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## MEMORANDUM

Date: October 5, 2020  
To: BCWMC Commissioners  
From: David T. Anderson  
Re: Flood Control Project Maintenance

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### I. Introduction and Background

In October of 2019, pursuant to the Commission's Flood Control Project Policy (the "FCP Policy"), the Commission Engineer inspected the double box culvert, a feature of the BCWMC Flood Control Project located in the city of Minneapolis. The FCP Policy was previously approved by the Commission at its May 19, 2016 and July 21, 2016 meetings. It includes a five-year inspection schedule for the double box culvert and further delegates major repair responsibility of the Flood Control Project to the Commission.

At its June 18, 2020 meeting, the Commission reviewed the inspection report which detailed the observations made by the Commission Engineer and recommended certain major repairs to the double box culvert, including repairs to the shear key joint material, crack sealing, deposit removal, and repairs to exposed reinforcement (collectively, the "Repairs"). The Commission approved the inspection report and directed the Commission Engineer to prepare an opinion of cost for the Repairs. As part of that approval, the Commission further requested that I provide an overview of its obligations and potential liability exposure if the Repairs are not made. The purpose of this memorandum is to provide such an overview ahead of the October 15, 2020 meeting, as the Commission will be asked to review additional information from the Commission Engineer at that meeting.

### II. Commission Policy

The Commission's legal responsibilities related to the Flood Control Project were carefully reviewed in a January 13, 2014 memorandum prepared by former Commission attorney Charles LeFevere and attached to this memorandum for reference. I generally concur with the conclusions contained in that memorandum, including the fact that although the

Commission is not contractually obligated to maintain the Flood Control Project, it is not precluded from doing so via policy, including its Watershed Management Plan or any other internal policy, e.g. the FCP Policy.

It seems that the Commission's reasoning for historically taking on heightened maintenance responsibilities with respect to the Flood Control Project is generally rooted in the Commission's establishment of a Flood Control Project emergency repair fund and long-term maintenance fund, which were both created with money that was leftover from the original Flood Control Project and since supplemented with annual assessments from member cities. The FCP Policy outlines the Commission's self-imposed responsibilities as it relates to the Flood Control Project, including duties to regularly inspect the double box culvert and implement major repairs to the same. It is also worth noting that inspections and reporting are essential to ensure the Commission maintains its eligibility to receive federal funds to repair or replace Flood Control Project features in the event of a catastrophe.

In light of the FCP Policy, and because the Repairs are being recommended by the Commission Engineer, it is recommended that the Commission move forward with such Repairs in a manner consistent with its current Watershed Management Plan and the FCP Policy. While the Commission is under no contractual obligation to make the Repairs, it previously made an affirmative policy determination that it will do so.

### **III. Potential Liability**

Additionally, a failure by the Commission to follow established policy regarding the maintenance of the Flood Control Project could expose it to legal liability. Although Minnesota Statutes, section 466.03, subd. 6 affords the Commission with legislative immunity, such immunity only applies to those functions that are discretionary in nature.<sup>1</sup> Discretionary functions are those which involve professional judgment to balance competing public policy considerations, such as political, economic, or social considerations. Although the Commission's past decisions regarding Flood Control Project maintenance responsibilities would most likely be viewed by a court as a discretionary function due to the inherent policymaking considerations that went into such a decision, its operational actions related to carrying out those established policies would likely not be viewed as such. The Minnesota Supreme Court has made clear that "[i]mplementing a policy, in contrast to formulating the policy itself, is often not subject to statutory immunity."<sup>2</sup>

In this case, the Commission Engineer has inspected the double box culvert and is now making repair recommendations, all in accordance with the Commission's FCP Policy. The Commission previously made a policy-level decision regarding the extent to which it will be responsible for such repairs. Because implementing that policy is less a matter of

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<sup>1</sup> Specifically, the Commission is immune from "[a]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused."

<sup>2</sup> *Angell v. Hennepin Cty. Reg'l Rail Auth.*, 578 N.W.2d 343, 346 (Minn. 1998).

the Commission's discretionary function and more a matter of its operational duties, failing to do so might certainly expose the Commission to unnecessary liability.

#### **IV. Conclusion**

For the reasons above, the Commission should proceed with the Repairs in a manner consistent with the Commission Engineer's recommendation and its established policies. Failing to do so would not only be contrary to the Commission's current policies related to the Flood Control Project, but it might also expose the Commission to liability should any claims arise that might have otherwise been prevented had the Repairs been carried out by the Commission.

## January 13, 2014 Memorandum Regarding Flood Control Project Maintenance

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### **MEMORANDUM**

TO: Bassett Creek Commissioners and Alternates

FROM: Charles LeFevere

DATE: January 13, 2014

RE: Commission Participation in Surface Water Management Facilities  
Maintenance Expenses

#### **I. INTRODUCTION**

The Commission has requested that staff gather information about the responsibility for inspection, maintenance, repair and replacement of facilities that were part of the Bassett Creek Flood Control Project constructed from the late 1970s through the 1990s. Discussion of the role of the Commission in maintaining the Flood Control Project led to questions about responsibilities for maintenance of other surface water management facilities in the watershed - facilities constructed for flood control as well as those constructed primarily for water quality purposes.

This memorandum is intended to 1) provide information about decisions that have been made in the past about responsibilities for maintaining surface water management facilities, and 2) suggest some considerations that may be helpful to the Commission in allocating maintenance responsibilities in the future. Maintenance could include any activity needed to maintain the function of a storm water management facility, including inspection, testing, cleaning, routine maintenance, repairs and replacement. For the sake of simplicity, the term "maintenance" as used in this memo is generally inclusive of all of these activities.

Of the various surface water management facilities in the watershed, the allocation of maintenance responsibilities for the Flood Control Project has been given the greatest attention. Therefore it may be helpful to start with that background.

#### **II. FLOOD CONTROL PROJECT MAINTENANCE RESPONSIBILITIES**

By agreement dated June 27, 1986, between the City of Minneapolis and the Department of the Army ("Army"), Minneapolis took responsibility to "operate, maintain and rehabilitate" the Flood

Control Project. At about the same time, Minneapolis entered into contracts with the upstream cities in the Commission. Under those agreements the cities where the flood control improvements were located agreed to take ownership of those improvements and maintain them. It was apparently contemplated that this responsibility might be assumed in the future by the Commission because the agreements stated that the maintenance required could be changed if the Commission was given authority to take on such maintenance and the Commission ordered it. In addition, the Army's Operation and Maintenance Manual for the Flood Control Project states that the "City of Minneapolis has assigned the tasks for operation and maintenance to the Chairman of the Bassett Creek Water Management Commission." However, staff has not been able to locate any document that shows the city assigning this responsibility to the Commission or the Commission legally assuming such responsibility.

However, although there has been no formal, binding commitment by the Commission to maintain the Flood Control Project, the Commission has indicated an intent to do so. At a special meeting on November 13, 2001, the Commission considered maintenance of the Flood Control Project as a part of what would become the 2004 Watershed Management Plan. The Commission decided to use some of the remaining funds from the original Flood Control Project construction to fund 1) an emergency repair fund for the Flood Control Project (\$500,000) and 2) a Long Term Maintenance Fund (\$335,000 plus an annual assessment of \$25,000). The Commission described the responsibilities it intended to take on for the Flood Control Project in Section 5.2.2.1 of its 2004 Watershed Management Plan as more fully described in the Barr Memorandum of October 31, 2013. That Memorandum also explains the Commission Engineer's understanding of how the 2004 Plan language applies to specific flood control facilities and raises some questions about areas where the intent of the Plan is unclear.

During discussions of maintenance responsibilities as part of the next generation planning process, the question was raised whether the statements in the 2004 Plan about the Commission's intent to undertake these maintenance tasks "trumps" the original existing contracts between the Army and Minneapolis and between Minneapolis and the other cities. The Plan is not a binding contract and does not relieve the cities of their existing contractual obligations. If the Commission fails to maintain facilities as stated in the Plan, the cities will still be obligated to do so.

The Commission could enter into contracts with Minneapolis and the other cities taking on the responsibilities for the Flood Control Project facilities that the cities assumed under the original 1986 contracts. If this were done, the cities could look to the Commission to meet their obligations under the 1986 contracts. However, the Commission's obligation would be meaningful only as long as long as the Commission is in existence, and its current joint powers agreement expires on January 1, 2015. If the Commission ceases to exist and a watershed district is formed, that entity would not be required to assume the contractual obligations of the Commission.

The member cities could enter into a separate joint powers agreement providing for the creation of a separate joint powers organization that would assume the cities' responsibilities to maintain the Flood Control Project if the Commission ceased to exist and providing a means of funding that separate joint powers organization's assumed maintenance responsibilities.

Unless separate contractual commitments of some kind are made, the member cities will continue to have the maintenance responsibilities they assumed under the 1986 contracts. However, this in no way restrains the Commission from continuing to take on maintenance responsibility in accordance with its 2004 Plan, and the Plan currently under development, if it wishes to do so.

### III. ALLOCATING MAINTENANCE RESPONSIBILITIES

#### A. Flood Control Facility Maintenance

Maintenance is required on all flood control facilities, whether or not they were constructed as a part of the Flood Control Project. Functionally, a pond that stores four acre-feet of water constructed before (or after) the Flood Control Project can provide the same flood control benefits as a pond of the same capacity constructed as a part of the Flood Control Project. In terms of function or benefit to the watershed, there is no reason to treat Flood Control Project facilities differently with respect to maintenance than other facilities that serve the same functions.

There is one practical reason, however, for treating the Flood Control Project facilities differently. That is the Flood Control Emergency Repair Project Fund (Emergency Fund) and the Flood Control Project Long Term Maintenance Fund (Long Term Maintenance Fund) which includes money left over from the original Flood Control Project that was contributed by the member cities specifically for that project. The Long Term Maintenance fund also includes \$25,000 in annual contributions from the member cities since 2001. To date those remaining monies and contributions have been spent primarily for the Flood Control Project and facilities that were constructed as a part of that project. However, there have been some exceptions. The Commission funded the 2012 Sweeney Lake Outlet project, which was not a part of the Flood Control Project, and the Commission authorized the use of the Long Term Maintenance Fund for the cost of the 2012 P8 and XP SWMM modeling projects (although costs have not yet been deducted from that fund). The current balance of the Emergency and the Long Term Maintenance Funds, combined, is \$1,059,806.67 and would be \$989,806.67 if the modeling project costs were deducted.

The Commission may wish to consider whether maintenance of the Flood Control Project will be continued in the same way after the remaining funds from the Flood Control Project are expended.

#### B. Water Quality Facility Maintenance

Most of the money spent by the Commission on water quality facilities has been for initial construction of the facilities, while maintenance costs have been the responsibility of the cities within which the projects are located. However, there are exceptions. One is the Plymouth Creek Fish barrier, which was intended to reduce the population of rough fish in Medicine Lake and which has been maintained by the Commission in the past. Another is the \$25,000 per year contribution by the Commission to the Creek and Streambank Trunk System Maintenance Repair and Sediment Removal (Channel Maintenance) Fund for stream bank maintenance projects (which is not maintenance of prior Commission CIP projects). Another is that the Commission has

modified its standard contract terms relating to maintenance for some recent projects. Most of the cooperative agreements for construction of water quality projects with Commission funds have required the responsible city to own and maintain the facilities. However, recent contracts with Golden Valley have either limited the explicit obligation of the city to “routine maintenance” or, as in the case of the contract for the Wirth Lake Outlet Modification project, explicitly made the Commission responsible for major maintenance, defined as including replacement of any of the major structural components of the project.

C. Development of Criteria for Commission Participation in Maintenance

The Commission has developed criteria, which it continues to re-evaluate and refine, to be used in the determination of what water quality projects it should pay to construct. It would be reasonable also to develop criteria to be used in the determination of what water quality facilities and what flood control facilities the Commission should maintain. To some extent, different criteria will be appropriate for different categories of facilities. As a start, the categories might include:

1. Flood Control Facilities
  - A. Flood Control Project
    - i. Maintenance using existing Flood Control Project funds
    - ii. Maintenance after original Flood Control Projects funds are expended
  - B. Flood Control Facilities Constructed with City Funds
  - C. Flood Control Facilities Other than the Flood Control Project that are Constructed with Commission Funds
2. Water Quality Facilities
  - A. Facilities Funded with Commission Funds
  - B. Facilities Funded with City Funds

There may be some kind of projects that will not fit neatly into these categories, stream bank maintenance or restoration as an example.

Over the years a number of arguments and observations have been made about the sharing of maintenance responsibilities. These include:

1. The Commission has decided that certain projects have sufficient watershed-wide benefits or importance that the construction of these projects should be funded by the Commission. The same factors that led to that decision may militate in favor of Commission participation in maintenance costs for those projects.
2. In both flood control and water quality, there may be many alternate means of addressing the Commission’s goals. For example, the TMDL obligations of several cities can be met either by constructing multiple local facilities higher in the watershed or by acting in concert and constructing a larger, more cost-effective facility downstream. Member cities report construction of water quality improvements funded by the Commission in their MS4

reports. Likewise, the Flood Control Project was designed to address flooding problems in the most cost-effective way using best engineering practices on a watershed-wide basis rather than being designed to spread the elements of the project among the cities in a way that would result in the most equitable maintenance burdens. Where flood control facilities or water quality facilities benefit a number of municipalities and help to meet the legal obligations of a number of municipalities, it may not be fair to the host city to burden it alone with the costs of maintenance of such facilities.

3. Surface water management facilities constructed without Commission funds may serve the same functions as facilities constructed with Commission funds. Although it is probably not reasonable to revisit contribution of costs for initial construction, these facilities could be considered for shared maintenance expenses.

D. Definition of Maintenance Obligations

The continuing costs of maintaining existing facilities may include inspection, cleaning, testing, maintenance, routine and major repairs and partial or complete replacement. None of these terms have a precise or universal meaning that can be used for all projects. If either a city or the Commission is solely responsible for all maintenance and repair of a given facility, it is not necessary to define the precise extent of each part of maintenance. However, if responsibility is shared, the definition of each party's obligations becomes more important and more difficult. It becomes difficult, for example, to define where minor maintenance ends and major maintenance begins or when replacement is necessary as opposed to major repair. And it is often the case that diligent maintenance makes for less frequent major repairs and may forestall the need for replacement for long periods of time.

E. Possible Interim Steps in Developing Maintenance Participation Policies

It may not be reasonably possible to develop a comprehensive policy to address all maintenance questions, particularly in the timeframe for completion of the next generation plan. The Commission could consider less ambitious approaches. One would be to deal only with the Flood Control Project maintenance at this time and identify the development of policies on Commission participation in maintenance of other facilities as tasks to be completed on some reasonable, specified schedule during the life of the Plan. Another would be to leave responsibility for maintenance with the host city of a facility and respond to requests from cities for maintenance and repair funds on a case-by-case basis, much as it currently does with requests for allocation of stream bank maintenance funds and as it did for the Sweeney Lake Outlet Project.