

## TECHNICAL MEMORANDUM

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DATE: June 1, 2020

TO: *JP* John Paczkowski, P.E., Interim State Engineer

FROM: *AC* Aaron Carranza, P.E., Regulatory Division Director

SUBJECT: **FM Diversion Board of Authority Mitigation Plan**

The Office of the State Engineer (OSE) staff have been participating in agency coordination discussions with the design team of the FM Diversion Board of Authority (Diversion Authority) over the past several years. The intent of this collaboration was to put forward the requirements under the jurisdiction of the OSE that would be necessary to permit, construct, and operate the FM Area Diversion Project (Project).

### **BACKGROUND**

The Diversion Authority has leveraged the multi-agency collaboration efforts to create a comprehensive document (Mitigation Plan) to outline how the Project would be mitigated in Minnesota and North Dakota.

Past OSE permitting of Project phases have conditioned the approval on future review and approval of a final Mitigation Plan.

Additionally, during North Dakota's 66<sup>th</sup> Legislative Assembly, Senate Bill 2020 passed with a specific requirement (Section 8) that the State Engineer must approve the Mitigation Plan for the Project prior to the release of state-appropriated funds.

### **PRIOR OSE REVIEW**

Prior review opportunities by OSE staff noted potential deficiencies and lack of clarity on certain topics within the OSE's purview, listed below. The OSE provided comments to the Diversion Authority first on December 19, 2019, in an in-person meeting in Bismarck and again on March 19, 2020, via email.

- Utility and outreach of the proposed Dispute Resolution Board (DRB)
- Notification and mitigation of in-channel effects to private lands

- Direct notification to impacted parties down to 0.1-foot upstream and downstream of the Project
- Mitigation for impacts to public easements, such as road rights-of-way
- Clarification on source of the hydrology of the 1% chance annual exceedance event
- Reference of the United States Army Corps of Engineers (USACE)/Federal Emergency Management Agency's (FEMA) Coordination Plan as outlining "floodplain management requirements"

### **CURRENT OSE REVIEW**

The Property Rights Acquisition and Mitigation Plan v.5 that was received by the OSE on May 4, 2020, is a culmination of collaborative outreach efforts to date.

Several new sections were added to the draft Mitigation Plan in order to satisfy OSE comments and to provide greater clarity. These include:

- Additional clarity on the source of Project design hydrology
- Additional clarity on the purpose of the DRB
- Additional notification and communication commitments
  - Includes commitment to notify property owners with modeled impacts of 0.1-foot upstream and downstream of the Project
  - In-channel private lands concerns are addressed by these enhanced commitments
- Impacted roadway mitigation section

While the updated information did not address the comment regarding the USACE/FEMA coordination plan, the Mitigation Plan is specific to property rights and not necessarily intended to capture all necessary permits and permissions for Project development. The OSE has discussed this issue with FEMA regional staff on the need for local floodplain development permits, however the topic is outside the scope of this Mitigation Plan review.

### **RECOMMENDATION**

Based upon the updated information included in the May 4, 2020 version of the Mitigation Plan, I recommend determining the Mitigation Plan adequately addresses the known jurisdictional mitigation concerns of the OSE. I also recommend notifying the Diversion Authority that the OSE reserves the right to order modifications to mitigation activities if additional mitigation needs within OSE's jurisdiction become known.