

FLOOD DIVERSION BOARD OF AUTHORITY

Thursday, November 12, 2015

3:30 PM

Fargo City Commission Room

Fargo City Hall

200 3rd Street North

1. Call to order
2. Approve minutes from previous meeting Item 2. Action
3. Approve order of agenda Action
4. Management Information
 - a. PMC report
 - b. Corps of Engineers report
5. Administrative/Legal Information/action
 - a. P3 Legal Services
 - b. Lawsuit / Injunction update
 - c. Oxbow MOU Amendment Item 5c.
6. Technical Information/action
 - a. Recommended Policy Actions Item 6a.
 - b. Recommended Contracting Actions Item 6b.
7. Public Outreach Information/action
 - a. Committee report
 - b. Business Leaders Task Force update
8. Land Management Information/action
 - a. Committee report
 - b. CCJWRD update
9. Finance Information/action
 - a. Committee report
 - b. Voucher approval Item 9b.
10. Other Business
11. Next Meeting – Date Change (December 17, 2015)
12. Adjournment

cc: Local Media

**FLOOD DIVERSION BOARD OF AUTHORITY
OCTOBER 8, 2015—3:40 PM**

1. PRESENTATION – AGRICULTURAL RISK STUDY INITIAL ASSESSMENT

A presentation was given prior to the board meeting on the agricultural risk of temporary water storage for the FM Diversion project. The research team consisting of Dean Bangsund, Nancy Hodur, and David Saxowsky from NDSU Department of Agribusiness and Applied Economics were present.

Mr. Bangsund said the study focused on the frequency (likelihood or probability of planting delays); magnitude (revenue losses); and geography (how effects vary among storage areas). The research team recommends impacted lands along the rivers be evaluated, implications of federal crop insurance be reviewed, and alternative compensation and mitigation strategies continue to be evaluated by the FM Diversion Authority. He said the study highlights the complexity of this issue and some issues remain unquantified.

Mr. Vanyo said the findings from the study will be reviewed further by the Diversion Agricultural Policy Subcommittee and their recommendations will be forwarded to the Diversion Authority Board.

2. MEETING TO ORDER

A meeting of the Flood Diversion Board of Authority was called to order on Thursday, October 8, 2015, at 3:40 PM in the Fargo City Commission Room with the following members present: Cass County Commission representative Darrell Vanyo; Cass County Commissioner Ken Pawluk; West Fargo City Commissioner Mike Thorstad; Fargo City Mayor Tim Mahoney; Fargo City Commissioner Mike Williams; Fargo City Commissioner Melissa Sobolik; Cass County Joint Water Resource District Manager Rodger Olson; and Clay County Commissioner Kevin Campbell. Moorhead City Council Member Nancy Otto was absent. Also present was ex-officio member Gerald Van Amburg, Buffalo-Red River Watershed District.

Staff members and others present: Cass County Administrator Keith Berndt; Interim Fargo City Administrator Bruce Grubb; Moorhead City Manager Michael Redlinger; Clay County Administrator Brian Berg; Cass County Engineer Jason Benson; Fargo City Director of Engineering Mark Bittner; Fargo City Engineer April Walker; Moorhead City Engineer Bob Zimmerman; Tom Dawson, Chairman; Chamber of Commerce Business Leaders Taskforce; and Bruce Spiller, CH2M.

3. MINUTES APPROVED

MOTION, passed

Mr. Mahoney moved and Mr. Williams seconded to approve the minutes from the September 2, and September 10, 2015, meetings as presented. Motion carried.

4. AGENDA ORDER

MOTION, passed

Mr. Mahoney moved and Mr. Campbell seconded to approve the order of the agenda. Motion carried.

5. ADMINISTRATIVE/LEGAL UPDATE

Lawsuit update

Attorney Erik Johnson provided an update regarding lawsuits filed by the Richland-Wilkin Joint Powers Authority. The deadline for the briefing cycle of the base lawsuit is October 13th. Mr. Pawluk asked for additional information on the status of the case. Mr. Johnson said the preliminary injunction on the OHB levee was granted and clarified by the judge. The Diversion Authority filed an appeal on the injunction, which is still pending. The injunction is contingent on completion of the Minnesota EIS process. Mr. Berndt asked if the presence of the lawsuit in any way prevents the project from moving forward. Mr. Johnson said the presence of the base lawsuit does not prevent the Diversion Authority from moving forward on the diversion project.

6. MANAGEMENT UPDATECorps of Engineers report

The Corps of Engineers staff were unable to attend today's meeting, but submitted a written report to the board.

Program management consultant (PMC) report

Bruce Spiller provided an update on activities over the last month including work on in-town levees and pump station projects; construction and closings on homes in Oxbow; work on the Oxbow Country Club golf course; permit preparation and coordination with the Corps of Engineers; and development of procurement documents for the Public-Private Partnership (P3).

Mr. Spiller said a public meeting will be held on October 14th on the Minnesota draft EIS. The public comment period ends October 28th.

7. TECHNICAL UPDATERecommended Contract Actions Summary

Mr. Spiller discussed task orders, contract awards, change orders, work change directives, and reimbursement agreements for the following:

- Beaver Creek Archaeology, Inc. Task Order No. 1 Amendment 0—western alignment Phase 1 cultural investigation in the amount of \$111,000;
- Landwehr Construction, Inc.—contract award for demolition and removal of Park East Apartments in the amount of \$1,089,888;
- Industrial Builders, Inc. Change Order No. 2—work revisions to 2nd Street North flood control project south of pump station to allow work around fiber optic lines in the amount of \$169,490.20;
- Industrial Builders, Inc. Work Change Directive No. 4—2nd Street North pump station project work revisions associated with wet well modifications in the amount of \$175,000;
- Eventis Telcom, Inc.—reimbursement agreement for utility relocation associated with the 2nd Street South flood wall project in the amount of \$381,909;
- Xcel Energy—reimbursement agreement for utility relocation to move overhead power lines associated with the for 2nd Street North pump station project in the amount of \$55,000;

MOTION, passed

Mr. Mahoney moved and Mr. Williams seconded to approve the appropriation of funds for the contracted actions listed above; and recommend approval of the appropriation of funds by the Dakota Metro Flood Board for the Diversion Authority. Discussion: Mr. Pawluk questioned the significant dollar amount for the change order with Industrial Builders. April Walker provided additional background information. Keith Berndt said the total cost of the 2nd Street North flood control project is substantial and the percentage of change orders at the end of a project should be reviewed to ensure they are within a certain percentage of the total project. On roll call vote, the motion carried unanimously.

8. PUBLIC OUTREACH UPDATECommittee report

Mr. Campbell said the Public Outreach Committee met on October 7th and discussed community outreach efforts including presentations given to the State Water Commission and Horace Lions Club. The committee also discussed the upcoming public meeting to be hosted by the Minnesota DNR on the draft EIS. Bob Zimmerman said barring any comments that may require additional study, the final report should be available in the spring.

Rocky Schneider from AE2S provided an update on the website. A re-design of the website went live last week with the goal to provide a more mobile and user friendly site with better search capabilities.

Mr. Vanyo and Mr. Mahoney provided an update on their trip to Washington, D.C. last week. They met with officials from the Corps of Engineers and the Office and Management and Budget.

Business Leaders Task Force

Mr. Dawson said the task force met two weeks ago. He said members are working on proactive and positive communications regarding the project, which includes TV ads and other marketing strategies.

9. LAND MANAGEMENT UPDATE

Mr. Mahoney said the Land Management Committee met on October 7th and heard a presentation on property acquisitions and replacement homes in Oxbow. A few issues were identified as a result, which include costs associated with Oxbow's covenant regulations, landscaping bids, and revisions to the current Oxbow MOU. Mr. Spiller said the CCJWRD met this morning and based on a suggestion by April Walker, decided to hire a landscaping architect to help determine cost estimates.

CCJWRD update

Mark Brodshaug referred to the handout regarding land acquisitions completed through September 30, 2015, which includes completed acquisitions, budget figures, and completed negotiations. He said twelve homes are under construction and six homes have been completed in Oxbow; bids were opened for the Park East Apartment demolition project; coordination is underway with the North Dakota State Historic Preservation Office to mitigate the effects of removing five homes in the Mickelson historical district; and critical in-town property negotiations are continuing with Fargo Public Schools, Mid-America Steel, Case Plaza, and Kilborne Group.

10. FINANCE UPDATECommittee report

Michael Montplaisir Cass County Auditor, said the Finance Committee met on October 7th. He said currently there is \$58 million in unallocated funds available in the FY15 budget.

Drawdown Request

The committee approved a drawdown request of the final \$25 million from the U.S. Bank loan taken out by the City of Fargo. Mr. Montplaisir said the funds are needed for property purchases and home construction in Oxbow and work on the in-town levees. Ms. Sobolik asked if an additional loan will be needed. Mr. Montplaisir said another interim loan or temporary special assessment financing will be necessary for 2016 costs.

MOTION, passed

Mr. Mahoney moved and Mr. Williams seconded to authorize the City Finance Director to initiate a draw request for loan funds from U.S. Bank in the amount of \$25 million to pay for construction and other expenses of the Diversion Board of Authority. On roll call vote, the motion carried unanimously.

Voucher approval

The bills for the month are with Xcel Energy for utility relocation work; Fredrikson & Byron, P.A. for government relations services; Consolidated Communications for utility relocation work; Terracon for in-town levee work; Erik R. Johnson & Associates, Ltd. for legal services; Dorsey & Whitney, LLP for legal services; CCJWRD for costs associated with right of entry work, in-town levees, OHB ring levee, Diversion Project Assessment Committee (DPAC) work, OHB levee, and Oxbow Country Club golf course construction; and North Dakota State University for services to conduct the Ag Risk Economic Evaluation Study.

MOTION, passed

Ms. Sobolik moved and Mr. Mahoney seconded to approve the vouchers in the amount of \$5,918,684.76 for September, 2015. On roll call vote, the motion carried unanimously.

11. OTHER BUSINESS

Mr. Campbell said a few months ago the Diversion Board authorized staff to talk with the Minnesota DNR about a hardship property in Minnesota before moving forward with the acquisition process. A letter was received from the DNR stating their agency would not confirm one way or the other whether the property could be acquired and directed the Diversion Authority to confer with its legal counsel.

12. NEXT MEETING DATE

The next meeting will be held on Thursday, November 12, 2015, at 3:30 PM.

13. ADJOURNMENT

MOTION, passed

**On motion by Mr. Williams, seconded by Ms. Sobolik, and all voting in favor,
the meeting was adjourned at 4:34 PM.**

Minutes prepared by Heather Worden, Cass County Administrative Assistant

**AMENDMENT TO
MEMORANDUM OF UNDERSTANDING**

**CITY OF OXBOW, NORTH DAKOTA AND METRO FLOOD
DIVERSION BOARD OF AUTHORITY**

This is an amendment [“Amendment”] to the Memorandum of Understanding that was made by and between the **METRO FLOOD DIVERSION BOARD OF AUTHORITY** [the “Diversion Authority”], and the **CITY OF OXBOW, a North Dakota municipal corporation** [the “City” or the “City of Oxbow”].

RECITALS:

WHEREAS, the METRO FLOOD DIVERSION BOARD OF AUTHORITY is a joint powers entity established by the 2011 limited joint powers agreement between Clay County, Minnesota, Moorhead, Minnesota, Cass County, North Dakota, Fargo, North Dakota, Cass County Joint Water Resource District and the Buffalo-Red River Watershed District [referred to herein as the “Diversion Authority”];

WHEREAS, the Diversion Authority and the City of Oxbow entered into a Memorandum of Understanding [“Oxbow MOU”] dated effective October 24, 2013, with the three North Dakota member-entities to the Diversion Authority also approving the Oxbow MOU; and,

WHEREAS, at the time the Oxbow MOU was approved, the parties were not able to fully predict how the agreed-upon provisions would work—the parties having attempted, in good faith, to identify a process for implementation of the O-H-B Levee Project to provide the intended benefits to the Oxbow, Hickson and Bakke communities while also protecting the interests of the Diversion Authority—however, since that time, the O-H-B Levee Project has commenced and, as a result, much more is now known as to how the Project is working, with particularly with respect to the process by which real property is being acquired for the Project and replacement property is being developed and made available for the Project; and,

WHEREAS, in particular, arrangements for and development of replacement lots has been completed such that land has been acquired and placed into the ownership of the Oxbow Job Development Authority for the replacement lots, specifically, 40 replacement lots plus

additional replacement lots for the staging area or other purposes and infrastructure (streets, lighting, curb and gutter, water, and storm and sanitary sewer) for said lots has been installed and constructed; and,

WHEREAS, in forming the Oxbow MOU, the parties recognized and agreed that the Oxbow MOU may need to be supplemented by more detailed arrangements in order for the concepts and agreements contained herein to be implemented and the parties therefore agreed to coordinate with each other and to work together to do so; and,

WHEREAS, the Diversion Authority and the City of Oxbow wish to amend the Oxbow MOU, particularly with respect to the arrangements for the Diversion Authority providing funding for acquisition of replacement lots, the development of infrastructure supporting said replacement lots, the sale of replacement lots, the repayment to the Diversion Authority of funds advanced by the Diversion Authority for said replacement property and with respect to other matters;

NOW, THEREFORE, BASED UPON THE MUTUAL COVENANTS SET FORTH HEREIN AND CONSIDERATION EXCHANGED, IT IS HEREBY AGREED:

Section I. Paragraph 2.3 of the Oxbow MOU, including subparagraphs thereof (which addresses the matter of “Replacement Lots” as defined in the Oxbow MOU), is amended to read as follows:

- 2.3 Proceeds from the sale of the Replacement Lots, shall be allocated and paid-out as follows:
 - 2.3.1 Oxbow Replacement Lots Sold to Oxbow Displaced Property Owners. With respect to the sale of one of the Replacement Lots to a property owner whose existing Oxbow residence is being purchased for the O-H-B Levee Project, one hundred percent (100%) of the proceeds from the sale of said sale shall be paid to the Diversion Authority.
 - 2.3.2 Sale of All Other Replacement Lots. With respect to the sale of all other Replacement Lots; including lots upon which the ten, or so, existing house-structures within Oxbow may be moved onto Replacement Lots by the city of Oxbow or its agent, lots upon which one or more condominiums are constructed and any lots that are sold to all others than the Oxbow displaced property owners and staging area displaced property owners, as described in subparagraphs 1.1.1 and 1.1.2, above; seventy-five percent (75%) of the proceeds from the sale of said sale shall be paid to the Diversion Authority. The remaining twenty-five percent (25%) of said

proceeds shall be allocated to, and retained by, the city of Oxbow or the Oxbow Job Development Authority. The division of sale proceeds shall be made after deduction of reasonable selling expenses.

- 2.3.3 Sale of All Other Replacement Lots. The foregoing allocation and pay-out of lot sale proceeds shall satisfy and replace the provisions in the original Oxbow MOU establishing an obligation of the City of Oxbow and/or the Oxbow Job Development Authority to repay to the Diversion Authority the advanced funds within a period of 15 years, as set forth in subparagraph 2.3.3, et sequitur.
- 2.3.4 Allocation of Sales Proceeds Retroactive to Initial Lot Sale. The above-prescribed allocation of sales proceeds of the Replacement Lots shall be retroactive to the initial sale of the initial Replacement Lot and to each sale since said initial sale and, therefore, shall be applicable to all sales of Replacement Lots.
- 2.3.5 Periodic Accounting to Diversion Authority. The City of Oxbow and the Oxbow Job Development Authority shall periodically provide to the Diversion Authority an accounting of all proceeds from the sale of the Replacement Lots, said accounting to be made at least on a quarterly basis.
- 2.3.6 Periodic Payment to Diversion Authority. The City of Oxbow and the Oxbow Job Development Authority shall periodically remit funds from the sale of the said Replacement Lots that are due and payable to the Diversion Authority, said remittance occurring at least on a quarterly basis. Oxbow Job Development Authority may temporarily retain up to \$375,000 from the Oxbow Replacement Lots sales, until sufficient proceeds to Oxbow Job Development Authority are generated from the Other Replacement Lots.
- 2.3.7 Removal of 15-year Repayment Obligation and Release of Mortgage. The obligation of the City of Oxbow and/or the Oxbow Job Development Authority to repay to the Diversion Authority the advanced funds within a period of 15 years is hereby removed to the extent that the repayment obligations of the City of Oxbow conflict with the terms of this Amendment. The “Metro Flood Diversion Authority” shall execute a release of the mortgage dated December 19, 2013, and recorded December 20, 2013 in the office of the Cass County recorder as Document Number 1407789.
- 2.3.8 Removal of Additional Ten Percent Payment on Lots. The “additional ten percent (10%) amount” set forth in subparagraph 2.3.5 of the Oxbow MOU shall not be applicable, retroactive to the sale of the first

Replacement Lot, said sum being replaced by the allocation and payout schedule set forth above.

Section II. “Wet side” golf holes to be used for wetlands mitigation rather than being conveyed to City of Oxbow. Subparagraph 2.6.2 of Paragraph 2 of the Oxbow MOU is amended to remove the requirement that, “To the extent such land is not needed for the location of the levee structure or clear zone, the Diversion Authority shall offer said land for sale or lease to the City of Oxbow at its then current market value (subject to no-build restrictions on said land) for a purpose yet to be determined; provided that such conveyance shall be subject to such use or other restriction or restrictions as may be required by federal or state law or by Corps policy or regulation.” Instead, the parties agree that the Diversion Authority may use said land for environmental mitigation purposes.

Section III. Timing of construction and implementation. The City of Oxbow and the Diversion Authority mutually recognize and agree that the parties have exercised best efforts to initiate and complete the construction of the O-H-B Levee Project within an approximately three-year period and the parties reaffirm their mutual intent to complete construction as soon as reasonably possible; recognizing, however, that certain events, some of which have been beyond the control of either party, have occurred which have resulted in delay, including the entry of a preliminary injunction by the U.S. District Court (District of Minnesota – Civil No. 13-2262 (JRT/LIB)) on May 13, 2015, and, therefore, the Oxbow MOU, including subparagraph 2.14 of paragraph 2, is hereby amended to remove a project construction deadlines of 36 months and 40 months and to replace said deadlines with the requirement that the ring levee project be completed within thirty-six (36) months from the date the preliminary injunction is removed or dismissed by the court.

Section IV. Interpretation of Conflicting Provisions. To the extent that the terms of this Amendment conflict with the original Oxbow MOU, the terms of this amendment shall govern. In all other respects, the terms of the original Oxbow MOU shall remain in full force and effect.

Section V. Effective Date. This Amendment to the Oxbow MOU will be deemed effective the date of the last signature of all the parties hereto, provided that to the extent any of the parties have taken action pursuant to this agreement prior to said effective date, the same shall be deemed to have been authorized by this memorandum of understanding..

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**METRO FLOOD DIVERSION BOARD
OF AUTHORITY**

Dated: _____

By: _____

Darrell Vanyo, Chairman of the Board

CITY OF OXBOW, a North Dakota
municipal corporation

Dated: _____

By: _____
James Nyhof, Mayor

ATTEST:

City Auditor

CITY OF FARGO, a North Dakota
municipal corporation

DATED: _____

By _____
Timothy J. Mahoney, Mayor

ATTEST:

Steven Sprague, City Auditor

COUNTY OF CASS,
NORTH DAKOTA

DATED: _____

By _____
Chad M. Peterson, Chairman

CASS COUNTY JOINT WATER RESOURCE
DISTRICT

DATED: _____

By _____
Mark Brodshaug, Chairman