



STATE OF MINNESOTA

Office of Governor Mark Dayton

116 Veterans Service Building ♦ 20 West 12th Street ♦ Saint Paul, MN 55155

September 1, 2016

The Honorable Shaun Donovan
Director
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

The Honorable Jo-Ellen Darcy
Assistant Secretary for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310

Dear Director Donovan and Assistant Secretary Darcy:

I write you with regard to the proposed Fargo-Moorhead Flood Risk Management Diversion Project. I am dismayed and deeply disappointed that the U.S. Army Corps of Engineers is proceeding without any evident regard for the unresolved issues Minnesota has identified. As I have expressed on multiple occasions, it is essential that the Army Corps of Engineers respect Minnesota's permit decision-making process and not act prematurely to initiate construction before our process is complete.

The Chief of Engineers, Lieutenant General Semonite, toured the proposed project area on August 22 and met with the Diversion Authority on August 23. Given how clearly Minnesota has communicated the state permitting issues facing this project, it was inconceivable to me that General Semonite did not also request an opportunity to meet with Minnesota and learn more about these challenges during his visit. But then I viewed his five-minute infomercial for the project (<https://www.youtube.com/watch?v=IwdOeqWxaug>) and realized this was not a fact finding visit, but rather a promotional tour. In the video, Lieutenant General Semonite did not so much as acknowledge the unresolved permitting questions, while he sung the praises of the "amazing project" that he promised to deliver by 2023, apparently with or without the required Minnesota permits. As his project manager stated, "We are racing with local sponsors to get it done as quick[ly] as possible."

This is not how we do business in Minnesota. Despite Lieutenant General Semonite's unfounded representation to the contrary, Minnesota has not "come together" with the Army Corps of Engineers and the State of North Dakota to advance the proposed project. In all my years of public service at the state and federal levels, I have never seen such a complete disregard for the process of a co-regulator. You should understand that a favorable permit decision by Minnesota is by no means guaranteed, and I take exception to actions by the U.S. Army Corps of Engineers and its non-federal sponsors to suggest otherwise or attempt to advance project construction in the absence of the required Minnesota permits.

These most recent developments are a very disappointing extension of Assistant Secretary Darcy's premature decision to execute the Project Partnership Agreement (PPA) for this project on July 11. Given what Minnesota communicated prior to July 11 about the very significant and unresolved issues relative to our threshold permit requirements, Assistant Secretary Darcy could not have reasonably concluded that the Army Corps of Engineers "is likely to resolve any outstanding regulatory issues that could affect the prospects for completing construction of the project." (Previous correspondence enclosed.)

Statements and actions like those described above demonstrate a federal disregard for state regulatory authority, which is very concerning to me and confusing to members of the public. Such rhetoric clouds an already complicated process and is a source of significant stress for many citizens in the project area.

Finally, let me assure you that Minnesota Department of Natural Resources continues to carefully evaluate the Diversion Authority's permit application, and is currently awaiting required information that was not provided with the Diversion Authority's original application. Minnesota has no desire to take any more time than is necessary in reaching its permit decision.

Sincerely,



Mark Dayton
Governor

Enclosures

cc: Lieutenant General Todd Semonite, USACE Chief of Engineers
Major General Michael Wehr, USACE Mississippi Valley Division
Commander
Colonel Samuel Calkins, USACE St. Paul District Commander
Mayor Timothy Mahoney, City of Fargo
Mayor Del Rae Williams, City of Moorhead
Darrell Vanyo, Chair, Flood Diversion Board of Authority
U.S. Senator Amy Klobuchar
U.S. Senator Al Franken
U.S. Congressman Collin Peterson



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July 15, 2016

Shaun Donovan
Director
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Dear Director Donovan:

I want to convey my personal concern with the Department of the Army's decision to execute a Project Partnership Agreement (PPA) for the proposed Fargo-Moorhead Flood Risk Management Diversion Project. I view this action as premature and inconsistent with the guidance your office issued when allocating \$5 million in funding for FY 2016 to the project.

Specifically, your guidance required the Assistant Secretary of the Army for Civil Works to determine that the Army Corps of Engineers "is likely to resolve any outstanding regulatory issues that could affect the prospects for completing construction of the project" *before* signing the PPA or initiating construction. We've been told that Assistant Secretary Darcy's decision to sign the PPA represents her determination that regulatory issues are likely to be resolved.

Respectfully, I must take issue with her decision. Minnesota was not consulted prior to the Assistant Secretary's determination, nor have we been provided with any written explanation of the basis for her determination. Minnesota has been abundantly clear that the Fargo-Moorhead project as proposed presents very significant issues relative to our threshold permit regulations. Commissioner Landwehr summarized some of those issues in his July 8, 2016 letter to Assistant Secretary Darcy, which is attached.

We are in the process of carefully evaluating the proposed Fargo-Moorhead Diversion Project under our permitting rules. It is premature to conclude that outstanding regulatory issues are likely to be resolved.

Thank you for your consideration of my concerns.

Sincerely,

A handwritten signature in black ink that reads "Mark Dayton".

Mark Dayton
Governor

Enclosure

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Minnesota Department of Natural Resources

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Office of the Commissioner

651-259-5555



July 8, 2016

The Honorable Jo-Ellen Darcy
Office of the Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Dear Assistant Secretary Darcy:

I understand that you are scheduled to sign the Project Partnership Agreement (PPA) for the proposed Flood Risk Management: Fargo-Moorhead Metro, North Dakota and Minnesota on Monday, July 11, 2016. Staff from your St. Paul District inform us that your July 5, 2016 approval of the project PPA represents your determination that "Corps is likely to resolve any outstanding regulatory issues that could affect the prospects for completing construction of the project," as required under the conditions accompanying the project's FY 2016 construction funding allocation. Given that your office did not directly consult with Minnesota prior to your making this determination, I want to ensure you are aware of Minnesota's perspectives regarding unresolved regulatory issues relevant to this project.

As Governor Mark Dayton shared with OMB Director Shaun Donovan in February 2016, the proposed Fargo-Moorhead Diversion presents significant issues under Minnesota's regulatory system. These are disclosed and discussed at length in the state's Final Environmental Impact Statement (FEIS) dated May 16, 2016. However, in Minnesota, the environmental review process is entirely separate from, and must precede, permitting decisions. Determination of whether these issues can be resolved is a matter for the state's permitting process, which is ongoing. Please understand, our June 29, 2016 decision that the state EIS is "adequate" and therefore that the environmental review process is complete should not, by any means, be interpreted as a project approval or as an indication that state permits are likely to be forthcoming.

Without prejudicing our ultimate decisions, we have attempted to be very clear in our FEIS and our adequacy determination, as well as in our communications surrounding these documents, that the project as proposed presents significant issues under Minnesota regulations that we will need to evaluate very carefully. Project impacts of special concern under Minnesota regulations include construction of a high hazard dam upstream of a large population center, the increased flooding that the project would cause in upstream areas, and the potential for induced development in the floodplain. These impacts raise issues with our regulatory standards including, but not limited to, sufficiency of mitigation; consistency with local, state, and federal plans; and our required determination whether the project represents a reasonable approach to flood risk reduction that is in the public interest. In addition, the level of engineering detail that has been provided thus far falls far short of what we need to complete our technical analysis of the pending permit application.

St. Paul District staff inform us that your determination regarding the likelihood of resolving outstanding regulatory issue was a process internal to your office. Given that we were not consulted as part of this process and further that we are not able to see the basis for your determination, I believe it is essential



Assistant Secretary Darcy
July 8, 2016
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to be on the record directly with you regarding the real and significant regulatory issues that are outstanding in Minnesota concerning the proposed Fargo-Moorhead Diversion Project. My staff are working diligently to review the pending project application and are giving priority to analyzing the threshold policy considerations that will determine whether this project is permittable in Minnesota. We appreciate the ongoing cooperation of your St. Paul District staff as we undertake this work.

Please be assured that Minnesota understands the very real flood risk management needs in Fargo-Moorhead, and in the Red River Valley more generally. Minnesota has invested \$234 million in state funds since 2008 to provide flood risk reduction for Moorhead and other communities in the Red River Valley. In this instance, as always, our goal is to find integrated approaches to flood risk management that meet the policy and technical standards in our regulations.

I appreciate your careful consideration of the issues I've raised here and would be pleased to discuss them further if that would be helpful.

Sincerely,



Tom Landwehr
Commissioner

c: OMB Director Shaun Donovan
USACE Chief of Engineers Lieutenant General Todd Semonite
USACE Mississippi Valley Division Commander Major General Michael Wehr
USACE St. Paul District Commander Colonel Samuel Calkins
Governor Mark Dayton
Mayor Timothy Mahoney, City of Fargo
Mayor Del Rae Williams, City of Moorhead
Darrell Vanyo, Chair, Metro Flood Diversion Authority
US Senator Amy Klobuchar
US Senator Al Franken
US Congressman Collin Peterson

Minnesota Department of Natural Resources

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



Fargo-Moorhead Diversion Authority
211 Ninth Street South
Box 2806
Fargo, ND 58108-2806

July 27, 2016

Dear Mr. Berndt,

The Minnesota Department of Natural Resources (MNDNR) Division of Ecological and Water Resources received permit application 2016-0386 from the Fargo-Moorhead Diversion Authority on February 18, 2016. The application is for public waters work and dam safety for the Fargo-Moorhead Flood Risk Management Project (Project). The MNDNR has determined that the permit application is incomplete. This letter describes the MNDNR permitting approach and key information that is required at this time. At a later date, we will be asking for additional details and technical information to complete the application.

The United States Army Corps of Engineers (USACE) is the Federal Sponsor for the Project and is designing the dam. The USACE has asked if the MNDNR would take a "phased" or "conditional" permitting approach because future phases of the Project are not fully designed at this time. We plan to determine the permissibility of the proposed Project before answering this question. We are attempting to make a permit decision prior to the proposed start of the first phase of project construction. The MNDNR requires the applicant to submit plans, designs, permissions, and mitigation measures that are complete enough to fully understand the Project and its components.

In order to apply the threshold considerations that are included in Minnesota Statutes and Rules regarding public waters and dam safety (i.e. minimal impact on environment, feasible alternative, consistent with local land use plans, consistent with environmental quality programs, need in terms of quantifiable benefit, etc.), the MNDNR permit review must consider all phases of the Project in total. We will attempt to evaluate these threshold considerations based on something less than a full design of the entire Project, but the current permit application materials are not complete enough.

We have previously identified in an email to Terry Williams dated July 20, 2016 the need to update the permit application, provide a plan for acquisitions, provide the latest mitigation plan, and provide a risk analysis. Items 1-4 below provide additional details about that request.

Please let us know by August 5 what information you can submit at that time, and if information needs to be developed, the date that the information will be available.

If a specific item or topic requested below is tied to a particular phase of the Project, please include in which phase the item or topic would be addressed. For example certain mitigations may not be proposed to occur until a certain Project feature is designed and implemented. When describing

that proposed mitigation in the mitigation plan, the discussion should include when it is anticipated that mitigation would occur.

1) State EIS

Portions of the draft State EIS were attached to the permit application for reference. Those references have been corrected to reference the Final EIS.

2) Property interest/rights

The applicant must secure property interests/rights from all affected property owners and submit documentation of this to the MNDNR. Affected properties are those that are directly impacted by construction of the Project footprint, as well as those impacted by operation of the Project. This includes individual property owners, governmental jurisdictions and drainage authorities that are potentially affected. We need your plan for acquisition of property rights, including the language of the easements. The documentation must provide the methodology used in determining the universe of potentially affected properties.

We understand that North Dakota Office of the State Engineer has asked for evidence establishing a property right for lands inundated by the dam below elevation 925 feet NAVD 88. Minnesota will require rights up to the water surface elevation at the maximum capacity of the dam, which currently is 925 feet NAVD at the dam according to Appendix C of the Diversion Inlet Structure design.

Please provide the Conditional Letter of Map Revision submittal of listed properties affected by the Project.

3) Mitigation

The applicant must submit to the MNDNR a mitigation plan describing specific mitigation measures that are proposed as part of the Project. This plan must identify all potential impacts and their proposed mitigation measures. There have been many considerations for Project mitigation throughout the federal and state environmental review processes. In some cases mitigation has been proposed with relative certainty and in other cases mitigation was identified as a potential that may be considered. The plan must be a stand-alone document that can be reviewed and referenced as part of application processing. The plan should specifically identify impacts that are within the Project footprint (permanent and temporary) versus those that would result from Project operation (permanent and temporary). The plan should include any avoidance and mitigation techniques that would be employed to avoid or reduce impacts. Temporary impacts should include details on how long impacts would be anticipated (i.e., only during construction, construction plus ---, operation, operation plus ---, etc.). In addition to specific measures, the mitigation plan also must identify and explain in detail the proposed adaptive management plan for addressing potential impacts. This plan must identify the specific monitoring techniques, locations and frequencies that are proposed as well as triggers for additional monitoring or actions. The plan must also propose specific measures that could be pursued if monitoring identifies the presence of an impact and how these mitigation measures would be funded over the life of the Project. Please include:

- A. Details of any adverse effects on property (land and structures) and proposed mitigation (includes all properties effected by the Project regardless of use of, type, or owner) both within the Project footprint and within inundated areas. If potential environmental hazards may impact natural resources, explain how those would be remediated.
- B. Details of any adverse effects on water supply (both public and private) and proposed mitigation.
- C. Details of any adverse effects on groundwater or subsurface water to include water levels and quality effects and proposed mitigation.
- D. Details of any adverse effects on navigation and proposed mitigation.
- E. Details of any adverse effects on drainage and proposed mitigation.
- F. Details of any adverse effects on fish and wildlife habitat and proposed mitigation.
- G. Details of any adverse effects on agriculture and proposed mitigation.
- H. Details of any adverse effects on waterways; bank stability, erosion and sedimentation both within and outside the existing channel and floodplain (including newly inundated areas).
- I. Details of any adverse effects to wetlands and land use/land cover, both indirect and direct, as a result of construction of Project operation.
- J. A detailed invasive species management plan.

4) Risk Analysis

The proposed Project includes construction of a Class I, high hazard dam. Please provide the most recent dam breach analysis using the current proposed dam configuration and hydrology, including a loss of life analysis. We suggest discussion of dam breach parameters and methodology as soon as possible. Also, please provide a comparison of the risk with existing conditions versus the risk with the proposed project, assuming that current floodplain areas downstream of the dam are developed because of the project.

We hope that this letter will help you to develop a complete set of permit application materials. Representatives of the MNDNR are available to meet with you to discuss information requirements and to ensure a common understanding of this information. Please feel free to contact me at (651) 259-5715, or at jason.boyle@state.mn.us if you have any questions or would like to schedule a meeting.

Sincerely,



Jason Boyle
State Dam Safety Engineer

Cc: Terry Williams, Project Manager, USACE
Bob Zimmerman, City of Moorhead