements of the Project for the purpose of pending or future permit action(s) by the MPCA. Ultimately, it is the responsibility of the Project proposer to secure any required permits and to comply with any requisite permit conditions. If you have any questions concerning our review of this Final SEIS, please contact me by email at [karen.kromar@state.mn.us](mailto:karen.kromar@state.mn.us) or by telephone at 651-757-2508.

Sincerely,

Karen Kromar  
Project Manager  
Environmental Review Unit  
Resource Management and Assistance Division

KK:bt

cc: Dan Card, MPCA, St. Paul  
Bill Wilde, MPCA, St. Paul  
Mark Gernes, MPCA, St. Paul  
Kim Laing, MPCA, St. Paul  
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November 29, 2018

Jill Townley, Project Manager  
Minnesota Department of Natural Resources  
500 Lafayette Road  
St. Paul, Minnesota, 55155-4025  
Sent Via Email: [environmentalrev.dnr@state.mn.us](mailto:environmentalrev.dnr@state.mn.us)

Re: Comments (Fargo-Moorhead FSEIS)  
DNR's Final Supplemental EIS for the Fargo-Moorhead Diversion Project  
Our File No. 24082-0005

Dear Ms. Townley:

I am submitting this comment letter regarding the Fargo-Moorhead FSEIS on behalf of the Joint Powers Authority (JPA).

#### I. Introduction

The purpose of these comments is to state the position of the Joint Powers Authority that the environmental review is inadequate for the following reasons:

- The application and record do not demonstrate that the Plan B design accepted the principles articulated by the Commissioner's order. The Commissioner's order articulated specific principles upon which a flood control project must be evaluated. Plan B was not designed to meet those principles, and it does not. The project is thus not feasible and should have been screened out of the environmental review on that basis.

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- The Diversion Authority failed to lay a foundation for permissibility by establishing the probability that the project will meet local and regional standards. Indeed, it appears that even at this late date, the Diversion Authority has made no effort to consult with and obtain even preliminary approval by the Buffalo Red River Watershed District.
- The application once again violates floodplain development constraints at the state and federal level, just as the LPP did.
- The application and subsequent record do not even contain an acknowledgment that Diversion Authority intends to comply with Minnesota and law and permit conditions in its construction and operation of the system.
- Plan B is not the least impact solution. Least impact solutions were improperly screened out of the environmental review. The record does not support exclusion of the Minnesota Diversion nor the JPA-Anderson alternative.
- The applicant failed to lay a foundation of compliance with local and regional permitting requirement, and in fact has proceeded as if it can ignore them.

In JPA's June 2018 comments to the proposed environmental impact statement, we raised the following concerns, and those concerns remain valid and still applicable to the proposed Final Environmental Impact Statement:

1. **The scope of the DNR's first environmental review addressed only unpermissible, illegal alternatives** (other than the no action alternative). The Commissioner correctly found that the LPP violates a myriad of statutes, regulations and policies. In short, we now know that the scope of original state EIS did not examine a single lawful feasible alternative. The Plan B now under

<sup>1</sup> Richland/Wilkin Joint Powers Authority (JPA), is a joint powers entity formed under both Minnesota and North Dakota joint powers laws. The JPA has represented the two counties, townships and residents in efforts to assure that the Fargo-Moorhead Flood Risk Management Project is configured in a way that complies with Minnesota and Federal law.

review is predicated on the same design characteristics that rendered the LPP unlawful. **As a result, the supplemental environmental review proposed by the scoping document has been completed without examining a single lawful feasible alternative.** Once again, all permissible alternatives have been screened out of the environmental review.

2. **The scoping decision again does not include a single feasible alternative that meets the requirements of Minn. Stat. § 116D.04 subdivision 6.** One of the central functions of the Minnesota environmental review is to provide all governmental authorities with decision making power information necessary to determine "whether there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction." The proposed scoping document fails to perform that function, because it examines none of the feasible and prudent alternatives meeting the section 116D.04 criteria.
3. **JPA North Dakota Diversion Must be Studied.** The JPA has proposed a North Dakota diversion that meets the underlying project purpose. Although not critical to the underlying purpose, its levees can be FEMA certified. It provides full protection to existing development in Fargo and Moorhead. It satisfies the conditions of the Commissioner's order, including preserving natural floodplain storage. Hydrological modelling demonstrated that this alternative will dramatically reduce the volume of floodwater produced by a diversion. (See Anderson, Fox and Aaland declarations attached as Exhibits A, B and C, Respectively to our DSEIS comments). That alternative should have been included in the scoping decision.

4. **An Enhanced NED – Minnesota Diversion Meets Section 116D.04 subdivision 6 criteria.** This same modelling confirms that a Minnesota diversion similar to the NED is feasible, practical and dramatically reduces or eliminates the need to store waters on the four-county area. A NED project would require far less storage than the LPP or Plan B. The Minnesota Diversion was wrongly rejected by the first scoping decision, because an LPP with storage, with enhanced flows through town, with certified levees was wrongly compared to a Minnesota diversion without any storage, without enhanced flows through town, and without certified levees. The LPP costs one billion dollars more than the Minnesota Diversion not included in the scoping decision.

With only a small portion of that extra one billion dollars, the Minnesota Diversion could be enhanced and that enhanced diversion would clearly meet Section 116D.04 subdivision 6 criteria. Exclusion of the NED is unsupported by the record and contradicted by the federal EIS' selection of the plan as meeting project purpose, without violating flood plain preservation policies.

JPA is frustrated that the essence of our position does not seem to be registering with DNR at the environmental and ecological level. We are, once again, proceeding to permitting based on an environmental review that excludes all permittable-alternatives, and that, we think is creating exceptional difficulties in the management of this complex case. For some reason, the FSEIS process seems completely disconnected from the permitting principles articulated by the Commissioner's Order, principles which derive directly from Chapter 103G and 116D. We have tried to point out that it is impossible to develop a meaningful environmental review, with appropriate screening, when permitting principles are ignored, as they have been here. Permitting constraints must be considered on a project this complex at every stage, from design to feasibility study, to environmental review and then of course at permitting.

An environmental review is supposed to consider feasible alternatives. For example, if a feedlot were proposed for construction in prohibited shoreland zone, then, it would be foolishness to conduct an environmental review to compare multiple ways of locating a feedlot in a prohibited shoreland zone. It would be futile to try to find the least damaging prohibited feedlot to be selected as environmentally preferable! The project development process, the feasibility study, the application for permit, environmental review, and permitting, only work properly if at every stage, the applicant embeds permitting requirements into the design.

Design of a successful flood control project *begins* with identifying permit requirements, just as the proper process for designing a home begins with the building and zoning codes. To arrive at a permittable project, the design team must consult with regulatory authorities, and identify permitting constraints. For a Minnesota flood control project that would require consulting with the impacted county and regional zoning and water planning authorities, because Chapter 103G requires the project to meet those code requirements. However, the record shows that Plan B was designed without attempting to coordinate with the Buffalo Red River Watershed District and other regulatory authorities. The result is that once

again, DNR is faced with an application that says, give us a permit and then we'll attempt to see if we can get the other permits that we need.

This problem is exactly why the mediated settlement agreement called for collaboration with regulatory authorities at the front end. As we raised this point, it has been suggested that the mediated settlement agreement may not have the force of law, but that completely misses our point. The mediated settlement is a framework designed to facilitate compliance with the complexities created by Chapter 103G and overlapping environmental regulatory frameworks. It is designed to assist the proposer in getting all of these constraints built into the project design, so that the project when designed, is likely to get approved. The 6 - year approval cycle for this project is a direct result of Diversion Authority's failure to take advantage of a process that is designed to assure that the project when advanced for approval, will have been designed in compliance with all applicable requirements. We are now on our third environmental review of the third project design: NED, LPP, and Plan B. Only the NED was designed explicitly in consultation with permitting authorities. Only the NED is permittable, but the NED project is the only one of the three designs that has been excluded by DNR's environmental team. That is a remarkable occurrence, to say the least.

The record shows that no attempt has been made, at any stage, by the project's designers to accommodate or even consider Minnesota permitting requirements. In fact, even at this late stage, Diversion Authority still insists that there is no legal permit requirement and that complying with Minnesota law is a mere voluntary accommodation. In its contested case motion to stay, DNR states that its approach to permitting was:

an effort to avoid a potentially unnecessary and divisive jurisdictional showdown, the Diversion Authority simply agreed to start the process of applying for Minnesota permits for work it was not even undertaking, with the reasonable expectation that once any potentially required Minnesota permits had been obtained, the jurisdictional issue would become moot." DA Motion to Stay, Vacate and Remand.

Buffalo Red River Watershed District has twice commented that Diversion Authority has not consulted with the District on permitting requirements. We understand that as of August 29, 2018, that is still the case. This state of affairs is

symptomatic of the cart-before-horse nature of Diversion Authority's approach.

There is another reason why screening viable options is arbitrary, capricious and unlawful. DNR is not the sole permitting authority here. DNR is the responsible governmental unit, charged with compiling environmental information, but it does so in a fiduciary capacity for the public and for other permitting authorities. When For this reason, environmental reviews under MEPA and NEPA are considered "action forcing" documents. Their purpose is to provide information to the public so that the public can advocate amongst viable choices. When DNR excludes viable choices that may be of interest to stakeholders and other permitting authorities, it is stacking the deck against public consideration of alternatives, and depriving other permitting authorities of information they may use in their own permitting decision. The central role afforded regional and local regulatory authorities makes this exclusion especially problematic.

**II. Federal and State Environmental Reviews are Arbitrary and Capricious and Unlawful, because they have Repeatedly screened Out Alternatives that are Permittable in favor of alternatives that are unpermittable and screened out designs necessary to meet permitting requirements.**

As we have stated in the past, the feasibility phases of the Fargo Moorhead flood mitigation project were conducted in conformance with federal<sup>2</sup> and state sustainability policies. In conformance with these policies, the project was to be designed:

“...to reduce flood risk and flood damages in the Fargo Moorhead metropolitan area while **avoiding an increase in peak Red River flood stages, either upstream or downstream and minimizing loss of floodplain in accordance with Executive Order 11988,**

<sup>2</sup> 42 USC 1962-3 states all water resources projects should reflect national priorities, encourage economic development, and protect the environment by- (1) seeking to maximize sustainable economic development; (2) seeking to avoid the unwise use of floodplains and flood-prone areas and minimizing adverse impacts and vulnerabilities in any case in which a floodplain or flood-prone area must be used; and (3) protecting and restoring the functions of natural systems and mitigating any unavoidable damage to natural systems.

the **floodplain policy**. See DNR Letter August 2010 (UF-4) UF 1(a) through 1(f). (emphasis added).

Through a lengthy series of feasibility studies, the United States Army Corps of Engineers had developed a project design that would reduce flood risk and flood damages in the metropolitan area while avoiding an increase in peak Red River flood stages, just as the above DNR letter describes. These sustainability goals were achieved by minimizing the loss of floodplain in accordance with Executive Order 11988 and its Minnesota policy analog. Floodplain storage plays a critical role in reducing the impact of major flooding in the Red River Valley, and particularly for the Fargo Moorhead metropolitan area. The aerial photo below shows the largely undeveloped floodplain south of Fargo during the 1997 flood of record.

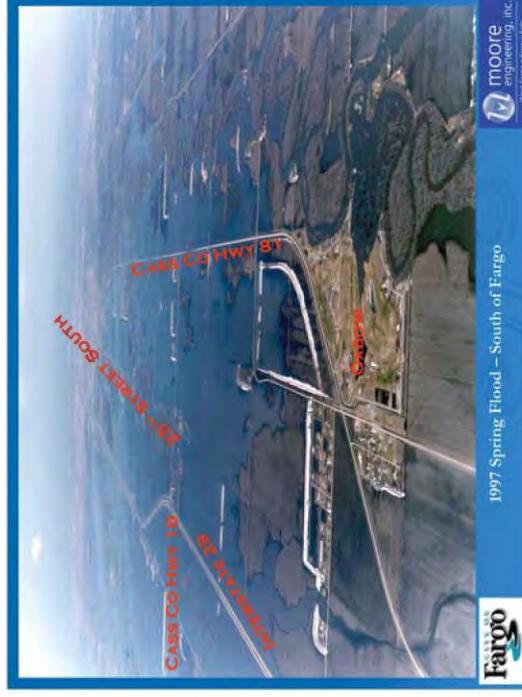


Figure 1

This floodplain to the south of Fargo and another larger floodplain to the northwest provide critical flood storage capacity during major flood events. If

water is removed from these floodplains during major floods, that makes flooding worse. Flood protecting those areas would destroy their flood storage function, and dramatically increase the flow of floodwaters downstream. That certainly is one of the reasons that the original project was designed to protect developed Fargo, but to preserve the natural flood storage functions of undeveloped floodplain south and northwest of developed Fargo.

On April 8, 2008, the USACE released a Reconnaissance Report, (Administrative Record, AR0054197) reflecting the results of years of careful study. The Report recommended preliminary project configurations with a diversion channel running east of Moorhead. This Minnesota Diversion would fully protect Fargo and Moorhead at a far lower cost than the North Dakota alternatives while maintaining the flood storage functions of the floodplains south and northwest of Fargo. In fact, the Reconnaissance Report found that only the Minnesota diversions were cost effective. North Dakota diversions were costlier and more environmentally complex, because they had to be longer and because they had to cross multiple tributaries of the Red River.

However, powerful interests on the Fargo side saw an opportunity to use federal funds to massively expand the flood control project to develop the 50 square miles of floodplain to the south and northwest of Fargo. To some extent, they used local opposition to the diversion channel as an excuse to append a floodplain development scheme to the project. Adding flood protection to the south floodplain would depart from the project constraints agreed to by interested parties but it would turn low value land into high value suburban sprawl. USACE initially ruled, correctly, that using federal funds to develop floodplain would violate the federal floodplain Executive Order, and it violates the original agreed design principles for the project.

**The permit problems for this project derive directly from the Diversion Authority's decision to violate the above described agreed sustainability principles and add massive flood plain development to the project design.** In 2010, after years of careful study, the United States Army Corps of Engineers selected a Minnesota Diversion as the National Economic Development (NED) project to provide flood control for metropolitan area. The NED project was estimated to cost approximately \$1.2 billion. Diversion Authority rejected the USACE's recommendation to approve the NED project and sought certification of the locally-preferred project (LPP), instead. The LPP would not only develop the

20 square miles to the south of Fargo, but would also flood protect and develop 30 square miles to the northwest, eliminating 50 square miles of floodplain storage. Development of this floodplain would nearly double the area of Fargo, spreading is future population across an area double Minneapolis' area.

Significantly, DNR warned the Diversion Authority that the federal environmental review was inadequate to satisfy Minnesota's environmental requirements under MEPA<sup>3</sup>. When USACE engineers ultimately admitted that the LPP could not drain 50 square miles of floodplain during major floods without causing significant downstream flooding, that triggered a supplemental environmental review which commenced in the fall of 2010.

Since Diversion Authority insisted that no project alternative would be acceptable unless it fostered development in the 50 square mile regions south and northwest of Fargo, the federal supplemental environmental review was forced to identify a project configuration that could manage 50 square miles of flood storage. This decision is part of a pattern of alternative exclusion, one after another, in which Diversion Authority has succeeded keeping alternatives off the table unless the alternative promotes unwise development of the floodplain. Although Minnesota had repeatedly warned that expanding the project in this fashion would depart from permitting principles, Diversion Authority plowed ahead. The record is devoid of any evidence that during the alternative selection process, or the project design, factored in the Minnesota permitting requirements, because USACE and Diversion Authority were proceeding as if they could ignore Minnesota law with impunity. Instead, USACE adopted the same strategy that is now adopted, unwisely, by DNR, to ignore permitting criteria in environmental scoping, except to note that permits are required.

Fargo simply does not need 40-50 square miles of expansion room. See Docket Comments of JPA. The environmental review now wrongly suggests that expanding Fargo in this way is consistent with the Fargo Comprehensive Plan, but

<sup>3</sup> After discussions with USACE, DNR determined that the main factor used for screening alternatives in the Federal EIS was the Benefit Cost Ratio. Environmental factors, although considered, were not the primary consideration. Based on this information, DNR determined that the federal alternative analysis was not adequate under Minnesota law and alternatives would need to be evaluated in the State EIS. Commissioner's Order, FF-50

that is ignoring the conclusion of the Comprehensive Plan that Fargo is already too sparsely developed. Fargo's comprehensive plan actually calls for infill development. As Governor Burgum has stated<sup>4</sup>:

Our city has an ability to grow and grow smarter than other cities by growing more densely as opposed to growing horizontally," he told the Planning Commission. "The 52 square miles is enough to hold us for a long time."

The net result of this change in purpose was to double the project cost from one billion dollars to over two billion dollars, using those taxpayer funds to promote unwise and unnecessary development in the floodplain, and to undermine Fargo's comprehensive plan, and all at the cost of transferring supplanted floodwaters onto other communities.

Since that time, DNR's environmental review process has replicated this fatal flaw. While the Commissioner's permitting denial applies the correct standards, the environmental review ignores those permitting standards. The record shows that permitting criteria were ignored by the joint task force. Plan B was never evaluated against permitting criteria. The only criteria utilized were that (a) Diversion Authority would have the maximum amount of unwise floodplain development that it could squeeze through the process, and (b) the negative consequences of that unwise floodplain development would be shared differently between Minnesota and North Dakota, so that politicians could claim that Minnesota bore less of the environmental harm unnecessarily caused by this project.

The elimination of the JPA-Anderson alternative is symptomatic of the arbitrary fashion that the environmental reviews have followed throughout. Diversion Authority announced the Plan B proposal before the JPA-Anderson results were presented. The claim that JPA-Anderson is environmentally

<sup>4</sup> He continued: The city has 3.7 residents per acre, a far cry from the 10.7 in 1950 when it followed a traditional growth pattern that preceded suburbanization. The kind of suburban development where people need to drive everywhere is becoming less popular nationally, Burgum said. A 2013 survey by Realtors found that 55 percent of American adults would prefer a house within walking distance of stores, restaurants and schools to a house with a big yard, he said.

equivalent to Plan B is completely false and unsustainable on the record. The record shows, in fact, that JPA-Anderson dramatically reduces the impacts by preserving floodplain storage.

### III. Plan B is Unpermittable

One of the main thrusts of our objection to adequacy is the failure of the process to account for the conditions required for permissibility. Permissibility is an important factor in this environmental review for several reasons:

First, years of public resources have been wasted on a permit and environmental process which ignored permissibility. During both the federal post 2010 process, and DNR process, all permittable alternatives were screened out. The result was a failed process that culminated with permit denial, but no studied feasible alternative. It should now be obvious that this approach was fundamentally wrong. An environmental review should attempt to study feasible, permittable alternatives. Instead, each of three reviews have intentionally excluded alternatives that are permittable. This process forces regulators to choose between a bad project or no project at all, contrary to MEPA's purpose.

Second, Minnesota's public waters permitting scheme intentionally requires applicants to comply with local and regional water and land use policies. For that reason, it is imperative that an applicant lay a foundation that the applicant has cooperated with permitting authorities and has established a reasonable likelihood that permit conditions will be met.

Third, during the task force deliberations, Plan B was not subjected to the Commissioner's permit criteria. There is no record that the Plan B design process required design engineers to take the Commissioner's LPP permit criteria and create a design that meets that criteria. Instead, the record shows that Plan B designers attempted to convince the State of Minnesota to accept the illegal features of the LPP, by pushing as many of the environmental negatives caused by the LPP into North Dakota.

Plan B ignores the massive efforts that resulted in the Commissioner's exhaustive findings of fact and conclusions denying the permit application. The factual basis for the Commissioner's Order is found in the record of proceedings.

Among the key components of the Commissioner's order are:

- That the project violates state and federal policy by promoting the unwise and unnecessary development of floodplain. Comm. Order ¶ 160. Both the NED and JPA-Anderson plans solve this problem. Plan B does not.
- That the project is not the least impact solution as required by Minnesota Environmental Policy Act, (MEPA) section 116D.04. Commissioner's Order, Conclusion of Law (CL)-85, CL-103. CL-105, CL 106, CL-109. Indeed, USACE itself identified and recommended selection of a Minnesota diversion that will cost \$1 billion less and avoid shifting floodwaters off of the natural floodplain and onto other communities. Both JPA-Anderson and the NED project solve this problem. Both JPA-Anderson and NED project virtually eliminate Minnesota impacts. Any suggestion otherwise is unsupported by the record. Plan B does not resolve this problem.
- That the project violates regional and local water and land use planning policy and law as required by the 1974 water law reforms passed Chapter in Laws 1974 Chapter 558 and then implemented in Minnesota Statutes Chapter 103G and its regulations. Comm Order ¶ 54-a; Comm order ¶57. See also Buffalo Red River Watershed District Docket Comments; Wilkin County Docket Comments. Plan B continues to violate this principle, whereas both JPA-Anderson and NED do not.
- That the project is overbuilt and over-engineered because it is predicated on providing 500-year protection instead of the standard 100-year protection used throughout the basin.

Throughout their justification of the LPP and of Plan B, both Diversion Authority and USACE wrongly describe this floodplain as "benefitted" by the project, because it would be converted from floodplain to land suitable for scattered suburban development outside the current metropolitan area. That description is misleading: under Minnesota and federal law, floodplain is not benefitted by developing it, any more than a lake would be benefitted by draining it and building a shopping center on it. Both national and state policy call for the preservation of floodplain's floodwater storage. Flood protecting floodplain for development impairs the natural flood handling capacity of the river basin and makes flooding worse. That, in fact, is the major problem with the expanded LPP.

Once Diversion Authority decided to expand the scope of the project beyond protecting existing development and infrastructure, to floodplain development, the project no longer became permissible.

The Commissioner correctly found that the high hazard dam across the Red River and its floodplain would be built to shift the waters off of the floodplain surrounding Fargo onto other regions and communities. (Para 34, Findings and Order). The plan: "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). The Commissioner further correctly concluded that

"[t]he reviews 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).

Plan B contains virtually all of the flaws found in the first. Both proposals are twice as expensive as the NED project selected by USACE as the National Economic Development Project (two billion plus versus one billion dollars).

- Both proposals continue massive and unnecessary development of floodplain, with the first developing 53 square miles of floodplain and the second developing 43 square miles of floodplain.
- Both projects shift waters off of the natural floodplain and to other communities, farms, infrastructure, cemeteries and other lands.
- As a result of the continued development of natural floodplain and the elimination of their floodplain storage, both proposals shift massive amounts of water out of the undeveloped rural areas south and northwest of Fargo and onto other communities, an action prohibited under the Commissioner's order.

**Table 1**

**Comparison of Floodplain and Pool Heights of the Two Project proposals**

	DA first permit	DA Second Permit
Pool Height	921.66 feet	920.98 feet
Floodplain Impacts	55.4 sq. miles	43.7 sq miles

JPA-Anderson dramatically reduces pool height, and NED does as well.

**IV. Diversion Authority Failed to Establish Compliance with Local and Regional Ordinances.**

At Finding 44 the Commissioner states that Minnesota law requires a flood control project to receive local permits and governmental approval. The Commissioner’s Order correctly finds that the Diversion Authority neither sought nor obtained those approvals. The Commissioner pointed out that the state environmental impact statement had warned Diversion Authority that the approvals were required. That should not have been a surprise to Diversion Authority, however, because the local approvals requirement is the centerpiece of Minnesota’s water regulatory framework. The Commissioner explained:

The proposed Project would require permits and other governmental approvals, and are discussed in the State FEIS §§ 1.5 and 3.14.3. Additionally, changes to regulatory floodways, Base Flood Elevations (BFEs) or extents of Special Flood Hazard Areas (SFHAs) caused by the construction and operation of the proposed Project would require updates to the existing Flood Insurance Study Map. The NFIP participating communities with FIRMs affected by the Project would require Flood Insurance Rate Map revisions pursuant to the FEMA Letter of Map Revision (LOMR) process and in accordance with the Final FEMA/USACE Coordination Plan. State FEIS §§ 1.5 and 3.2 and App. F.

It is clear that this failure to coordinate, collaborate, and develop the project so that it meets local ordinance requirements was intentional. USACE and Diversion Authority simply applied a surface analysis and assumed, without a scintilla of legal support, that regional and local permits could not possibly be required. As the Commissioner pointed out:

In a meeting dated July 13, 2016, the DNR asked the Diversion Authority if it had applied for or intended to apply for any local government approvals. The Diversion Authority represented that it did not intend to seek approval from local governments for the proposed Project. Consistency with local government land and water plans is a required element for any Minnesota State water permit decision and is addressed in ¶¶ 161 - 197. Commissioner’s Order, Finding 53.

The direct result of Diversion Authority’s out of hand dismissal of local and regional regulators is that the project was not designed in coordination with local and regional regulators. This would be like designing a building without checking with the local building and zoning codes. Even a cursory review of the actual permitting laws and regulations should have caused Diversion Authority and USACE to recognize that the legislature intentionally barred projects benefiting one region from shifting waters onto another region, without obtaining permits from the negatively impacted region. In federal court, and in the state proceedings, Diversion Authority has repeatedly disparaged the application of local and regional ordinances to public water permitting. It argues that surely regional and local ordinances could not defeat its plan to transfer water from one portion of the state to another.

In our Docket comments, we showed that to the contrary, Laws 1974, Chapter 558 intentionally founded state water policy upon local and regional water planning. JPA Comments Pages 5-7. This new policy, embodied now in Chapter 103 sought to prevent one region from pushing its floodwaters into another region. Minn. Stat. § 103G.245, subd. 9(b). Laws 1974 Chapter 558 was part of a national policy reform parallel to Executive Order 11988, designed to promote sustainable flood control policy:

The commissioner shall recommend by January 15, 1975, to the legislature a comprehensive law containing standards and criteria governing the issuance and denial of permits under this section. These standards and criteria shall relate to the diversion of water from other uses and changes in the level of public waters to ensure that projects will be completed and maintained in a satisfactory manner.

The legislation continued

After November, 1975 a permit shall be granted under this section only when the project conforms to state, regional and local and related land resources management plans and only when it will involve a minimum of encroachment, change, or damage to the environment, particularly the ecology of the waterway. In those instances where major change in the resource is justified, permits shall include provisions to compensate for the detrimental aspects of the change. (emphasis added).

Minnesota's floodwater regulatory scheme was designed to protect regional and local water plans from destruction by the water projects of other regions. These requirements are directly incorporated into the permitting provisions now found in Chapter 103G as the Commissioner's order explains.

#### **V. The Environmental Review Fails to Account for Floodplain Development Restrictions in State and Federal Law.**

For some reason, the division conducting this environmental review refuses to abide by the Commissioner's own ruling that EO 11988 principles govern this project. It appears that ecological services believe that unwise floodplain development is a nice idea, sort of like climate change, that has no operational component and thus can be treated as unimportant in an environmental review. We urge that the environmental review reconsider the marginal treatment afforded to floodplain preservation principles. To our knowledge, this project entails by far the largest violation of floodplain development principles since EO 11988 was first promulgated. Nothing else comes close. Most of the EO 11988 cases involve development of a few acres. This project originally entailed a 50 square mile

invasion of that principle, and has been slightly scaled back, but still it exceeds 40 square miles.

In the federal case, Judge Tunheim (wrongly) ruled that the Obama climate change Executive Order barred parties from enforcing EO 11988 against the USACE. That interlocutory order has yet to be reviewed by the 8<sup>th</sup> Circuit Court of Appeals, because Judge Tunheim's order has not become final and appealable. However, in the interim, President Trump has rescinded the Obama climate change order, and consequently, Judge Tunheim's prior order cannot possibly withstand review. In addition, the SEIS effectively ignores the Commissioner's recognition of floodplain preservation principles. The Commissioner's order specifically recognizes that the project state and federal policy by promoting the unwise and unnecessary development of floodplain. Comm. Order ¶ 160. Plan B nowhere reflects any attempt to apply the anti-floodplain development principles found in the Commissioner's order, in EO 11988, and in the sustainability amendments of the Water Resources Development Act of 2007.

#### **VI. Conclusion**

This environmental review is inadequate for the following reasons:

- The application and record do not demonstrate that the Plan B design accepted the principles articulated by the Commissioner's order.
- The application and record do not demonstrate a potential for compliance with local and regional permitting requirements.
- The application and subsequent record do not contain an acknowledgment that Diversion Authority intends to comply with Minnesota and law and permit conditions in its construction and operation of the system.
- Plan B is not the least impact solution. Least impact solutions were improperly screened out of the environmental review. The record does not support exclusion of the Minnesota Diversion nor the JPA-Anderson alternative.

**From:** Ken Bye  
**To:** [MN Review Environmental \(DNR\)](#)  
**Subject:** Fargo Moorhead FSEIS  
**Date:** Thursday, November 29, 2018 4:29:40 PM

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Dear Jill Townley

- The applicant failed to lay a foundation of compliance with local and regional permitting requirement, and in fact has proceeded as if it can ignore them.

Thanks for the opportunity to comment on the Final SIEs.

Minnesota Rule 6115.0410 sub part 8a is still not adequately addressed, comment ID 91b, utilizing current dams (Orwell & White Rock) can be used to take off the top of a crest along the Red, The Wild Rice river could be channeled to the Shyenne Diversion to reach the Goal of the project without a High Hazard dam on the main stem of the Red. Executive Orders 11988 & 13690 are also not adhered too as well.

Thank You

Kenneth Bye  
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Moorhead, MN 56560

Sincerely,

/s/ Gerald W. Von Korff  
Gerald W. Von Korff  
JVK/dvf

**Commenter 28**



**United States Department of the Interior**

**FISH AND WILDLIFE SERVICE**  
North Dakota Ecological Services  
3425 Miriam Avenue  
Bismarck, North Dakota 58501

W-REPLY REFER TO  
2018 CPA-0017

November 30, 2018

Ms. Jill Townley  
Minnesota Department of Natural Resources  
500 Lafayette Road, Box 25  
St. Paul, Minnesota 55155-4025

Dear Ms. Townley:

Thank you for your letter of November 12, 2018, requesting comment on the Fargo-Moorhead Flood Risk Management for the Final Supplement Environmental Impact Statement located in Fargo, North Dakota and Moorhead, Minnesota.

The U.S. Fish and Wildlife Service (Service) offers the following comments under the authority of and in accordance with the Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*), Executive Order 13186 "Responsibilities of Federal Agencies to Protect Migratory Birds," the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and the Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 668-668d, 54 Stat. 250).

**Eagle Guidance**

Several active Bald eagle (*Haliaeetus leucocephalus*) nests are located in the vicinity (See Attached Map) of the proposed project based on historical data and we are providing you that information for planning purposes. The Final Supplemental Environmental Impact Statement did not include a plan for development and operation based on timing of construction, noise barriers and line-of sight, so it is unclear whether or how this action may affect bald eagles. The Service recommends a risk analysis, including the determination of distance and the nest status prior to the initial construction. If it is determined there is a likelihood that bald eagles may be affected, we encourage contacting this office to discuss next steps to address the risk of incidental take pursuant to the BGEPA.

Bald eagles are protected from a variety of harmful actions via take prohibitions in both the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703-712) and the Bald and Golden Eagle

<sup>1</sup> On December 22, 2017, the Department of the Interior's (DOI) Office of the Solicitor Memorandum M-17050 titled The Migratory Bird Treaty Act Does Not Prohibit Incidental Take <https://www.doi.gov/sites/doi.gov/files/uploads/m-17050.pdf> concludes that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to affirmative actions that have as their



Minnesota Department of Natural Resources  
Office of the Commissioner  
Attention: Jill Townley  
500 Lafayette Rd., Box 25  
St. Paul, MN 55155-4025

November 29, 2018

Dear Mrs. Townley,

The City of Horace would like to thank the MN DNR for taking into consideration the City's concerns in regarding the Fargo-Moorhead Diversion SEIS. As our previous comments have brought to your attention, this project has significant impacts on our City's economic future. The City of Horace encourages the MN DNR and all parties involved with this project to work with those entities impacted, such as the City of Horace, to mitigate negative impacts of the Plan B alignment.

Thank you for your organization's time in commitment to review the impacts of the Plan B alignment.

Brenton Holmer, City Administrator  
On behalf of Kory Peterson  
Mayor of Horace, North Dakota

Protection Act (BGEPA; 16 U.S.C. 668-668d). The BGEPA, enacted in 1940 and amended several times, prohibits take of bald eagles and golden eagles, including their parts, nests, young or eggs, except where otherwise permitted pursuant to federal regulations. Incidental take of eagles are prohibited unless specifically authorized via an eagle incidental take permit from US Fish and Wildlife Service (Service). BGEPA provides penalties for persons who "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or any manner, any bald eagle ... [or any golden eagle], alive or dead, or any part, nest, or egg thereof." BGEPA defines take to include the following actions: "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb." The Service expanded this definition by regulation to include the term "destroy" to ensure that "take" also encompasses destruction of eagle nests. Also the Service defined the term disturb which means to agitate or bother a bald eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.

The Service has developed guidance for the public regarding means to avoid take of bald and golden eagles:

- The 2007 *National Bald Eagle Management Guidelines* serve to advise landowners, land managers, and others who share public and private lands with bald eagles when and under what circumstances the protective provisions of BGEPA may apply. They provide conservation recommendations to help people avoid and/or minimize such impacts to bald eagles, particularly where they may constitute "disturbance," which is prohibited by the BGEPA.  
<https://www.fws.gov/northeast/ecologicalservices/pdf/NationalBaldEagleManagementGuidelines.pdf>  
<https://www.fws.gov/migratorybirds/pdf/management/eagleconservationplanguidance.pdf>

The Service also has promulgated new permit regulations under BGEPA:

- New eagle permit regulations, as allowed under BGEPA, were promulgated by the Service in 2009 (74 FR 46836; Sept. 11, 2009) and revised in 2016 (81 FR 91494; Dec. 16, 2016). The regulations authorize the limited take of bald eagles where the take to be authorized is associated with otherwise lawful activities. These regulations also establish permit provisions for intentional take of eagle nests where necessary to ensure public health and safety, in addition to other limited circumstances. The revisions in 2016 included changes to permit issuance criteria and duration, definitions, compensatory mitigation standards, criteria for eagle nest removal permits, permit application

purpose the taking or killing of migratory birds, their nests, or their eggs. The MBTA list of protected species includes bald and golden eagles, and the law has been an effective tool to pursue incidental take cases involving eagles. However, the primary law protecting eagles is the Bald and Golden Eagle Protection Act (BGEPA) (16 U.S. Code § 668), since the bald eagle was delisted under the Endangered Species Act in 2007. Memorandum-37050 does not affect the ability of the Service to refer entities for prosecution that have violated the take prohibitions for eagles established by the BGEPA.

requirements, and fees in order to clarify, improve implementation and increase compliance while still protecting eagles.

<https://www.gpo.gov/fdsys/pkg/FR-2016-12-16/pdf/2016-29908.pdf>

The Service's Office of Law Enforcement carries out its mission to protect eagles through investigations and enforcement, as well as by fostering relationships with individuals, companies, industries and agencies that have taken effective steps to avoid take, including incidental take of these species, and encouraging others to implement measures to avoid take. The Office of Law Enforcement focuses its resources on investigating individuals and entities that take eagles without identifying and implementing all reasonable, prudent and effective measures to avoid that take. Those individuals and entities are encouraged to work closely with Service biologists to identify available protective measures, and to implement those measures during all activities or situations where their action or inaction may result in the take of an eagle(s).

#### Migratory Birds

To the extent practicable, schedule construction for late summer or fall/early winter so as not to disrupt migratory birds during the breeding season, April 1 to July 15. If the project construction cannot avoid the nesting season, the Service suggests that the vegetation within the proposed project area be mowed/cleared outside of the nesting season, in advance of the project initiation to remove potential breeding habitat for nesting migratory birds in the project area. Once cleared, the project area should be maintained in a state that is unsuitable for nesting until the end of the breeding season or until construction is complete.

If changes are made in the project plans or operating criteria, or if additional information becomes available, the Service should be informed so that the above recommendations can be reconsidered.

We appreciate the opportunity to provide comments. If you have any questions on these comments, please contact Jerry Reimisch of this office at (701) 333-0267 or contact me at 605-224-8693, ext. 224.

Sincerely,



Scott Larson  
State Supervisor  
North Dakota Field Office

Attachment: Bald Eagle location map

cc: Maria Boroja, Regional Environmental Contaminants Coordinator, Region 6, USFWS  
Greg Link, Division Chief, North Dakota Game and Fish Department



ENVIRONMENTAL HEALTH SECTION  
Gold Seal Center, 918 E. Divide Ave.  
Bismarck, ND 58501-1947  
701.328.5200 (fax)  
www.ndhealth.gov



December 3, 2018

Ms. Jill Townley  
Minnesota Department of Natural Resources  
500 Lafayette Road, Box 25  
St. Paul, MN 55155-4025

Re: Fargo-Moorhead Flood Risk Management Final SEIS  
Cass County, North Dakota

Dear Ms. Townley:

This department has reviewed the information concerning the above-referenced project submitted under date of November 12, 2018, with respect to possible environmental impacts.

This department believes that environmental impacts from the proposed construction will be minor and can be controlled by proper construction methods. With respect to construction, we have the following comments:

1. Care is to be taken during construction activity near any water of the state to minimize adverse effects on a water body. This includes minimal disturbance of stream beds and banks to prevent excess siltation, and the replacement and revegetation of any disturbed area as soon as possible after work has been completed. Caution must also be taken to prevent spills of oil and grease that may reach the receiving water from equipment maintenance, and/or the handling of fuels on the site. Guidelines for minimizing degradation to waterways during construction are attached.
2. Projects disturbing one or more acres are required to have a permit to discharge storm water runoff until the site is stabilized by the reestablishment of vegetation or other permanent cover. Projects disturbing less than one acre also are required to have a permit if the project is part of a larger common plan of development or sale, and the larger common plan ultimately disturbs one or more acres. A temporary dewatering permit is required to discharge water from sources other than storm water runoff including contaminated groundwater. Further information on the storm water and temporary dewatering permits may be obtained from the Department's website or by calling the Division of Water Quality (701-328-5210).
3. Cities, counties, or the North Dakota Department of Transportation may require additional sediment and erosion control measures for construction activity affecting their storm drainage system. Check with local officials to be sure local storm water management considerations are addressed.



Green Dots = Active Bald Eagle nests

Red Dots = Inactive Bald Eagle nests

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Air Quality  
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Ms. Jill Townley

2.

December 3, 2018

- Projects that discharge to a water body that has a total maximum daily load allocation or is listed as impaired under section 303(d) of the Federal CWA should ensure construction activity does not affect the water body. Slurry, residue, and concrete wash water resulting from concrete activities must be managed or treated to prevent the slurry, residue, or wash water from adversely affecting any water of the state.
- The proposed construction project overlies the West Fargo glacial drift aquifer. Some portions of the project may be located within community and non-community wellhead protection areas. Care should be taken to avoid spills of any materials that may have an adverse effect on groundwater quality. All spills must be immediately reported to this Department and appropriate remedial actions performed.

The department owns no land in or adjacent to the proposed improvements, nor does it have any projects scheduled in the area. In addition, we believe the proposed activities are consistent with the State Implementation Plan for the Control of Air Pollution for the State of North Dakota.

These comments are based on the information provided about the project in the above-referenced submittal. The U.S. Army Corps of Engineers may require a water quality certification from this department for the project if the project is subject to their Section 404 permitting process. Any additional information which may be required by the U.S. Army Corps of Engineers under the process will be considered by this department in our determination regarding the issuance of such a certification.

If you have any questions regarding our comments, please feel free to contact this office.

Sincerely,

L. David Glatt, P.E., Chief  
Environmental Health Section

LDG:cc  
Attach.

### Construction and Environmental Disturbance Requirements

These represent the minimum requirements of the North Dakota Department of Health. They ensure that minimal environmental degradation occurs as a result of construction or related work which has the potential to affect the waters of the State of North Dakota. All projects will be designed and implemented to restrict the losses or disturbances of soil, vegetative cover, and pollutants (chemical or biological) from a site.

#### **Soils**

Prevent the erosion of exposed soil surfaces and trapping sediments being transported. Examples include, but are not restricted to, sediment dams or berms, diversion dikes, hay bales as erosion checks, riprap, mesh or burlap blankets to hold soil during construction, and immediately establishing vegetative cover on disturbed areas after construction is completed. Fragile and sensitive areas such as wetlands, riparian zones, delicate flora, or land resources will be protected against compaction, vegetation loss, and unnecessary damage.

#### **Surface Waters**

All construction which directly or indirectly impacts aquatic systems will be managed to minimize impacts. All attempts will be made to prevent the contamination of water at construction sites from fuel spillage, lubricants, and chemicals, by following safe storage and handling procedures. Stream bank and stream bed disturbances will be controlled to minimize and/or prevent silt movement, nutrient upsurges, plant dislocation, and any physical, chemical, or biological disruption. The use of pesticides or herbicides in or near these systems is forbidden without approval from this Department.

#### **Fill Material**

Any fill material placed below the high water mark must be free of top soils, decomposable materials, and persistent synthetic organic compounds (in toxic concentrations). This includes, but is not limited to, asphalt, tires, treated lumber, and construction debris. The Department may require testing of fill materials. All temporary fills must be removed. Debris and solid wastes will be removed from the site and the impacted areas restored as nearly as possible to the original condition.

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