

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

In the Matter of the Alteration of Big
Marine Lake by Harold E. Johnson
without a Permit from the Commissioner
of Natural Resources

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
RECOMMENDATION
AND MEMORANDUM

This matter was heard on October 13, 1998, in Scandia, Minnesota before Allan W. Klein, Administrative Law Judge. The hearing concluded in one day, and the record closed on that date.

Appearing on behalf of the Department of Natural Resources was Assistant Attorney General David Iverson, 900 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2127. Harold E. Johnson, 18599 Langly Avenue North, Marine-on-St. Croix, Minnesota 55040, appeared with his wife, Cynthia Johnson, on his own behalf.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, a final decision of the Commissioner shall not be made until this Report has been made available to the parties in this proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. The parties desiring to file exceptions or present argument should contact Rodney W. Sando, Commissioner of Natural Resources, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Whether Harold E. Johnson must comply with the Order of the Commissioner dated January 6, 1998, ordering him to remove all sand and fill material, to remove a dike and metal grate, and to restore the area.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Harold E. Johnson is the owner of parts of Lots 5-10, Bliss Plat First Division, which land is on the western shore of Big Marine Lake in Washington County,

Minnesota. He has owned this land only since April of 1995, but has been familiar with it for a number of years.

2. The Bliss Addition is a subdivision located around a man-made bay that was carved out of the west side of Big Marine Lake. There is a small passageway connecting the bay to Big Marine Lake, giving the bay and passageway the appearance of a mushroom on aerial photos.

3. In September of 1997, the Department received anonymous tips that Johnson was placing fill on his property. Wayne Eller, an enforcement officer, investigated and issued a citation to Johnson for placing fill and clearing aquatic life without a permit. Johnson readily admitted that he had placed fill and cut cattails.

4. On September 22, 1997, Molly Shodeen, the Department's area hydrologist, and others conducted a field survey of the Johnson fill area. They determined that the fill placed on the Johnson property was below the ordinary high water level. They also documented the cutting of the cattails on the Johnson property. Finally, they documented a walkway which had been created with fill and a metal grate.

5. On June 15, 1998, the DNR water survey crew conducted a topographic survey of the Johnson property. A topographical drawing of the Johnson property resulted from the survey. Ex. 5. The areas which had been filled the previous fall could be determined by visual observation. The survey demonstrated that all of the fill, including the walkway and grate, had been placed below the ordinary high water mark. The area of recent sand fill is indicated by diagonal lines on Ex. 5.

6. In 1978, the ordinary high water level for Big Marine Lake was established at 942.5 feet, National Geodetic Vertical Datum 1929. Ex. 6. It has not been changed since that date.

7. In 1991, before Johnson's filling, aerial photography was used to map topographic elevations around this part of the lake. The 942.5 line resulting from that aerial topography was slightly different from the 942.5 line resulting from the Department's post-filling survey in June of 1998. The 1991 line was more favorable to Johnson, in that it was closer to the lake than the 1998 survey, so that not so much fill would be deemed to have been placed below 942.5 using the 1991 line. In order to give Johnson the benefit of the doubt, and avoid any controversy over which line to use, Shodeen agreed to use the 1991 line. The Department's current position is that Johnson must remove all of the fill below 942.5 using the 1991 line. Shodeen has placed stakes on the land to designate that line, and she also drew it on Ex. 5 (black dotted line).

8. The Johnsons' home is in a relatively secluded area. The Johnsons encountered problems with persons dumping garbage and debris on their property where there were cattails virtually all of the way from the road bank to the lake. The Johnsons were forced to remove tires and other debris from the area where the cattails stood. They felt that clearing this area of the cattails would reduce dumping on their

property. They did reduce the cattail area by filling and cutting. They have found that the dumping has been greatly reduced as a result of clearing the cattails and placing fill on their property.

9. The Johnsons also believed that the appearance of their property would be improved if the cattails on the north side of their house were removed and replaced with trees and natural vegetation.

10. Another reason for the Johnsons' filling was to extend their side "yard" in order to allow them to comply with side setback zoning limitations. They wanted to add on to the deck on their house, but understood they could not do so due to inadequate side setbacks.

11. In the 1970s, Big Marine Lake levels rose and caused substantial flooding of land and homes. See Ex. 11. The Bliss Addition was particularly hard hit, because the homes had been built at lower elevations than many others around the lake. As more and more homes were inundated, the Department issued a blanket permit to all persons who desired to place fill on their properties at that time. The lots and houses in this area still show signs of that filling and raising. The Johnsons' lot was filled, but their house was not raised. They must operate a sump pump continuously to avoid basement seepage.

12. In 1989, the waterway connecting the Bliss Addition to the lake was filled and persons living inside the Bliss Addition could no longer access the main lake with their boats. Although they did not live in the Bliss Addition at that time, the Johnsons called the DNR about the blocked waterway and were told that the blocked area was not part of the DNR's jurisdiction. Eventually, the DNR and the watershed district did work with the property owner and the waterway was reopened. However, this incident gave the Johnsons the idea that anything inside the "mushroom" was not the DNR's jurisdiction.

13. Wetland areas around Big Marine Lake are important for a number of reasons. Big Marine Lake is known to have superior water quality and to be one of the cleanest lakes in the Twin Cities area. In part, this is due to the large amount of cattail on the lake, and the high diversity of plant aquatic life. The cattails have absorbing qualities that help to reduce pollutants draining from the roads into the lake and cattails also protect the shorelines. In addition to nutrient entrapment, cattails also serve a valuable purpose for fish habitat. Northern pike, for example, depend on areas such as the Johnsons' cattails for spawning. Northern pike lay their eggs directly on the vegetation. The areas are also good for foraging and rearing of young fish.

14. The walkway and grate create an artificial barrier to normal water flow, and thus impair the water quality of the newly isolated area. They are clearly below the 942.5 mark.

15. On January 6, 1998, the Commissioner issued his Findings of Fact and Order of the Commissioner in this matter. It directed Harold Johnson to restore the bed

of the lake by removing all sand fill material down to the natural organic soil layer within an area outlined in the Order, to remove the walkway/dike and metal grate and restore the area to contours that existed prior to the filling, to allow the cattails to grow in the cut area and fill removal area, and finally, to pay field inspection costs of \$208.80. Ex. 3.

16. On January 27, 1998, Harold Johnson requested a hearing on the Commissioner's Order, and submitted the \$500 required by statute. Ex. 4.

17. On February 20, 1998, Johnson applied for a permit to retain the existing fill and to do additional filling. Ex. 11. The stated purpose in the application was to clean up the existing debris, to increase the road setback, to provide additional filtering capacity, and to allow the existing homes on Lots 8 and 11 to meet side setbacks from the lake. By agreement of the parties, this application was put on hold pending the outcome of this hearing.

18. On September 2, 1998, Commissioner Sando issued the Notice and Order for Hearing in this matter, setting the hearing for October 13 and 14 in Scandia. Ex. 1. On September 16, and again on September 23, the Notice was published in the Oakdale/Lake Elmo Review. Ex. 2.

19. The Johnsons currently have a permit application pending with the Washington Soil and Water Conservation District for additional work on their property. The District has jurisdiction over wetland above the ordinary high water level.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner has jurisdiction in this matter pursuant to Minn. Stat. §§ 103G.065, subd. 15 and 103G.201, subd. 1.

2. Notice of the hearing was timely given, and all other relevant substantive and procedural requirements of law or rule have been fulfilled. Therefore, the matter is properly before the Administrative Law Judge.

3. Minn. Rule pt. 6115.0190 prohibits the placement of fill to create upland areas. Harold E. Johnson violated Minn. Stat. § 103G.245, and Minnesota Rules pts. 6115.0190 and 6115.0191 by placing fill below the ordinary high water level without first obtaining a permit.

4. The Commissioner's Order, dated January 6, 1998, requiring Johnson to remove the fill, remove the dike and grate and restore the area is a reasonable exercise of the Commissioner's authority granted in Minn. Stat. § 103G.251, subd. 2. It is in the public interest that the actions be taken to restore the area.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that the Commissioner's Order be AFFIRMED in its entirety, and that Johnson be required to remove the fill and restore the area outlined by Molly Shodeen as the 1991 line for elevation 942.5.

Dated this 17th day of November 1998.

ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Department is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail.

Reported: Tape Recorded, no transcript prepared.

MEMORANDUM

There is no dispute over the fact that fill was placed and cattails were cut and cleared at the Johnson's property below the ordinary high water mark. The Johnsons believed that they did not need a permit because they thought the DNR did not have jurisdiction. They got this idea from a 1989 telephone conversation regarding the blocked waterway. Clearly, that is not a correct understanding of the law, and had they checked with the Department before acting, they would have been so informed.

The Johnsons also believe that the area at issue is minimal in relation to the entire lake, and that their actions helped reduce lake pollution by reducing the amount of midnight dumping which takes place on their property. Neither of these are legitimate justifications for destroying the cattails and placing fill in public waters.

The Administrative Law Judge agrees with the Johnsons that there are numerous areas of fill, diking, and other unnatural activities around Big Marine Lake, particularly in the area of the Bliss Addition. These resulted from the severe flooding of the late 1970s. In response to that flooding, an improved outlet system was installed in the mid-1980s, which has served to moderate the high waters. Whatever may have been the emergency conditions and emergency responses back in the 1970s, they are no longer justification for filling and diking in the mid-1990s. The law, the rules, and the existing practices of the Department all require that the Johnsons seek a permit before taking

these actions. Had the permit been applied for in the normal course of events, the Johnsons would not have been allowed to engage in the filling and cutting which they did. There is no reason to allow them to benefit by their failure to apply, and thus the Commissioner's Order to Restore is appropriate.

Molly Shodeen's stakes, representing the 1991 pre-filling elevation of 942.5, are the appropriate boundaries for the Johnsons to follow in their restoration. Using that line will allow a portion of the fill (the portion closest to the house) to remain. To the extent that any of the fill helps prevent basement seepage, the portion closest to the house would seem to be the most effective protector of the house. Thus, Shodeen's willingness to allow that to remain may help the Johnsons with their basement seepage.

AWK