OAH 65-2002-36151

SEP 27 2019

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Dam Safety and Public Waters Work Permit No. 2018-0819 for the Fargo-Moorhead Flood Risk Management Project, Clay and Wilkin Counties, Minnesota, and Cass and Richland Counties, North Dakota

ORDER DENYING DIVERSION AUTHORITY'S MOTION IN LIMINE AND MOTION FOR PROTECTIVE ORDER

This matter is pending before Administrative Law Judge Ann C. O'Reilly based upon a motion in limine and motion for a protective order.

Colin O'Donovan and Philip Pulitzer, Assistant Attorneys General, appeared on behalf of the Minnesota Department of Natural Resources (DNR). Robert Cattanach and Michael Drysdale, Dorsey & Whitney, LLP, appeared on behalf of the Fargo-Moorhead Flood Diversion Board of Authority (Diversion Authority). Gerald Von Korf, Rinke Noonan, appeared on behalf of the cities of Comstock and Wolverton and Intervenor the Richland/Wilkin Joint Powers Authority (RWJPA). Brent Edison, Vogel Law Firm, appeared on behalf of the Buffalo-Red River Watershed District (BRRWD).[1]

On July 25, 2019, the Diversion Authority filed a Motion in Limine and Motion for a Protective Order. On August 8, 2019, the RWJPA and the BRRWD filed Memoranda in Opposition to the Motion in Limine and Motion for Protective Order. The RWJPA supplemented its filings in response to the motions on August 12, 2019, and the motion record closed on that date.

Based upon the submissions of counsel and the hearing record, the Administrative Law Judge makes the following:

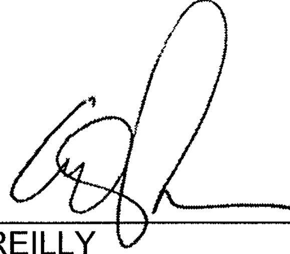
[1] The BRRWD has not filed a Petition to Intervene in this action and the deadline to file petitions to intervene expired on August 30, 2019. *See* First Prehearing Order (July 5, 2019).

ORDER

1. The Diversion Authority's Motion in Limine is **DENIED**.

2. The Diversion Authority's Motion for a Protective Order is **DENIED**.

Dated: September 23, 2019



ANN C. O'REILLY
Administrative Law Judge

MEMORANDUM

I. Factual Background and Procedural History

The Red River flows northward along the Minnesota-North Dakota border, through the cities of Fargo, North Dakota, and Moorhead, Minnesota.[2] The river and its tributaries have frequently flooded the Fargo-Moorhead metropolitan area over the years.[3] After extensive flooding in 1997, a long process of discussions and planning began regarding flood protection that involved federal, state, and local stakeholders.[4]

In 2016, the Diversion Authority, together with the cities of Fargo and Moorhead, submitted a permit application to the DNR for both a dam safety permit and a public waters work permit for the construction of the Fargo-Moorhead Flood Risk Management Project (Plan A Project).[5] The Plan A Project was a diversion channel system flood control project designed to divert waters around the cities of Fargo and Moorhead, as well as surrounding areas.[6] The DNR undertook environmental review of the Plan A Project and, in May 2016, issued a Final Environmental Impact Statement (FEIS) for the project.[7]

On October 3, 2016, then-DNR Commissioner Tom Landwehr issued Findings of Fact, Conclusions, and an Order (2016 Order) denying the permit application for the Plan A Project.[8] In its Order, the DNR concluded that:

[2] Notice and Order for Hearing and Prehearing Conference at 2 (May 30, 2019).
[3] *Id.*
[4] *Id.*
[5] *Id.* at 4.
[6] *Id.*
[7] *Id.* at 5.
[8] DNR Findings of Fact, Conclusions and Order at 48 (Oct. 3, 2016).

(1) the Plan A Project "does not adequately protect the public health, safety, and welfare of its citizens, does not represent the minimal impact solution, and is neither reasonable nor practical";

(2) the Plan A Project "has significant environmental impacts that are not in compliance with prudent environmental requirements";

(3) the "No Action Alternative with Emergency Measures" represents a feasible, prudent, and minimal-impact alternative to provide flood protection to the Fargo-Moorhead area;

(4) the Plan A Project "does not adequately mitigate for adverse impacts";

(5) the Plan A Project is "not consistent with state floodplain requirements or local plans."[9]

The Diversion Authority appealed the Plan A Project permit denial by petitioning for a contested case hearing before the Office of Administrative Hearings pursuant to Minn. Stat. § 103G.311 (2016).[10] The Plan A Project was also the subject of litigation in the United States District Court for the District of Minnesota.[11]

On September 7, 2017, the federal district court issued a preliminary injunction prohibiting the Diversion Authority and the U.S. Army Corps of Engineers from proceeding with the Plan A Project.[12] In response, in October 2017, the governors of Minnesota and North Dakota convened a Joint Task Force to reconsider "design principles and concept-level engineering solutions" for flood risk management for the Fargo-Moorhead region, including upstream and downstream communities and properties.[13]

The Joint Task Force, with the assistance of a Technical Advisory Committee, developed several options and made recommendations regarding flood risk reduction efforts.[14] Ultimately, a revised flood control project, known as the "Plan B Project," was developed.[15] On March 16, 2018, the Diversion Authority applied for dam safety and work in public waters permits for the Plan B Project.[16]

After evaluating the Plan B Project application, the DNR determined that it was substantially different from the Plan A Project and could result in potentially significant adverse environmental effects not adequately analyzed in the FEIS prepared by the DNR

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[9] *Id.*
[10] Notice and Order for Hearing and Prehearing Conference at 6 (May 30, 2019).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 7.

for the Plan A Project.[17] As a result, the DNR ordered that a Supplemental Environmental Impact Statement be prepared to analyze the environmental effects of the Plan B Project.[18]

On July 2, 2018, the Administrative Law Judge stayed the contested case proceedings in the Plan A Project appeal as a result of the Diversion Authority's new permit application and the on-going federal litigation.[19]

On November 13, 2018, the DNR published the Final Supplemental Environmental Impact Statement (FSEIS) for the Plan B Project.[20] The DNR made its final adequacy determination of the FSEIS on December 26, 2018, determining the document to be adequate.[21] The DNR's adequacy decision was not appealed and is now final.[22]

On December 27, 2018, the DNR issued Findings of Fact, Conclusions, and Order granting the permits for the Plan B Project (2018 Order).[23] The DNR found that the plans for the Plan B Project were "reasonable, practical, and will adequately protect public safety and promote the public welfare."[24] The DNR further determined that the Plan B Project represents the "minimal impact" solution to a specific need with respect to all the other reasonable alternatives and does not exceed more than a "minimum encroachment, change or damage to the environment."[25]

In January 10, 2019, the RWJPA, the cities of Comstock and Wolverton, and the BRRWD filed requests for a contested case hearing pursuant to Minn. Stat. § 103G.311, subd. 5.[26] The RWJPA is a joint powers entity representing county and local governments in Wilkin and Clay Counties in Minnesota, county and local governments in Richland and Cass Counties in North Dakota, and the cities of Comstock and Wolverton.[27]

In response to the requests for hearing, the DNR issued a Notice and Order for Prehearing Telephone Conference (Order for Hearing) dated May 30, 2019.[28] The Order for Hearing identifies two issues for hearing in this contested case proceeding:

(1) Whether the proposed activity for which a permit is required (i.e., the construction of the Plan B Project) is within the municipality of either

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[17] *Id.*
[18] *Id.*
[19] *In re Dam Safety and Public Water Works Permit Application for the Fargo-Moorhead Flood Risk Management Project, Clay and Wilkin Counties*, No. 65-2002-34309, ORDER DENYING MOTION FOR SUMMARY DISPOSITION AND STAYING PROCEEDINGS (July 2, 2019).
[20] Notice and Order for Hearing and Prehearing Conference at 7.
[21] *Id.*
[22] *See* Minn. Stat. § 116D.04, subd. 10 (2018).
[23] Notice and Order for Hearing and Prehearing Conference at 7 and Ex. A (DNR's Findings of Fact, Conclusions and Order of the Commissioner for the Plan B Permit Application).
[24] Notice and Order for Hearing and Prehearing Conference at at 8.
[25] *Id.*
[26] *Id.* at 9-10 (May 30, 2019).
[27] Richland/Wilkin Joint Powers Authority's Verified Petition to Intervene in Contested Case (June 25, 2019).
[28] Notice and Order for Prehearing Telephone Conference (May 30, 2019).

Comstock or Wolverton and, therefore, whether the cities of Comstock or Wolverton have standing to challenge the issuance of a permit for the Plan B Project through a contested case hearing. *See* Minn. Stat. §§ 103G.301, subd. 6 and 103G.311, subd. 5(a).

(2) Whether the Permit Applicants have proven that the proposed project is reasonable, practical, and will adequately protect public safety and promote the public welfare. *See* Minn. Stat. §§ 103G.315, subd. 6 (2018) and *In re Application of Orr*, 396 N.W.2d 657, 661 (Minn. Ct. App. 1986).[29]

On July 2, 2019, the Administrative Law Judge held a prehearing conference with the parties. Following the conference, the Administrative Law Judge issued a First Prehearing Order establishing deadlines for the close of discovery and the filing of dispositive motions and subpoena requests.[30] The order also scheduled this matter for hearing in June 2020.[31]

On or about July 9, 2019, RWJPA served the DNR with Requests for the Production of Documents.[32] Request No. 1 asks the DNR to:

> Produce documents reflecting feasible alternatives consider[ed] at any time during DNR's consideration of the Fargo-Moorhead project. Production should include all documents from consideration of alternatives before submission of an application, and in connection with both Plan A and Plan B applications.[33]

Request Nos. 2, 3, 4, and 9 ask the DNR to provide all documents "reflecting any analysis" or "reflecting application or consideration" of statements and conclusions contained in the DNR's 2016 Order denying permits for the Plan A Project.[34] Curiously, the Requests ask the DNR to explain how the statements contained in the 2016 Order apply to the Plan B Project, a project that was not the subject of the 2016 Order.[35]

The DNR has not filed any motion or argument opposing the discovery requests served upon it by the RWJPA.

II. Diversion Authority's Motions to Exclude Evidence and Preclude Discovery

The Diversion Authority brings a Motion in Limine to exclude evidence that it maintains is "immaterial, wasteful and irrelevant." It also requests a protective order to

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[29] *Id.* at 10.
[30] First Prehearing Order (Jul. 5, 2019).
[31] *Id.*
[32] Affidavit of Michael Drysdale at Ex. A.
[33] *Id.*
[34] *Id.*
[35] *Id.*

preclude "unnecessary and time-consuming" discovery designed to develop or elicit such evidence.

Specifically, the Diversion Authority seeks an order barring from admission at the hearing and excluding from discovery:

> (1) evidence of the Findings of Fact, Conclusions and Order issued on October 3, 2016 by then-Commissioner Tom Landwehr denying permits for the prior Plan A Project (including evidence comparing that Order to the later Order granting permits for the Plan B Project under consideration in this matter), and
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> (2) evidence of alternative flood projects or proposals except for those alternatives analyzed in detail in the Final Supplemental Environmental Impact Statement (FSEIS).[36]

The Diversion Authority asserts that its motion to exclude the two general categories of evidence, as well as discovery designed to elicit such evidence, is necessary to keep the hearing focused on the main issue to be determined in this case: whether the proposed Plan B Project is "reasonable, practical, and will adequately protect public safety and promote the public welfare."[37] The Diversion Authority contends that the RWJPA is attempting to improperly shift the focus of the hearing to the merits of the DNR's 2016 Order denying the Plan A Project permits, and to use that order as the legal standard by which the Plan B Project should be judged.

The Diversion Authority argues that the findings and conclusions related to the denial of the Plan A permit are irrelevant, especially given that the order was challenged but never finalized. The Diversion Authority maintains that the RWJPA should not be allowed to attack the DNR's grant of the Plan B permit by claiming it is inconsistent with the findings in a prior non-final order. The Diversion Authority further contends that if the Plan A permit order is allowed to be considered probative, the parties will be forced to lift the stay of the contested case proceeding regarding Plan A and litigate whether the order denying the Plan A permit was properly issued.

The Diversion Authority further asserts that the RWJPA should not be allowed to challenge the Plan B permit application on the grounds that it is inferior to an alternative not included in the FSEIS. The Diversion Authority argues that the exclusive procedure for challenging consideration of alternatives and the adequacy of the FSEIS is to seek review from the Minnesota Court of Appeals.[38] Because RWJPA chose not to appeal the DNR's determination that the FSEIS for the Plan B permit was adequate, the Diversion Authority contends that evidence should be limited to only those alternatives fully studied as part of the FSEIS. The Diversion Authority argues that the DNR may only grant permits

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[36] *Id.*

[37] Notice and Order for Hearing and Prehearing Conference at 10 (May 30, 2019).

[38] Minn. Stat. § 116D.04, subd. 10 (2018) (establishing a procedure for aggrieved persons to seek judicial review by filing a petition for a writ of certiorari with the Minnesota Court of Appeals within 30 days of publication in the EQB Monitor).

to alternatives that are fully analyzed in the environmental review process, and that the Plan A Project was not evaluated as an alternative in the FSEIS.[39] According to the Diversion Authority, consideration of alternatives that were not examined in the FSEIS would obscure and distract from the issues in this proceeding.

III. Opposition to Diversion Authority's Motions

Both the RWJPA and the BRRWD filed oppositions to the Diversion Authority's motions.

RWJPA asserts that the Motion in Limine is premature and is actually a motion for partial summary disposition in disguise. RWJPA contends that the Diversion Authority is improperly attempting to exclude relevant information and limit development of the record before the March 2020 close of discovery.

RWJPA maintains that the discovery requests it has addressed to the DNR seeking documents and data supporting the findings in the 2016 Order denying permits to the Plan A Project and the 2018 Order granting permits for the Plan B Project are appropriate and intended to lead to relevant and probative evidence. RWJPA contends that it has a right to use discovery to find out the rationale behind what it maintains are two different approaches in the permit orders. RWJPA further asserts that the information will assist the Administrative Law Judge and ultimately the Commissioner in rendering an informed decision. RWJPA emphasizes that the permit application is reviewed *de novo* by the Administrative Law Judge and the Commissioner makes a final determination on issuing or denying the permit as though the previous order had not been made.[40]

RWJPA also asserts that attempting to preclude evidence related to Plan A is nonsensical because the 2018 Plan B environmental review incorporates by reference the 2016 Plan A environmental review, which, in turn, relies on the earlier federal environmental review of that Plan A Project.[41] RWJPA maintains that each of the environmental reviews provide relevant information on environmental impacts that should be considered and made part of the record. According to RWJPA, the Diversion Authority's suggestion that the 2018 Plan B environmental impact statement is a binding, final adjudication on the permitting issues is incorrect and simply an attempt to preclude presentation of contrary evidence.

RWJPA also argues that the Motion in Limine is procedurally improper as it has not yet indicated what evidence it intends to submit at the hearing. RWJPA notes that the deadline for identifying exhibits and potential witnesses is May 22, 2020. Therefore, RWJPA argues the motion is premature. In addition, RWJPA asserts that because the motion is really an attempt to prevent access to discovery, it is brought by the wrong party. According to RWJPA, the DNR is the proper party to object to the discovery demands,

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[39] Minn. Stat. § 116D.04, subd. 2a-2b (2018); Minn. R. 4410.2000 (2017).
[40] *See* Minn. Stat. § 103G.11, subd. 5(b) (2018).
[41] RWJPA's Mem. of Law in Opp. to Mot. in Limine at 13 (Aug. 8, 2019) and Ex. 11 at ¶¶ 19-20.

not the Diversion Authority, because the identified discovery request was directed to the DNR, not the Diversion Authority.

The BRRWD also urges denial of the Diversion Authority's motions. The BRRWD contends that barring the parties from referencing Plan A or the DNR's 2016 Order denying permits for the Plan A Project will unfairly prejudice the contesting parties and impermissibly limit *de novo* review of the contested DNR order.

The BRRWD asserts that evidence of the DNR's consideration of alternatives flood projects is probative, reliable, and admissible in this proceeding. The BRRWD submits that the parties should be allowed to introduce evidence of alternatives and the environmental study performed so that there may be a true *de novo* review of the DNR's decision to reject alternatives. In addition, the BRRWD contends that the Diversion Authority's motion to limit discovery is premature given that the discovery deadline in this matter is March 9, 2020. The BRRWD argues that the parties should be allowed to proceed with discovery and, once completed, arguments may be made as to whether the evidence is probative and admissible.

IV. Analysis

The Diversion Authority's motions seek to bar from the hearing and preclude from discovery two generally categories of evidence:

(1) all "evidence of the [2016] Findings of Fact, Conclusions, and Order . . . denying the permits for the prior Plan A," including evidence comparing the 2016 Order denying permits to the Plan A Project to the 2018 Order granting permits for the Plan B Project; and

(2) all "evidence of alternative flood projects or proposals except for those analyzed in detail analyzed in the [FSEIS]."

Because the rules and laws applicable to the admission of evidence at hearing and the disclosure of evidence during discovery differ, the Administrative Law Judge will address the Diversion Authority's motions separately.

A. Motion in Limine to Exclude Evidence from Hearing

As the applicant, the Diversion Authority has the burden to show that the Plan B Project is "reasonable, practical, and will adequately protect public safety and promote the public welfare."[42] The RWJPA and BRRWD,[43] as the challengers, have the opportunity to oppose the permits with "relevant evidence"[44] having "probative value."[45]

[42] Minn. Stat. § 103G.315, subd. 6(a).
[43] It is unclear whether the BRRWD will continue to participate in these proceedings as it did not timely file a Petition to Intervene in this action.
[44] See Minn. R. Evid. 402.
[45] Minn. R. 1400.7300, subp. 1.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable."[46] While relevant evidence is generally admissible at hearing, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, . . .or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[47]

With respect to the admissibility of evidence in contested case hearings, the Administrative Procedure Act, provides:

> The judge may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in their serious affairs. The judge shall give effect to the rules of privilege recognized by law. Evidence which is incompetent, irrelevant, immaterial, or unduly repetitious shall be excluded.[48]

When reviewing a motion in limine to exclude evidence from a contested case hearing, the first consideration is whether the disputed evidence is relevant to the issues to be determined at hearing. If relevant, the next consideration is whether the probative value of the evidence outweighs the risk of prejudice, confusion, duplication, undue delay, burden, or expense potentially caused by the admission of such evidence.

i. Evidence of the 2016 Order and Plan A Project

The Diversion Authority first seeks to exclude from hearing all evidence of the 2016 Order denying the Plan A Project permits, as well as all evidence comparing the two projects. The Diversion Authority argues that evidence of the Plan A Project and the 2016 Order are "completely immaterial and irrelevant" to this proceeding, would cause confusion of the issues, and would impose undue expense and burden on the parties.

While the Administrative Law Judge agrees that evidence of the Plan A Project is not the subject of this proceeding and its denial does not dictate the permit decisions for the Plan B Project, the Judge will not, at this juncture in the proceeding, issue a blanket order prohibiting all evidence of the Plan A Project or its denial from admission of hearing. Such a request is both overbroad and premature.

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[46] Minn. R. Evid. 401.
[47] Minn. R. Evid. 402, 403.
[48] Minn. R. 1400.7300, subp. 1 (2017). See also, Minn. Stat. § 14.60, subd. 1 (2018), which provides:
> In contested cases agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and repetitious evidence.

The Motion in Limine is overbroad because it attempts to exclude all evidence of the Plan A Project and its denial. The motion is also premature because the parties have not yet identified what evidence they intend to offer at hearing. Under the First Prehearing Order issued in this case, discovery does not end until March 9, 2020, and the parties' proposed exhibits are not due to be filed until May 22, 2020. Thus, at this time, it is unknown what particular evidence the parties will offer at hearing.

The 2016 Order denying permits to the Plan A Project was the precursor to the development of the Plan B Project. Therefore, it is possible that an argument could be made that the 2016 Order and the fact that the Plan A Project was rejected by the DNR, could be offered into evidence by a party as general background for the development of Plan B Project. This does not mean, however, that the parties will be allowed to present evidence comparing the two projects. The Plan A Project is not the subject of this hearing and its denial does not dictate the fate of the Plan B Project. Put simply, this proceeding will not be used to litigate issues related to the Plan A Project, nor to compare or contrast the two projects.

However, without knowing what specific items of evidence will be offered at hearing or the purpose of such evidence, the Judge cannot determine the relevance or probative value of the evidence or fully evaluate the potential for prejudice, confusion, burden, or expense of such evidence. Therefore, until specific documents, testimony, or information is identified or offered, the Judge will not issue a preemptive blanket order excluding all evidence of the Plan A Project or the DNR's 2016 Order denying permits for such project.

Once specific evidence or testimony is identified, the Administrative Law Judge will entertain motions to exclude evidence on the bases of irrelevance, lack of probative value, prejudice, or the like. Thus, the denial of the Diversion Authority's Motion in Limine does not preclude the Diversion Authority from making a motion to exclude evidence later in this proceeding once evidence or testimony is identified.

The Administrative Law Judge is sympathetic to what the Diversion Authority is attempting to accomplish in its motion. This proceeding is limited to two issues identified in the Notice and Order for Hearing. Those issues are: (1) whether Comstock and/or Wolverton have standing to challenge the issuance of permits for the Plan B Project; and (2) whether the Plan B Project is "reasonable, practical, and will adequately protect public safety and promote the public welfare." This proceeding is not to about the Plan A Project.

The permit applications for the Plan A Project and the Plan B Project are different applications. Whether the Plan A permits were properly denied is not before the Administrative Law Judge in this proceeding. This case is limited to the evaluation of the Plan B Project only. Therefore, when it comes to the admissibility of evidence at hearing, the evidence offered will need to relate to the suitability of the Plan B Project, not the Plan A Project. The fact that a different administration denied permits to a different project is not dispositive in this case and is not sufficient to make such evidence relevant to the Plan B Project.

ii. Evidence of Alternatives not Identified in FSEIS

The Diversion Authority next seeks to preclude from admission at hearing all "evidence of alternative flood projects or proposals except for those alternatives analyzed in detail in the [FSEIS]." The Diversion Authority asserts that only project alternatives studied in the FSEIS are relevant to the issues in this case. The Diversion Authority argues that the RWJPA has waived its opportunity to present additional alternatives in this case by failing to challenge the adequacy of the FSEIS and by failing to appeal the DNR's adequacy determination. According to the Diversion Authority, an adequacy challenge is the sole avenue for asserting feasible alternatives to the project.

The Diversion Authority's Motion in Limine with respect to project alternatives is actually a more complicated issue than it initially appears. In the Notice and Order for Hearing, the DNR lists only two issues for hearing: whether Comstock and Wolverton have standing to challenge the permits and whether the Plan B Project is reasonable, practical, and protective of the public interest. The Notice does not list as an issue for hearing whether there is a more "feasible and prudent alternative" to the project.

Under the Minnesota Environmental Policy Act (MEPA), Minn. Stat. § 116D.04, subd. 6:

> No state action significantly affecting the quality of the environment shall be allowed, *nor shall any permit for natural resources management and development be granted,* where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, *so long as 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. . . .[49]

The parties do not dispute that the Plan B Project implicates the provisions of MEPA and requires environmental review (in this case, an EIS). Nor do the parties dispute that, before permits can be issued, the DNR, as the responsible governmental unit, must determine that there is no feasible and prudent alternative to the Plan B Project.

In the 2018 Order granting permits for the Plan B Project, the DNR found that the issuance of permits to the Plan B Project complied with MEPA, although it made no specific factual findings analyzing why alternatives identified are not feasible and prudent.[50] The Commissioner then generally concludes that "the DNR has . . . determined that there is a lack of suitable feasible and practical alternatives to the Revised Project as mitigated" and that the Plan B project "represents the minimal impact solution."[51]

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[49] Emphasis added.
[50] Findings of Fact, Conclusions and Order of Commissioner at 84-85 (Dec. 27, 2019).
[51] *Id.* at 86.

In the Notice and Order for Hearing, the DNR does not specifically identify, as an issue for hearing, whether feasible and prudent alternatives exist for the project. As a result, the Administrative Law Judge is unclear if this is an issue before the Office of Administrative Hearings for a contested hearing and recommendation. If it is an issue for determination at hearing, then the DNR should amend its Notice. If alternatives are not an issue to be litigated in the contested case hearing, then evidence of alternatives may be severely curtailed as irrelevant.

Assuming that the "feasible and prudent alternatives" issue is before the Administrative Law Judge for hearing, the Judge nonetheless concludes that the Diversion Authority's motion to exclude alternatives not studied in the FSEIS is premature. At this juncture in the proceeding, the parties have not identified any evidence that they intend to offer at hearing. Therefore, the Diversion Authority has not identified any specific evidence of any alternative that the RWJPA intends to offer, including alternatives appearing in the FSEIS and those not included in the FSEIS.

Without knowing the scope of this contested case hearing, and without knowing the specific evidence of alternatives that the parties intend to offer at hearing, the Administrative Law Judge will not issue a blanket order excluding all evidence of alternatives not analyzed in the FSEIS. The Diversion Authority's Motion in Limine for this general category of evidence is, therefore, **DENIED**. The Diversion Authority is not precluded, however, from renewing its motion once specific evidence is identified or offered at the hearing.

B. Motion for a Protective Order

The second motion the Diversion Authority brings is a Motion for a Protective Order to preclude discovery into the same two general categories of evidence identified in the Motion in Limine: (1) evidence of the 2016 Order, including evidencing comparing the two projects; and (2) evidence of alternatives not analyzed in the FSEIS.

Both the rules applicable to administrative hearings and the Minnesota Rules of Civil Procedure provide for the use of protective orders to limit the scope of litigation or discovery. Under the administrative rules, an administrative law judge can issue a protective order "as justice requires" to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense."[52] Under the Rules of Civil Procedure, a party to a proceeding or a party from whom discovery is sought, when good cause is shown, may seek an order "that discovery not be had" or "that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters."[53] Like the administrative rules, a protective order can be issued, when "justice requires," "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

In its motion, the Diversion Authority does not identify any discovery requests directed to it from which it seeks protection. Instead, the Diversion Authority generally

[52] Minn. R. 1400.6700, subp. 4 (2017).
[53] Minn. R. Civ. P. 26.03(a), (d).

argues for a blanket protective order excluding from discovery the two general categories of evidence identified above. In support of its motion, the Diversion Authority attaches a Request for the Production of Documents that the RWJPA served upon the DNR.

In those Requests, the RWJPA seeks from the DNR all documents "reflecting" feasible alternatives considered during both the Plan A and Plan B Projects, as well as documents "reflecting any analysis" of findings and conclusions contained in the 2016 Order denying the Plan A permits.

First, the DNR has not joined in the Diversion Authority's motion for a protective order and has not submitted any argument supporting or opposing the motion. Therefore, the DNR is not seeking protection from the discovery requests served upon it.

Second, because the Diversion Authority has not identified any discovery requests that have been made to it, the Diversion Authority's claim that it may be subjected to annoyance, oppression, or undue burden or expense is merely speculative. The documents requested by the RWJPA are in the possession of the DNR, not the applicant. It was the DNR that made the determination as to alternatives and it was the DNR that granted and denied the Plan A and Plan B permits, respectively. It is unclear at this juncture if similar requests will be made to the applicant -- and the Diversion Authority points to no discovery requests actually made to it. Because the Diversion Authority has not shown any discovery requests served upon it, and because the DNR is not joining in a motion for a protective order, the Diversion Authority has not established that it or another party has, or would be, subject to annoyance, embarrassment, oppression, or undue burden or expense. The Diversion Authority's motion for a protective order is, therefore, denied.

As for future discovery requests, the Administrative Law Judge will entertain, if necessary, motions to compel or motions for protective orders when specific discovery requests are made of parties who oppose the requests. Under the Rules of Civil Procedure:

> Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including without limitation, the burden or expense of the proposed discovery weighed against its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issues. *Subject to these limitations, parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party. . . . Relevant information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.*[54]

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[54] Minn. R. Civ. P. 26.02(b) (emphasis added).

Thus, while discovery requests must be relevant to the case generally, the information requested need not be admissible at trial. The request must only "lead to the discovery of admissible evidence." As a result, the burden of establishing evidence is discoverable is lower than establishing it is admissible at hearing. For this reason, the Judge will not issue a blanket protective order prohibiting discovery on general categories of evidence without first knowing what particular evidence is being requested.

The parties are urged to carefully consider discovery requests and objections before engaging in costly and time-consuming discovery disputes. The parties are reminded of the limited issues in this case, as set forth above, and the Judge's intent not to litigate the Plan A permit application in this proceeding.

As for the Requests for Production of Documents directed at the DNR, many of those requests are improper as to form. For example, most of the requests seek documents that "reflect analysis" or "reflect application or consideration" of statements contained in the 2016 Order as applied to the Plan B Project. Because the 2016 Order applied only to the Plan A Project and not the Plan B Project, the requests are non-sensical. Should the DNR object to such requests, the Administrative Law Judge would sustain its objections.

V. Conclusion

The Administrative Law Judge concludes the Diversion Authority's Motion in Limine and Motion for a Protective Order are overbroad and premature. Accordingly, motions are **DENIED**. As set forth above, the Diversion Authority is not precluded from bringing future motions once specific evidence is identified or discovery requests are made to the Diversion Authority.

A. C. O.

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September 25, 2019

SEP 27 2019

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Re: ***In the Matter of the Dam Safety and Public Waters Work Permit No. 2018-0819 for the Fargo-Moorhead Flood Risk Management Project, Clay and Wilkin Counties, Minnesota, and Cass and Richland Counties, North Dakota***
OAH 65-2002-36151

Dear Counsel:

Enclosed and served upon you please find the **ORDER DENYING DIVERSION AUTHORITY'S MOTION IN LIMINE AND MOTION FOR PROTECTIVE ORDER** in the above-entitled matter.

If you have any questions, please contact me at (651) 361-7881, sheena.denny@state.mn.us, or via facsimile at (651) 539-0310.

Sincerely,

SHEENA DENNY
Legal Assistant

Enclosure