

BUFFALO-RED RIVER WATERSHED DISTRICT

BARNESVILLE, MINNESOTA 56514

1303 4th AVE NE
Email: general@brrwd.org

PO BOX 341

PHONE 218-354-7710
Website: www.brrwd.org

MINUTES FOR MANAGERS' SPECIAL MEETING

February 19, 2019

The Board of Managers, Buffalo-Red River Watershed District (BRRWD), held a special meeting via Skype with the Minnesota Department of Natural Resources (DNR) on Tuesday, February 19, 2019, at 2:00 PM at the Houston Engineering, Inc. (HEI) office, Fargo, ND. BRRWD Managers present were Jay A. Leitch, Mark T. Anderson, Peter V. Fjestad, Gerald L. Van Amburg (via conference phone), and Troy E. Larson. DNR representatives participating from the St. Paul office included Barbara Naramore, Deputy Commissioner, Sherry Enzler, General Counsel, Julie Eckman, Section Manager, and Steve Colin and Jason Boyle, Ecological and Water Resources Division. DNR staff from the Bemidji Office included Rita Albrecht, Northwest Regional Director, and Nathan Kestner, Northwest Regional Environmental Ecologist. Others attending in Fargo included Bruce E. Albright, BRRWD Administrator, and Erik S. Jones, BRRWD Engineer, HEI; Kevin Campbell and Jenny Mongeau, Clay County Commissioners; Lyle Hovland, Wilkin County Commissioner; Mary Scherling, Cass County Commissioner; Eric Dodds, Engineer, Advanced Engineering and Environmental Services, Inc. (AE2S); Gregg Thielman, Engineer, Houston-Moore Group, LLC (HMG); Nathan Boreman, Engineer, City of Fargo; Patrick Springer, The *Forum*; Del Rae Williams, former Mayor, City of Moorhead; Bennett Johnson, Attorney, Vogel Law Firm (via conference phone); Sue Nelson, Moorhead resident; and Mark Askegaard, landowner.

BRRWD President Jay A. Leitch called the special meeting to order at 2:02 PM and announced that the proceedings were being video recorded to aid in the preparation of the minutes.

Agenda. President Leitch asked for comments or additions to the meeting agenda. There being none, **motion** by Manager Anderson to approve the agenda. **Seconded** by Manager Fjestad. **Approved.**

Leitch asked the attendees to introduce themselves. He thanked the DNR Staff for agreeing to meet with the Board via Skype to discuss issues the BRRWD has with the permit they granted for the Fargo-Moorhead (FM) Diversion project. Specifically, the Board has questions regarding three general issues: the timing of the property rights acquisition relative to permit approval and project startup, the enforcement of the DNR's 54 permit conditions, and interpretation of the conditions/litigation liability.

Deputy Commissioner Naramore prefaced her responses by pointing out that since the BRRWD has requested a contested case hearing of the Diversion Authority's (DA) DNR permit, her staff might be limited on the detail/interpretation they can share regarding their current permit conditions. That being said, she assured the Board they will provide all the information allowable under the constraint of the appeal process. In the future, conversations to explore more details, might need to be conducted in a more formal settlement format where there would be mutual associated provisions and protections. President Leitch commented that the BRRWD's goal is not to delay or stop project development, the contest of the DNR permit was only to allow more time for the Board to review and investigate the provisions of their permit. Albright noted that the FM DA recently filed an application for a BRRWD permit, so the BRRWD is now working through our own permit review process for the Diversion project. A list of BRRWD questions was furnished to the DNR on 2/15/19, and that list is the basis for today's meeting. President Leitch led the discussions.

The first DNR condition discussed was **No. 7, Written Consent:** *In all cases where the permittee by performing **the work** authorized by this permit shall involve the taking, using, or damaging of any property rights or interests of any other person or persons, or of any publicly owned lands or improvements thereon*

or interests therein, the permittee, **before proceeding**, shall obtain the written consent of all persons, agencies, or authorities concerned, and **shall acquire all property, rights, and interests needed for the work**. Leitch asked what the DNR meant by "before proceeding". Sherry Enzler, DNR General Counsel, explained that if the project were at either the construction or operational stage where the permit holders(DA) will need property rights to either build the project or operate it, the DA would have to acquire all property rights and interests associated with that phase, and those acquisition or easement agreements would be evidence of consent. She gave the example that if the DA were preparing to build the eastern embankment of the project on privately owned Minnesota property, before they could proceed with that construction, the DNR requires that the DA would already have acquired property rights through either a negotiated agreement or with condemnation, resulting in a written document as evidence of the acquisition transaction. Enzler explained that this condition is meant to be a phased approach to property acquisition: before construction, before operation, etc. She added that the permit conditions document is meant to be cohesive and taken as a whole, noting that Condition No. 32, as referenced in the BRRWD handout, also expands on No. 7. Leitch suggested that the two conditions could have been combined to provide more clarity. He added that an attorney we consulted to help us interpret the conditions, could only guess at their meaning to the "best of his understanding". Leitch pointed out that the BRRWD wants to avoid having to "guess" at the interpretation of the DNR's conditions so as to avoid future litigation. The conditions should mean what they are meant to mean and nothing else.

In reference to Condition No. 7, Leitch stated that landowners in the upstream staging area feel that the "taking" of their property occurred when the DNR permit was issued, and their land suffered immediate devaluation whether the actual acquisition takes place now or 5 years from now. Enzler emphasized that the issuance of the DNR's permit does not constitute a "taking" and referenced Minnesota case law regarding this subject. She stressed that according to the DNR's permit, the project cannot move through the development phases without mitigating the impacts on all affected properties. Enzler stated that the DNR would not issue the authority for the DA to operate the project until all the property interests have been acquired. Naramore said that until the DA has DNR approval to operate the project, they don't have the 100-year flood protection for the in-town residents and the primary purpose of the project will not be realized until they have the DNR's permission to operate. Leitch related a common upstream landowner concern about a scenario where the project is completed, the DA has not acquired all the necessary property rights in the upstream staging area, there is a high volume flood threatening Fargo, and downstream property owners demand that the project be operated without the DNR's acquisition conditions being met. He asked if the DNR would allow the project to be operated under those conditions. Enzler said that under the terms of the permit, the project could not be operated in any way until all of the flowage easements have been acquired. Leitch observed that stopping dam operation under those conditions would be very difficult.

The group moved on to **Condition No. 13, Limitations:** *Any violation of the terms and provisions of this permit shall constitute a violation of Minnesota Statute, Chapter 103G. The Permittee shall obtain the written consent of all persons, agencies, or authorities concerned, and **shall acquire all property, rights, and interests necessary, before proceeding with any activity authorized by this permit involving the taking, using, or damaging of any property, rights or interests of any other person or persons, or of any publicly owned lands or improvements thereon or interests therein.*** Leitch noted that this condition is similar to Nos. 7 & 32, and he asked if it meant that no work can be done on the project until all property rights are acquired, stressing the key words in No. 13 are "any activity". Enzler reiterated that this is a staged permit, so before proceeding with a particular stage of the project, the DA would need to acquire all property interests necessary to complete that particular phase. By the time construction is completed, the DA will be required to obtain all the flowage easements prior to operation. Leitch observed that as a stand-alone condition, No. 13 says "any activity", and does not reference a staged or phased permitting approach.

Leitch asked for a clear definition of "an upland area" in No. 17, Excavated Materials Runoff: *Excavated materials must be deposited or stored in **an upland area**.* He explained that his questions stem from a desire to avoid litigation during the project development. Julie Eckman, DNR, responded that a sufficient upland

area would be such that the excavated material will not run back into the area from which it was excavated. Naramore observed that the BRRWD's questions are asking for definitions for terms that the DNR assumed to have a common meaning. They apply this common meaning in the current fact specific circumstances to allow the DNR to maintain their ability to work effectively as the permitting and regulatory authority over the course of project development to protect the natural resources and public health and safety considerations for an evolving and unpredictable set of "on-the-ground" circumstances. Eckman noted that at the very minimum, an upland area could be above the Ordinary High Water Level (OHWL) for public waters and probably not a wetland area. Enzler added that there are some rural restrictions regarding the placement of fill in floodplain area that would also apply. Leitch reiterated that the BRRWD's concern is that the Board not become entangled in litigation when problems arise regarding the interpretation of this condition. Naramore pointed out that the DNR is ultimately responsible for enforcing their permit and wouldn't cede that authority to any other entity, including compliance monitoring. Eckman added that sediment and erosion control methods are required, but the specific method(s) is discretionary and site specific.

Condition No. 18, Erosion and Sediment Control: *Topsoil **should be** used to re-dress disturbed soil areas and indigenous plant species **should be** used to revegetate disturbed areas **whenever possible**.* Leitch asked if the phrases "should be" and "whenever possible" are meant to be "permissive", or if the condition is meant to be understood as more of a guideline than requirement. Eckman explained that sediment and erosion control measures are required, but the specific method(s) is discretionary and site specific. Naramore observed that there is a general expectation that the topsoil would be used as described. If the permittee doesn't adhere to the prescribed practices, the DNR would work with the permittee to find an alternative approach. Leitch observed that many of the DNR's condition enforcement methods appear to be situational by definition. Naramore replied that the *enforcement* of the condition isn't situational, but the *method* by which the permittee enacts the condition is dependent on specific situations.

Leitch asked if the DNR had an optimal depth for the topsoil re-dressing requirements in mind or if that was also situation dependent. Enzler commented on Leitch's use of the term "situational". She stressed that in every case, the DNR will enforce their requirements, but the method for how the requirement is applied at a given site will depend on the specifics of the particular site. Leitch observed that the BRRWD will be satisfied with the condition as stated, as long as the DNR is the entity that will deal with landowner complaints if the contractor and the landowner don't agree on how much topsoil should be replaced.

Condition No. 21, Other Permits: *Construction shall not commence until the permittee has obtained all federal, state, and local permits, authorizations, and permissions necessary to undertake the work authorized in this permit.* Leitch commented that with this condition, the BRRWD doesn't think the DNR has adequately resolved the issue of the Wilkin County and Holy Cross Township's drainage zoning ordinances. Albright explained that according to their permit, the DNR has determined that the Wilkin County and Holy Cross Township's ordinances "weren't reasonable" and therefore, in terms of No. 21, would be disregarded. As a local drainage authority, the BRRWD is obliged to take those ordinances into account when reviewing the DA's BRRWD permit application. He noted that the Wilkin County drainage ordinance is referenced in the BRRWD's Revised Watershed Management Plan (RWMP). Naramore defended their position regarding the consistency with state and local plans and ordinances by pointing out that the DNR's permit doesn't absolve the DA from the responsibilities to identify, obtain, and comply with other local entities' approvals, permits, licenses, etc. Enzler explained that the DNR used a "preemption" type of analysis, which is recognized by the Minnesota Supreme Court. The DNR said that the Holy Cross Township ordinance had expired and was no longer applicable. The second issue was to determine if the ordinance at issue applies to the lands across all of the ordinance in accordance with the legislative policies towards regional flood control management. She thought that their findings were clear to the extent that the ordinance prohibited the construction of a regional flood control project, the DNR's conclusion was that the State Law and policy preempted the ordinances. As to all other zoning regulations regarding the project construction, the DNR found that all of those requirements to obtain local permits remained in place. Leitch pointed out that the BRRWD has received the same DA permit application that they submitted to the DNR. Compared to the DNR, the

BRRWD has limited resources to review the voluminous application. Enzler emphasized that the DNR told the DA that they had to obtain permits from all other permitting agencies. Leitch noted that the BRRWD permitting process also includes that provision regarding other agency permits.

Condition No. 22, Property Rights: *Property rights shall be acquired for all property necessary for construction of the Project **prior to the commencement of construction**. Property rights shall include fee simple absolute acquisition of all property of the Project footprint. Temporary construction easements shall be acquired on all property that will be used for construction of the Project. In Minnesota, in accordance with the 5th Amendment Takings Requirement of the US Constitution and in accordance with the Minnesota Constitution Article XIII Section 4, **prior to dam operation**, property rights shall be acquired for all land and structures that will be impacted by the Project when the Project is operated at **maximum capacity**. All lands with **structures that will be impacted** will be acquired in fee simple absolute, **unless the structure** will be relocated, elevated or floodproofed. For all other property impacted when the dam is operated at maximum capacity that is not acquired in fee simple absolute, flowage easements are required. In Minnesota, these acquisitions must comport with the requirements of Minnesota Statutes Chapter 117. Leitch pointed out that interpretation of the DNR's conditions could have been simplified if the DNR would have combined the findings according to topic into one statement each instead of spreading out conditions for the same topic over the entire document. He noted that our engineers questioned what the definition of "maximum capacity" meant to the DNR, and if the use of this term was consistent throughout the permit. Jason Boyle, DNR, explained that the dam is designed to safely pass the Probable Maximum Flood (PMF) event, so the term "maximum capacity" is the amount of water stored and managed for the PMF event, which the design report listed at approximately 204,000 cubic feet per second (cfs) for the peak flow event. Enzler commented that from a legal perspective, the DNR drafted their Findings so that any property that sustained an increase in flood water on their property as a result of construction and operation of the project be compensated, and the DA be required to obtain a flowage easement on those properties. No property should experience new flooding or an increase in flooding as a result of the project without just compensation.*

Leitch asked how property on the edge of the PMF event would be valued where the probability of flooding was remote. Enzler referenced Condemnation Law regarding property values. She explained that the value of the flowage easement is based on the difference between the value of the parcel of land taken as a whole before the project and after project construction, reflecting the impact of the potential flooding on the inundated land and the land that is not inundated. Naramore added that this valuation approach applies to both land that has historically never flooded (new water) versus property that has flooded in the past but is taking on additional water as a result of the project, as a pre and post project valuation comparison of the two values. Enzler explained that the appraisers will look at the actual damage to a parcel, as well as how flooding will affect the market value of the entire property. Leitch reiterated his question about land values in the fringe areas of the project where flooding might occur only for the PMF event. Naramore noted that the frequency of potential flooding might affect the land's valuation. She pointed out that these issues will be handled by the appraisers and land agent when they negotiate with the landowners. If landowners are dissatisfied with the easement offer, they have the right to a hearing with a potential recourse to a jury trial if necessary. Leitch pointed out that the BRRWD would prefer to avoid litigation if possible.

Condition No. 23, Flowage Easements: *Permittee shall address damages **to the underlying fee** resulting from the storage of floodwater, presence of invasive species, **etc.** **Permittee shall comply** with the Post Operation Debris Clean-Up Plan Easements and land acquisition must comply with **MN Statutes Chapter 117**. Leitch asked what the DNR meant by the term "to the underlying fee". Enzler explained that this a legal term that would pertain to damages to the land use interest (property ownership), as well as the easement interest. Leitch questioned if there were words missing in the condition to get to the meaning Enzler just provided. Enzler said there were no words missing and lawyers would understand the term. Leitch pointed out that the term might not be understandable to a nonprofessional layperson trying to interpret the DNR's conditions.*

Leitch next questioned what items were included in the DNR's use of the term "etc." Enzler pointed that the term was meant to indicate there could be damages not specifically listed in the permit that the DNR did not envision. Naramore commented that they could have phrased the language to say "including, but not limited to", the result is the same. They provided examples of possible sources of damages easily anticipated, but also acknowledged that the list might not be complete. Enzler reiterated that during their work with the DA on their permit, the DNR has been very clear that the landowner must be fully compensated under Minnesota Law for any direct impact or increased inundation caused by this project, which was also their goal when writing their 54 conditions. Leitch asked if Minnesota Law indicates when compensation should occur in the project development process. Enzler and Naramore said that the compensation should occur before the property is impacted by water or if the property is impacted by the construction footprint. Enzler emphasized that State and Federal Constitutions are very clear that property can't be taken or damaged without the payment of just compensation. Naramore added that the DNR permit goes slightly further than that, stating that the compensation must take place before a certain construction phase or the operation phase. Leitch voiced concern about the permit/project phasing mitigation process. He asked why property impacted by Phase 4 shouldn't be compensated when Phase 1 work begins. Enzler explained that the DNR used a similar method used for highway projects. Easements will be acquired as the project moves forward. She stressed that the DNR would not approve work on a phase until the property rights are acquired for that phase. By the Operation Phase of the project, DNR would not approve dam operation until all the property flowage easements are acquired. Leitch commented that DNR has made their position clear on phased property rights acquisition, it is still a concern for the BRRWD.

Leitch asked why Condition No. 23 contains a reference to Minnesota Statutes Annotated (M.S.A.) Chapter 117, which deals with eminent domain. Enzler explained that the DNR wanted to be sure the DA and the Cities used the proper process to acquire the property rights and not use some other process that might short change the landowners. Leitch agreed that this is also the BRRWD's objective.

Condition No. 24, Damages: *....., nothing in this permit alleviates the responsibility of the Permittee to make whole any party damaged by the construction or operation of the Project.* Leitch noted that again the BRRWD's questions pertain to the timing of the acquisitions associated with the project's phased approach and who is the enforcement agency, and the DNR has already given their answer in this regard.

Condition No. 25, Cemetery Impacts: *In Minnesota, prior to dam operation, the Permittee shall provide to the DNR written, mutually agreed upon mitigation for impacts to cemeteries in the storage area.* Leitch commented that the same argument applies to cemetery impact mitigation as to the other property rights conditions, in that once construction has begun on any portion of the dam, the cemetery is threatened for some time in the future, leaving the cemetery owners at a disadvantage in negotiations. He asked if it wouldn't be easier to take care of the "mutually agreed upon mitigation" prior to starting any work on the project. Naramore pointed out that they had already answered this question in regard to all property owners. Leitch agreed that the DNR gave their answer, but the BRRWD has concerns regarding mitigation timing.

Condition No. 27, Environmental Mitigation: *. Within five (5) years of permit issuance, the Permittee shall have a legally binding commitment to **fund a portion** of the restoration work on the Lower Otter Tail River Restoration Project to a dollar amount that would ensure replacement of all ecological resource values and functions of the public waters impacted by the Project.* Leitch asked what "fund a portion" meant. Naramore explained that the DNR thought that the amount of the financial commitment should be between the BRRWD and the DA. Enzler added that the condition was left intentionally vague to allow for sufficient upstream mitigation for the Diversion project as it evolves. Naramore commented that if an agreement can't be reached between the BRRWD and the DA, the DA would have to come back to the DNR to find an alternate mitigation. Leitch noted that this is another instance where litigation might be triggered because of the ambiguous condition language. Naramore pointed out that the DA would be well served to work with the BRRWD on the required mitigation funding, because they can't proceed with their project until the mitigation is in place. She explained that the condition stated that within

5 years after the DNR permit is issued, the DA has to have a legally binding funding commitment for a portion of the costs for the Lower Otter Tail River Restoration project and have commenced construction within the same 5-year period, or they have to come back to the DNR with an identified alternate.

Condition No. 28, Contingency Action Plan: *Prior to construction of the last phase of dam construction (currently the Southern embankment in Minnesota), ... The breach models shall extend downstream to a point where water level increases due to a breach are less than one foot. If there is no feasible or practical means to provide for adequate evacuation warning in sufficient time, the Permittee shall notify all potentially affected property owners of that fact.* Leitch noted that the Eastern Tieback wasn't mentioned in this condition. Boyle said that the DNR would require a dam break analysis for the Eastern Tieback as part of the Contingency Action Plan. Boyle explained that No. 28 was aimed at emergency planning/notification in case of a dam breach. Leitch commented that the 1' or more of water language was arbitrary. Naramore pointed out that this language is actually more conservative than what's used at the Federal level, where 2' is the normal cut off. Enzler added that the term "standard" refers to the standard used across the nation to analyze the impacts of dam breaches. Leitch questioned the recourse for the affected property owners when there is "no feasible or practical means to provide for adequate evacuation warning in sufficient time". Naramore explained that this condition lays out a contingency action plan with the steps that are going to be taken by local authorities/DA in the event of the dam failure. There is a common provision for dam structure permits that residents living in the dam "shadow" must be advised that it might not be feasible to notify them in case of emergency.

Condition 32, Construction Phase Approval: *Written approval must be obtained from the DNR prior to construction of any phase of dam construction. The dam must act as a whole, with all parts being integral to its integrity and safety. **At least 120 days prior** to the anticipated start of a phase of construction of the dam, the Permittee shall submit to the DNR a design report, detailed plans and specifications, and documentation **showing that land rights have been acquired for that phase of dam construction.** The design report shall contain all items required in Minnesota Rules 6115.0410, subp. 6 and 6115.0240, subp. 3. Prior to the start of construction of a phase of the dam, the Permittee shall obtain written approval from the DNR of the design (design, plans, specifications,) and rights acquisition, of that construction phase. Construction of that phase of the dam may not commence until such written approval is obtained. Permittee shall develop and maintain a worksheet to record, track, and show approval date of all changes made to the design, construction, and operations.* Leitch noted that this condition relates back to the BRRWD's "takings" concern, which has already been discussed, and the difference between the BRRWD's view that we don't recognize separate construction phases with respect to property rights acquisition timing and the DNR phased view of the project and property rights acquisition.

Condition No. 37, Impoundment Approval: *... **No impoundment of water is allowed** by this permit until written approval is obtained., and such written approval shall not be granted until the Permittee has acquired all land rights ...* Leitch noted that the BRRWD felt that this condition conflicted with Conditions Nos. 7 and 13. He restated the scenario of an impending historic flood threatening Fargo and public demands for the project to be operated before the flowage easements have been acquired. Having all property rights secured before any work/activity commences would address this concern. Leitch stressed that even though the DNR maintains that the dam would not be operated, if Fargo was facing a historic flood, they would operate the project, with or without the DNR's approval.

Condition No. 41, Perpetual Maintenance: *The Permittee shall **perpetually maintain** the dam and all of its components to ensure the integrity of all structures.* Leitch noted that Condition No. 54 implies possible abandonment. He asked which condition would take precedence. He suggested that the phrase "or remove" could be inserted after "maintain". Enzler explained that these two conditions are not an "either, or" situation. Both provisions are included in every DNR dam safety permit in the State. She thought it was widely recognized that many of these dams have a multi-generational useful life, and that there should be a perpetual maintenance requirement, but it is also apparent that eventually the structure/conditions will change in ways

that we can't anticipate. Naramore explained that the DNR's view is that the permittee is obligated to perpetual maintenance. If at some future date, the project is abandoned or the project is no longer serving a useful public purpose, then the permittee must work with the DNR on abandonment plans.

Condition No. 42, Freeboard Requirement: *The Permittee shall maintain enough available flood storage capacity to store the inflow **maximum capacity event** with at least 5 feet of freeboard remaining to the **top of dam**. Portions of the Western Tieback and Eastern Tieback may be constructed with **less freeboard** as designed to allow for planned overtopping of those sections in the event of misoperation, e.g. not operating the control structures, or extreme floods.* Leitch noted that DNR has already defined the "maximum capacity event" as elevation 928.5'. He asked what DNR meant by the "top of dam" elevation, given the elevation variations listed in Plan B. Boyle explained the most important part of the condition is that the project must maintain 5' of freeboard from the top of the dam in all dam segments. The dam gets higher as it moves south, but the 5' freeboard must be maintained. Leitch asked what was meant by the western tieback and eastern tieback would have "less freeboard" to allow for overtopping. Boyle stated that during the PMF, the eastern tieback will act as an overflow area or spillway. Leitch asked who would determine the height of the freeboard in this area. Boyle explained that the condition is just acknowledging that the lower sections will exist with less freeboard because they will be designed to be lower to allow overtopping. Naramore noted from the DNR's perspective, the freeboard design would come with their approval of the construction plans for that phase.

Condition No. 45, Limitation of Upstream and Downstream Development: *... adopt requirements that **any new structure** in the storage area **be relocated**, elevated or floodproofed, ... DNR recommends that local governmental units adopt requirements that **no development be allowed** within one quarter mile of the dam or along river channels.* Leitch commented that the phrase "any new structure" doesn't make sense, as it implies someone would build a new structure in the storage area and then relocate it. Enzler explained that what the condition means is that while a new structure wouldn't necessarily be relocated, it should be built at the correct elevation, or floodproofed. Leitch commented that if the condition has to be explained for a layperson to understand it, the condition wasn't clear enough in the first place. The second part of the condition recommends that the local government units (LGUs) to enact a downstream "no development" zone within a quarter mile of the dam or along river channels. Leitch commented that this zoning ordinance would be a taking of private property rights, which should be accounted for by the Permittee, not by LGUs. If DNR admits that a breach could be hazardous, then the area inundated by that breach has suffered a taking. Enzler pointed out that DNR does not require, but recommends, the LGUs should enact a zoning ordinance. This condition would fall within the zoning authority of LGUs, who have extensive zoning authority, and as a general rule, zoning is rarely considered to be a "taking", so long as there are other uses for the property. Leitch suggested that the DNR could be asking the LGUs to take an action that should be the DA's responsibility. Enzler stated that the DA doesn't have zoning authority, but the members of the DA do have zoning within their jurisdictions. The dam is not necessarily within the jurisdiction of the DA members, so they may or may not have the jurisdiction necessary to impose zoning ordinances. Leitch thought that zoning for protection from a man-made hazard would have different zoning regulations from the typical municipal or township jurisdiction in the State of Minnesota.

Condition No. 46, Crop Loss: *No less than **three years prior** to completion of the Project, the Permittee shall provide a financial analysis that demonstrates that it has the necessary reserve fund to compensate for crop loss.* Leitch observed that the language of the condition is confusing. Enzler explained that this condition was included so that funding was in place to ensure crop loss protection well in advance (at least 3 years) of project operation. Naramore observed that if the project is going to be completed ahead of schedule, the DA should be prepared to show they have the funds in reserve according to that completion date timing.

Leitch asked if there was a total crop loss from a PMF, should the DA be required to have a bond in place to guarantee payment in all situations up to and including total loss across all of the impacted area. Naramore commented that it is not the practice of the DNR to require permittees to obtain bonds for their obligations if

they are municipalities with taxing authority. Leitch observed that those municipalities have taxing authority limitations, and they might not be able to tax the full amount of a potential crop loss within a reasonable time period to compensate the landowners. Naramore noted that this would refer back to the reserve fund requirement in the condition.

Condition No. 51, Clean Fill: *The Permittee shall use fill material **which is clean** and **free of all contaminants**.* Leitch asked the definition of the phrases "which is clean" and "free of all contaminants". He felt that this condition lacks specificity and invites litigation. Enzler explained that the condition prohibits the permittee from using "dirty" fill in areas that might be in the public waterway, according to standard DNR Rules and laws regarding soil contamination. Generally, this is a standard provision in most construction contracts, that the soil is tested to make sure it's free of contaminants/pollutants/hazardous waste before it can be used. Leitch noted that it is impossible to make fill material free from all contaminants. Enzler stated that this condition language is standard in both private and public construction contracts across the nation. It has a widely accepted meaning in the construction profession.

Condition No. 52, List of Flowage Easement Holders: *The Permittee shall submit a list of **persons** with **substantial interest** in the Project....* Leitch asked if the word "persons" indicate entities other than people, such as LGUs, Non-Government Organizations (NGOs), and legal entities that are not people. Enzler agreed. He also asked about the meaning of "substantial" interest. Boyle explained that this term comes from the Public Waters Rules. Naramore commented that it has a common definition and is not defined in the Rules as far as a numerical/percentage threshold.

Condition No. 54, Future Orders: *Should the dam be abandoned at a future date for any reason or fall into a state of disrepair,* Leitch commented that we have already discussed this condition as it related to Condition No. 41. He asked if the condition should include provisions to address property rights, easements and fee, that were acquired by the Permittee, if the dam is abandoned. Enzler explained that under Property Law, regarding property rights acquired in fee, the fee title would remain in the name of the entity that acquired the rights. For easements, generally common and state law holds that the easement would merge back into the fee title holder and the easement would cease to exist over time.

Albright noted that the Board will take today's information under advisement. He will work with Naramore and others if the Board needs additional clarification. The BRRWD permitting process is independent of the DNR contest.

Leitch thanked the DNR staff for their participation in today's discussions. One issue that still concerned him is the enforcement of the 54 conditions, and he noted that the DNR has assured the BRRWD that they will be in charge of enforcement. The BRRWD wants to avoid a situation where local landowners are faced with legal expenses to get these conditions enforced, and the BRRWD doesn't want to have legal expenses for enforcement either.

Naramore responded to Leitch's concerns about condition enforcement by saying that the DNR takes the monitoring and enforcement of all permits seriously, but not in respect to representing private interests of an affected landowner or enforcing related conditions of permits issued by other entities. The DNR's enforcement only relates to their permit. Leitch agreed that the BRRWD wouldn't expect the DNR to enforce our permit. Naramore reiterated that the DNR would not represent or pursue the interests of private parties to the extent that their interests are protected by the DNR's permit conditions and to ensure that the permittee complies with the DNR's permit conditions. She said that she didn't want to leave the group with an unrealistic expectation of the DNR's role with respect to matters between other parties. Leitch commented that the BRRWD is just trying to anticipate and prevent potential problems that could lead to future litigation.

President Leitch asked if anyone had any further comments. Albright noted that the BRRWD Board won't meet again until 3/11/19, which will be the next time we might need to contact the DNR. The BRRWD does

intend to keep the BRRWD permitting process moving forward. Naramore questioned if the BRRWD might be interested in a settlement discussion with the DNR about our request for a contested case hearing on their Diversion project permit before our 3/11/19 meeting. Leitch said that the Board will probably need the time prior to the 3/11/19 meeting to consider all of the issues. Two of the Board members aren't in attendance, and Leitch explained that he hopes to have all the Board members as well informed as possible prior to making a decision about the contested case. Albright noted that there are three requests for a contested hearing, and he asked if the hearings would be handled as one process or three independent cases. Enzler said that the DNR would ask that that the process be consolidated into one contested case hearing.

Albright thanked the DNR staff for their cooperation in scheduling today's meeting. There being no further discussion, President Leitch adjourned the special meeting at 3:37 PM.

Respectfully submitted,

John E. Hanson, Secretary