

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the City of Inver,
Grove Heights, Petitioner, Regarding
the Commissioner's Order to Remove
Debris on the Mississippi River
Bed adjacent to two City Storm Sewer
Outlets.

FINDINGS OF FACT
CONCLUSIONS OF LAW,
and
RECOMMENDATION

The above-entitled matter came on for hearing before Allan W. Klein on October 24, 1978, at the City Council Chambers in Inver Grove Heights, Minnesota. Hearings continued on October 25, 26, 3J and 31.

Paul A. Magnuson, Esq., and Daniel J. Beeson, Esq., of the firm of LeVander, Gillen, Miller & Magnuson, appeared on behalf of the City of Inver Grove Heights (hereinafter the "City"). Tibor M. Gallo, Special Assistant Attorney General, appeared on behalf of the Department of Natural Resources (hereinafter the "Department").

The record remained open for the submission of briefs and certain late-filed exhibits. The last brief was submitted on January 29, 1979. The last late-filed exhibit was received on March 29, 1979.

Based upon all of the testimony, exhibits, and briefs, the Hearing Examiner hereby makes the following:

FINDINGS OF FACT

Procedural History,

1. This contested case arose from a letter, dated April 28, 1978, sent by the Department to the City (Agency Ex. 1) in which the Department ordered the City to:

(a) Restore the bed of the Mississippi River to its natural condition by removing certain fill at a point near the former site of the City's sewage treatment plant (hereinafter the "south outfall") which had allegedly been placed on the bed of the river by virtue of the operation of a storm water discharge conveyancing system allegedly constructed and maintained by the City.

(b) Restore the bed of the Mississippi River to its natural condition by removing certain fill at a point near the Harold Johnson property (hereinafter the "north outfall") which had allegedly been placed on the bed of the river by virtue of the operation of a separate storm water discharge conveyancing system constructed and maintained by the City.

(c) Complete both projects by July 1, 1978, and notify the Department of their completion; and

(d) Prepare a storm water plan by January 1, 1979, which would reduce the need for future fill removal operations and to forward said plan to the Department prior to its implementation.

2. This letter was issued pursuant to Minn. Stat. sec. 105.462 (1977 Supp.) without a hearing, and it included a notice to the City of its right to a hearing upon demand.

3. The city made a demand for a hearing by letter dated June 8, 1978 (Agency Ex. 2).

4. The Department issued a Notice and Order for Hearing on September 22, 1978, setting forth the date, place and other pertinent information regarding this hearing (Agency Ex. 3).

5. A prehearing conference was held on October 18, 1978, at which time the parties discussed the case and exchanged information.

6. The Department issued an Amendment to its original Notice and Order on October 19, 1978, adding an additional issue for determination.

7. The hearing commenced on October 24, 1978. Immediately prior to the first hearing session, a site visit to both the north outfall and the south outfall was made by the attorneys for both parties and the Hearing Examiner. This visit included viewing both outfalls and certain areas to the west ("upstream") of the outfalls.
General background

8. The two outfalls are located about 1/2-mile apart. Both outlet into a long, narrow body of water which, although part of the Mississippi, is to the west of the main navigation channel of the River. Between the navigation channel and the westerly bank of the river is a long, narrow island known as Merrimack Island. The two outfalls are located on the westerly river bank. The south outfall is separated from the main navigation channel by Merrimack Island. The island is totally surrounded by water with the main channel to the east of the island and this "backwater" to the west. The northerly outfall is actually just to the north of the northern tip of the island, while the southerly outfall is approximately 750" to the north of the south tip of the island.

9. For purposes of identifying various locations mentioned throughout this Report, a rough sketch of the areas in question is included as the next page hereof.

10. The north outfall, briefly described, is the terminus of a storm sewer drain system which drains a 95-acre section of what is commonly referred to as the 'Old Village'. It consists of a pipe which runs north and south along the westerly edge of Vickman Avenue (also referred to as County Road 77) with seven catch basins in the street gutter. The water collected

by that pipe is then fed into another pipe which carries it east across the railroad tracks and across Doane Trail until it reaches the Mississippi River, where it discharges. Between Dickman Trail and the River, four additional "beehive- catchn basins collect surface water and divert it into the sewer.

11. The south outfall, orietly described, is the terminus of a drainage system which drains a 560-acre section of what is commonly referred to as the "South Grove Watershed", most of which consists of a residential subdivision referred to as the "South Grove Addition-. Unlike the northern system, which is a new, man-made underground pipe system for its entire length, the system- which feeds the south outfall is made up of open ditches, natural ravines, and culverts. Some of these are artificial, consisting of engineered ditches and road culverts, while others are natural topo-

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graphic features (ravines) which appear to have carried water to the river for many decades, if not centuries.

This difference between the two systems must be kept in mind, for although both are referred to as "systems", the northerly one clearly fits that description, while the application of that word to the southerly of the two is at the heart of one of the issues to be resolved.

12. There is a sizeable sediment delta in the river at the site of the north outfall. It is shown in Agency Exs. 6, photos 39 and 40; and Petitioner's Exs. 47 and 48. It is visible above the water surface to varying degrees, depending on the level of the river. As of the date of the hearings in the fall of 1978, this sediment delta at the north outfall was not so sizeable that it prevented small and medium-sized recreational boats from passing past it, although the testimony of local residents indicated that it was getting larger and larger as time passed and was creating more and more of a barrier to navigation.

13. There is an obstruction at the site of the south outfall as well. It is much larger than the northern delta, and its origins are far more complex. It is of such dimensions that on the day the hearing commenced, the Examiner and the attorneys were able to use it to walk across from the river bank to Merrimack Island, a distance of at least 55 feet, encountering only a 3-foot stretch of water. The channel is completely impassible by boat at this point and has been for several years. This present condition can be contrasted with what must have been a virtually non-existent delta in some past years, as residents recalled that very large "cruisers" used to traverse the inlet, passing through the areas at both the north outfall and the south outfall. However, as will be discussed in greater detail, the channel at this southerly outfall has been subject to numerous openings and blockages in years past.

14. The most recent aerial photographs of these areas were taken in the spring and summer of 1977 (Agency Exs. 8, 9, 17A and 17B). They show approximately twenty houses on both sides of Doane Trail in the half-mile stretch between the two outfalls. It was some of these residents who initially contacted the Department in the fall of 1977 regarding the problems created at the south outfall. At the hearing, eight of them testified, and two others submitted written comments. Prior to the hearing, 21 residents signed a petition, dated January 26, 1978, urging the Department to take action to clear both the northerly and southerly sites. At the hearing, the residents voiced concerns about:

(a) Navigability - They (desire to get boats past both outfalls. This was the primary concern voiced by most of those who testified.

(b) Water Quality - A few of the residents used words such as "sewer hole," "swamp," "stink" and "slimy" to describe the water quality in the inlet during the past few summers, which they attributed to the fact that there is little or no flowage through the inlet because of the blockage at the south outfall. This was the second most common concern of the residents.

(c) Aesthetics - In addition to the aesthetic problem due to water quality, residents were also concerned about the debris and refuse

which has accumulated in the inlet, including both:

- (a) materials, such as trees, and sections of docks which have flowed in the northerly outlet and been deposited through out the length of the inlet (but primarily at the southerly blockage), as well as
- (B) sand and silt which they believe have entered through the two storm sewer "systems".

(d) Land Values For the reasons given above, at least one resident was concerned that he would not be able to sell some lots he owned as "river lots" and would thereby receive a lower price for them.

(e) Future Alteration of Natural Conditions - There is a spring to the north of the north outfall which flows the year around. One resident who lived closest to that spring was concerned that unless something is done, the sediment delta at the north outfall might grow to the point where the spring's fresh water would no longer flow into the inlet.

Sources and Causes of Sediment - North Outfall

15. As can be seen from the sketch, the north outfall serves as the discharge point for a relatively small storm sewer drainage system serving Dickman Trail (County Road 77), and other points to the east toward the river. It is the position of the Department that the sediment delta at the outfall is the result of the gradual accumulation of sand coming from that system. The City does not deny that the sand in the river came from the system; rather it denies liability, at least in this proceeding, for any damages on a number of theories: the sand entered the system and the river during an extraordinary rainfall on the evening of August 30, 1977 and that this "Act of God" relieves the City from responsibility; the system and outfall were constructed as a part of a highway construction program and thus fall within a statutory exemption; and finally, that the Pollution Control Agency has jurisdiction here, not the Department.

A review of the testimony indicates the history of this problem. Harold Johnson owns a relatively large piece of property between Doane Trail and the River. He was born and raised across Doane Trail from the north outfall and has lived closest to it for most of his life (born 1935, moved away in 1957, returned in 1964, and lived in immediate area since 1964). He testified that before the installation of the storm sewer in 1971-1972, there was a natural drainage path that came across his parents' property, crossed Doane Trail and entered the river just to the south of the north outfall. He described it as a 'river' in the springtime, and indicated that it caused damage to his parents' home. This must have also caused a sediment buildup in the river in years past, as Gerald Burington testified that in the late 1950's, there was a sandbar at this site, which caused some problem for "big cruisers," but was not serious enough to block their passage.

Johnson testified that at the time he granted the City an easement for the storm sewer, he expressed concern about sand accumulations at the out-

fall. He testified that approximately two years before the hearing (which, if correct, would have been the fall of 1976), he noticed that silt was building up and contacted the City Engineer, John Davidson. He stated that

Davidson told him that if there was a buildup, the spring flood on the river would likely clean it out.

Richard Pesek purchased land just to the north of the north outfall in 1976 and moved in during the winter-of 1976-77. He stated that the sediment delta at the north outfall was not present when he first moved in, but that the day after the August 30, 1977 rain, it was there. He stated that it has gotten larger after each big rain in 1978 and that it now forces him to navigate his boat so close to the opposite shore that he scrapes the bottom of his boat against a submerged tree stump which he used to be able to avoid entirely. Robert Hanson, who lives next door to Pesek, confirmed the fact that the delta has grown substantially during 1978. When Hansen first purchased his lot in February of 1978, the water was open and he estimated the delta to extend about ten feet from the shoreline. As of the date of the hearing, he estimated it reached about halfway across the channel. It has also grown in width from 2 or 20 feet wide then, to 4 or 4 1/2 feet wide now.

16. There is insufficient evidence to determine whether Johnson, Pesek, or both, are correct about the timing of the first sediment at the outfall. In the extent that it is relevant, it is found that the Department failed to meet its burden of proof in demonstrating that there was sediment present at the north outfall prior to the rain of August 30, 1977. However, in the opinion of this Examiner, it is not a relevant fact because it is undisputed that following that rainfall, the delta was there, and it has increased substantially thereafter.

As will be discussed more fully below in the section entitled "Legal Analysis - North Outfall", the Examiner does not adopt the "Act of God" exception which the City would engraft onto the statute. However, because it is a major defense of the City, the Examiner will make findings with respect to it.

On August 30, 1977, there was an unusually severe rainstorm. The common method of categorizing such storms is in terms of their frequency of recurrence in any year. For example, what is commonly called a "ten-year storm" will, on the average occur once every ten years. In order to determine what frequency interval to assign to any given storm, two facts must be known: The duration of the storm and its intensity. Duration is measured in minutes or hours, while intensity is measured in inches per hour. If those two facts are known, reference is then made to tables or charts in order to determine the frequency of recurrence. Those tables or charts, in turn, are based upon historical rainfall data, which varies from region to region. They also vary depending upon the data base used to prepare them. An example of such variations can be demonstrated if one assumes that there has been accurate rainfall records kept in Minneapolis for 125 years, but in Duluth, there are only 75 years of data. Under these hypothetical assumptions, it can be said that the Minneapolis data is more accurate than the Duluth data. It can also be said that regardless of the historical

length or accuracy of the data base, it is very likely that errors will result if the Minneapolis data is used to prepare a frequency curve for Duluth rainfalls.

There was extensive testimony concerning the severity of the August 30, 1977 storm in Inver Grove Heights, with various witnesses giving estimates of its frequency of recurrence. The problem with all of this testimony is that there was only scant evidence about the duration or intensity of the storm at Inver Grove Heights on that night because no official records are kept for Inver Grove Heights. It is found that the rainfall did exceed 5.5 inches, and probably exceeded 6 inches, but the extent of the excess is unknown. The intensity is also unknown with precision, but, taking the lowest possible figures, it exceeded .9 inches per hour. Thus, using the most conservative figures, it was at least a 50-year event.

17. The sources of the sand that appear at the north outfall are two: erosion of "natural" sand into the storm water system, and (2) "deicing" sand from Concord Street entering the system at the northernmost intake and being carried to the river (Testimony of Ronald Hannack).

Construction of North Outfall and Related Storm Sewer_System

18. The north outfall was constructed during the winter of 1971-72 as part of a much larger project involving (1) this and other storm sewers; (2) sanitary sewers; (3) water mains, and (4) improvements to Concord Street. The scope of these projects is outlined in Petitioner's Exs. 22, 23 and 24. As a part of that overall project, the then Village of Inver Grove Heights entered into a Cooperative Construction Agreement with the Minnesota Highway Department in August of 1971 (Agency Ex. 31). This Agreement allocates responsibility for various activities between the Village and the Highway Department, including a very detailed allocation of costs. However, with respect to the particular storm sewer system and outfall at issue in this proceeding, the Highway department paid nothing (except for a share of the roadwork on Dickman Trail which was incurred in order to lay the system). This can be contrasted with another storm sewer system, completely separated from the one at issue, where the Department participated in a share of the materials and construction costs of manholes, sewer pipe, outfall and other items. In both cases, the Agreement provides that the Village shall "properly maintain" the storm sewer facilities at no cost to the Highway Department.

Thus, although the system at issue was a part of a larger multi-faceted project, portions of which did involve participation by the Highway Department, this particular system was not sufficiently connected with the "construction and maintenance of highways" so as to bring it within an exception to Minn. Stat. sec. 105.42 (1971).

19. The terminus of the storm water discharge system is a pipe which discharges the water into the river. The end of this pipe is held in place by a large concrete headwall which can be seen on Agency Ex. 7, photo No. 38, and Petitioner's ex. 48. This headwall is, in turn, supported by steel pilings driven down into the ground. Eugene Lindholm, who supervised the construction of the storm sewer system while acting as a Consulting Engineer for the Village, testified that at the time the headwall and pilings were put into place, the steel sheet pilings were located "just short of the water," and not directly in the water. They were driven six to eight

down, until they met resistance. The headwall, itself, was not poured in such a way that it was "in the water." In fact, according to Lindholm, the pilings and headwall were approximately eight feet from the edge of the water at the time they were constructed. He also stated that the invert of the culvert (the bottom of the pipe) was 31/2 feet above the bottom of the concrete headwall.

This testimony contrasts with that of Bruce Sandstrom, a Department of Natural Resources Hydrologist, who stated that according to measurements made by him on September 19, 1978, the invert of the pipe was .72 of a foot above the water level and that the bottom of the concrete was below the water surface. This was confirmed by Ronald Harnack, Regional Hydrologist for the Department, who stated that the headwall was in the "bed" of the river when he first saw it on September 19, 1978. He explained that good design practice requires that some form of erosion protection be placed below discharge pipes to prevent "scouring", whereby turbulent waters would tend to erode the soil beneath the pipes. These protective devices vary in nature, but the headwall and associated sheeting would qualify as such a device. It is not necessary to resolve this conflict in testimony for reasons set forth below.

Legal_Analysis - North Outfall

20. The Mississippi River, at all points relevant hereto, and at all times relevant hereto, is a "public water" within the meaning of Minn. Stat. Ch. 105.

21. No Departmental permit was applied for, or granted, in connection with the construction of the sewer system or the headwall.

The Department alleges that the city (and its predecessor, the Village) ought to have obtained a permit for both the construction of the headwall and the placement of sand into the River by operation of the sewer, as both changed the "course, current or cross-section" of the river within the meaning of Chapter 105.

With respect to the initial construction of the headwall, it is found that any change in the cross-section of the river due to the placement of the headwall is so de minimus as to not require a permit, based upon the reasoning of State v. Kulvar, 266 Minn. 408, 123 N.W. 2d 699 (1963). In that case, a riparian owner of land on Rainy Lake was charged with a criminal violation of Minn. Stat. 105.42 for changing the cross-section of the lake when he dredged out a channel to allow boats better access to his resort. The trial court, following a jury verdict, found him guilty. The Supreme Court reversed his conviction and ordered a new trial on the issue of whether Kulvar's actions were a public detriment. Acknowledging that the dredging had altered the cross-section of the lake, the Court held that in order to sustain a conviction, the State must also show that the change detrimentally affected the beneficial use of waters by the public. The Court stated:

Clearly, the legislature did not intend that every change apparent in a cross-section view of the waters or every

act of excavating or filling be prohibited, for such a

construction could result in absurd application. As suggested by defendant, many acts which would technically result in a change in the cross-section view are so minimal as to be of no significance to the public interest.

The Court emphasized that a proper reading of the prohibition should place

emphasis on whether a proposed action interferes with the natural condition of public waters in a manner contrary to the purposes of Chapter 105,

rather than emphasizing whether there has been interference with the bed of public waters.

22. At the time that the headwall was constructed, there were no rules in force which altered the Kulvar holding as it would affect the placement of the headwall.

23. At the time that the headwall was constructed, it was unnecessary for the Village to seek or obtain a Departmental permit because any change in the cross-section was of no public detriment.

24. When the system was installed, the relevant part of the statute read:

Except in the construction and maintenance of highways when the control of public waters is not affected, it shall be unlawful for the state, any person, partnership, association, private or public corporation, county, municipality or other political subdivision of the state to change in any reservoir, dam or waterway obstruction on any public water; or in any manner, other than in the usual operation of dams beneficially using water prior to July 1, 1937, to change or diminish the course, current or cross-section of any public waters, wholly or partly within the state, without a written permit from the commissioner previously obtained. Application for such permit shall be in writing to the commissioner on forms prescribed by him.

The Kulvar case contains an admonition which is as valid today as it was in 1963: that this statutory language cannot be read in a vacuum

it must be read in conjunction with other portions of Chapter 105. In the

Kulvar case, as in the instant proceedings, there are two relevant portions which must be included in a legal analysis of whether the City has violated

sec. 105.42 by constructing or maintaining its sewer system leading to the

north outfall. Those sections, in 1971, were 105.38 and 105.45. Section

105.38 stated:

In order to conserve and utilize the water resources of the state in the best interests of the people of the state, and for the purpose of promoting the public health, safety and welfare, it is hereby declared to be the policy of the state:

(1) Subject to existing rights all waters in streams and lakes within the state which are capable of substantial beneficial public use are public waters subject to the control of the state. The public character of water shall not be determined exclusively by the proprietorship of the underlying, overlying, or surrounding land or on whether it is a body or stream of water which was navigable in fact or susceptible of being used as a highway for commerce at the time this state was admitted to the union. This section is not intended to affect determination of the ownership of the beds of lakes or streams.

(2) The state, to the extent provided by law from time to time, shall control the appropriation and use of surface and underground waters of the state.

(3) The state shall control and supervise, so far as practicable, the construction, reconstruction, repair, removal, or abandonment of dams, reservoirs, and all control structures in any of the public waters of the state.

Section 105.45 sets forth the standards which must be applied by the Commissioner in deciding to grant, deny or limit a permit. According to Kulvar, these standards are to be read into sec. 105.42, the prohibition section. In 1971, section 105.45 read, in relevant part, as follows:

If the commissioner concludes that the plans of the applicant provide for the most practical use of the waters of the state and will adequately protect public safety and promote the public welfare, he shall grant the permit, and, if that be in issue, fix the control levels of public waters accordingly. If the commissioner concludes that the proposed appropriation or use of state waters or the proposed construction is inadequate, wasteful, dangerous, or impractical, or detrimental to the public interest, he shall reject the application or he may require such modification of the plan as he deems proper to protect the public interest.

In granting a permit the commissioner may include therein such terms and reservations with respect to the amount and manner of such use or appropriation or method of construction or operation of controls as appears reasonably necessary for the safety and welfare of the people of the state.

The Kulvar doctrine, which requires that sec. 105.42 be interpreted with regard to 105.38 and 105.45, can best be summarized from the following language appears at the end of the decision:

When it is established that the public has access to waters capable of substantial beneficial use by all who so desire, the statute directs that the state fulfill its trusteeship over such waters by protecting against interference by anyone. . . .

As we construe the statute, the essential elements of the charge against defendant . . . required proof that defendant's dredging and filling interfered with /public/ waters . . . and that the change made resulted in a detriment to the public either in its present or prospective use of the waters. . . . while it is true that one cannot dredge the bed of a lake without changing the cross-section of waters, emphasizing the effect on the bed detracts from the most important objective of the law, namely, to prohibit acts which interfere with public rights in those waters.

Applying this concept to the present case, the question of whether Inver Grove Heights should have applied for a permit for the operation and maintenance of its storm water system boils down to a question of when its sys-

tem began to interfere with public rights in the Mississippi.

25. There is no preponderance of evidence in the record to indicate that at the time of construction, or during the time prior to the fall of 1977, that the city (or its predecessor, the Village) , knew or ought to have known, that its operation of the system was causing any problems.

Therefore, the City did not need a permit prior to August 30, 1977.

26. After the rainfall of August 30, 1977, however, the facts change. The facts have been related above, and will not be repeated In addition,

the law had undergone several changes so that by the fall of 1977, the three factors to be taken into account by Kulvar had changed as follows:

(a) 105.38, the declaration of public purpose, read:
In order to conserve and utilize the water resources of the state in the best interests of the people of the state, and for the purpose of promoting the public health, safety and welfare, it is hereby declared to be the policy of the state:

(1) Subject to existing rights all waters of the state which serve a material beneficial public purpose are public waters subject to the control of the state. In the determination of whether a beneficial public purpose exists, specific evidence of the present or future beneficial public purpose shall be evaluated in accordance with section 105.37, subdivision 6, and with reference to the existing land use of the area, the soil types surrounding and underlying the water, the ownership of the land surrounding the water, the relative agricultural and wildlife productivity of the area, and relevant provisions of a county or municipal shorelands ordinance enacted pursuant to section 105.485. The public character of water shall not be determined exclusively by the proprietorship of the underlying, overlying, or surrounding land or on whether it is a body or stream of water which was navigable in fact or susceptible of being used as a highway for commerce at the time this state was admitted to the union. This section is not intended to affect determination of the ownership of the beds of lakes or streams.

(2) The state, to the extent provided by law from time to time, shall control the appropriation and use of surface and underground waters of the state.

(3) The state shall control and supervise, so far as practicable, any activity which changes or which will change the course, current, or cross-section of public waters, including but not limited to the construction, reconstruction, repair, removal, abandonment, the making of any other change, or the transfer of ownership of dams, reservoirs, control structures, and waterway obstructions in any of the public waters of the state.

(b) 105.42, the prohibition section, read, in pertinent part,
as follows:

It shall be unlawful for the state, any person, partnership, association, private or public corporation, county, municipality or other political subdivision of the state, to construct, reconstruct, remove, abandon, transfer ownership, or make any change in any reservoir, dam or waterway obstruction on any public water; or in any manner, to change or diminish the course, current or cross-section of any public waters, wholly or partly within the state, by any means, including but not limited to, filling, excavating, or placing of any materials in or on the beds of public wat-

ers, without a written permit from the commissioner previously obtained. Application for such permit shall be in writing to the commissioner on forms prescribed by him.

(c) 105.45, the "standards" section, read, in pertinent part,
as follows:

If the commissioner concludes that the plans of the applicant are reasonable, practical, and will adequately protect public safety and promote the public welfare, he shall grant the permit, In all other cases the commissioner shall reject the application or he may require such modification of the plan as he deems proper to protect the

public interest. In all permit applications the applicant has the burden of proving that the proposed project is reasonable, practical and will adequately protect public safety and promote the public welfare.

In granting a permit the commissioner may include therein such terms and reservations with respect to the amount and manner of such use or appropriation or method of construction or operation of controls as appears reasonably necessary for the safety and welfare of the people of the state.

All three sections have remained constant to date.

27. At some point immediately after August 30, 1977, the City should have realized that its operation of the storm sewer system had altered the cross-section of the river so as to cause interference to the public's interest. At that point, technically, the City should have applied for a permit to continue operating its system. However, in response to public complaints, the Department intervened, and through what appears to have been primarily poor communication on the part of both sides, this problem became an adversary proceeding. The Department issued its Order to Restore on April 28, 1978. To determine precisely when, prior to that date, the City ought to have applied for a permit is impossible and unnecessary. By August of 1977, the statutory scheme had evolved to a point that other sections of Chapter 105 intervene and render moot the question of the precise point at which the City ought to have acted.

Statutory Authority for the Order to Restore - North Outfall

28. As of April 28, 1978, Chapter 105 contained not only the provisions cited above, but also two other relevant sections. The first is sec. 105.462, which provides for the Commissioner to issue an order without a permit application. It provides as follows:

When the commissioner determines that the public interest so requires, he may investigate on his own motion any activities being conducted in relation to public waters without a permit as required by sections 105.37 to 105.55. With or without a public hearing the commissioner may make findings and issue orders as otherwise may be issued pursuant to sections 105.37 to 105.55. A copy of his findings

and order shall be served upon the person to whom the order is issued. If the commissioner issues his findings and order without a hearing, the person to whom the order is issued may file with the commissioner a demand for a hearing, together with the bond required by section 105.44, subdivision 6, within 30 days after being served with a copy of the commissioner's order. Thereafter the matter shall be heard in the same manner and pursuant to the same laws as an application is heard following a demand made under section 105.44, subdivision 3, insofar as applicable. However, if no demand for hearing is made by the person to whom the order is issued under this section, or if that person demands a hearing but fails to file the required bond, the commissioner's order becomes final at the expiration of 30 days after the person is served with the order and no appeal of the order may be taken to the district court.

This was the route followed by the Department. Believing that the City would take no action to remove the obstruction at the north outfall without an order to do so, the Department issued its letter of April 28, 1978. That

letter essentially ordered the restoration of the river bed to the natural conditions which prevailed prior to the construction of the storm sewer facility.

In addition to sec. 105.462, quoted above, another section needs to be noted. It is sec. 105.461, which authorizes an Order of Restoration such as the one given to the City. It reads as follows:

As a part of any order granting or denying a permit, whether or not a hearing has been held, the commissioner may order the applicant to take any action necessary to restore the public waters or beds thereof to the condition existing before unlawful activities, if any, were undertaken by the applicant. This restoration may include, but not be limited to, filling beds unlawfully dredged, removing fill unlawfully placed, or restoring water unlawfully appropriated. If a hearing on the application was not held, the applicant may, within 30 days of the receipt of an order to restore public waters or beds, contest the order and shall be afforded a contested case hearing in the manner prescribed by chapter 15.

An alert reader will have noticed that while the Department's Order to Restore orders the City to restore the bed to the condition as it existed prior to construction of the storm sewer, that Order is premised upon a statute which authorizes the Commissioner to order restoration to the condition existing before unlawful activities were undertaken. Since it has been found that the installation of the storm sewer itself was not illegal, the issue arises as to how much sediment the Department may require the City to remove.

Again, the Kulvar case provides guidance. There, the Court stated that the State, as trustee for the public, has the obligation to protect public waters against interference with the public's right to fish, swim, navigate and otherwise enjoy such waters. Therefore, when a person's activities so change the cross-section of waters that it detrimentally affects the public's interests, sec. 105.461 provides that that person may be ordered to restore the waters to the condition they were in prior to such interference. The key to the problem lies in the interference with

public rights. Therefore, the City must remove so much of the sediment as is necessary to restore the public's use of the river.

August 30, 1977 Storm - Act of God Defense

29. As noted earlier, the City points out that the storm of August 30, 1977 was unusually severe and raises the defense of "Act of God" so as to absolve it of liability for removal of deposition resulting from that storm.

It is conceded by the Department that it would be uneconomical to design a storm sewer system to handle a 50 or 100-year event. The Department alleges, however, that a properly designed storm sewer system would have ponding facilities or other design features to alleviate the impact of severe storms.

Before getting off on a tangent of the pros and cons of installing such devices at the north outfall, it is helpful to examine the relationship between the "Act of God" defense and the statute.

An examination of the cases in Minnesota relating to "Act of God" reveals that the defense is almost always raised in tort actions, and the

Examiner has been unable to find a Minnesota case where the defense is raised in the context of an alleged statutory violation.* A question arises as to whether it is an appropriate defense to a statutory charge. The statute is silent on the question. However, when one considers other defenses to tort actions, such as contributory (or comparative) negligence, assumption of risk, etc., they have no bearing on statutory actions. Rather, defenses to statutory actions are either spelled out in the statute, itself, (such as "safe harbor" exemptions) or are engrafted onto a statute by a Court (such as in Kulvar). Clearly, the most common defense to a statutory action is "I didn't do it." which, put more eloquently, means that the conduct complained of does not fit within the proscriptions of the statute. Another such defense is "The statute does not apply to me," which again measures the class of person accused against the classes of persons enumerated in the statute as being subject to its proscriptions.

Another question to be asked is "What is the purpose of the statute?" This was the question asked by the Kulvar court. When the conduct of the accused is measured against the purpose of the statute, insights may arise to assist in interpreting the statute and defenses to the statute.

Applying the methods of analysis set forth above, the Examiner finds that the "Act of God" defense is inapplicable to the alleged statutory violation in this case.

30. Another "defense" raised by the City is lack of subject-matter jurisdiction in the Department. The City points out the extensive jurisdiction of the Pollution Control Agency and argues that the broad scope of that Agency's powers indicate a lack of authority for the Department of Natural Resources.

The Department readily admits that the PCA, under Minn. Stat. Ch. 115, has "substantially greater authority over storm and sanitary sewers than

the DNR would ever wish to acquire." But, the Department argues, when it comes to a question of protecting public waters, the Department's jurisdiction is not preempted or diminished.

The Examiner agrees with the Department. Overlapping or concurrent jurisdiction over the same subject matter in two or more agencies does not diminish the specific jurisdiction of any such agency. It may require coordination between agencies to prevent a person from being 'whipsawed," but that has not been alleged or demonstrated by the City. The Department does have subject matter jurisdiction over this matter.

Sources and Causes of Sediment - South Outfall

31. As mentioned in the introductory portion hereof, as of the start of the hearings herein, the channel between the south outfall and Merrimack Island was, for all intents and purposes, totally blocked. Unlike the north outfall, which consists of sand and small gravel from the storm sewer

The most relevant cases located are Hanson v. City of Montevideo, 189 Minn. 268, 249 N.W. 46 (1933); Sauer v. Rural Co-op Power Ass'n. of Maple Lake, 225 Minn. 356, 31 N.W. 2d 15 (1948); Swanson v. LaFontaine, 238 Minn. 460, 57 N.W. 2d 262 (1953); and Vanden Broucke v. Lyon County, 301 Minn. 399, 222 N.W. 2d 792 (1974).

in a delta-shaped configuration rising a few inches above the water surface, the material at south outfall is so large in size and so diverse in origin that it can be used as a parking lot or turn-around for automobiles, and includes material ranging in size, from fine silt to an abandoned refrigerator. Agency Ex. 6, photos 31-37, and Petitioner's Exs. 25-30 and 43-45 all show this site from differing perspectives. How all of this material got to this site, and the legality of the City's actions with respect to it will take some space to recount, and the reader is asked to have the patience necessary to gain a full understanding of it.

32. The earliest aerial photographs of this area in the record are Agency Exs. 22A and B, both taken in June, 1940. Expert testimony from Steven Prestin, a Land Use Hydrologist for the Department, was given based upon his examination of these and later photographs, with the use of a Delft Scanning Stereoscope. This device can be used, with two overlapping aerial photographs, to observe variations in elevation. It also assists the user to identify objects otherwise unidentifiable. Prestin was given aerial photographs from 1940, 1951, 1957, 1964, 1970 and 1977 and was asked to observe and report on a number of different factors. At this point, all that will be discussed are his observations of the channel between the south outfall and Merrimack Island.

in June of 1940, there was a small delta which extended approximately 30% of the width of the channel.

In July of 1951, the delta showed evidence of recent deposition and occupied approximately 40% of the width of the channel.

In May of 1957, the photographs again evidenced recent deposition on the north and south sides of the delta, but it remained at about 40% of the channel's width.

In July of 1964, there was what Prestin described as a "dramatic change." The delta had doubled in size, expanding to the east and south, and most importantly, it appeared that recent deposition had caused it to entirely block the channel.

In September of 1970, the shape of the delta had changed. It had become elongated, running north and south. Brush was beginning to grow on it, and it extended across only 50% of the channel although the water across the remainder appeared to be shallow.

By July, 1977, the delta extended across 60% of the channel, had become vegetated, and some small tree crowns (tree tops) were visible.

33. Testimony from area residents indicates that most of them are far more concerned about the present blockage of the channel at the south outfall than they are concerned about the partial obstruction at the north outfall. When Bruce Sandstrom first visited this area in November of 1977 in response to public complaints, he was not even aware of the problem to the north -- he spent all of his time at the south outfall.

Testimony of the resident; (including Warren Gish, a city employee who lives nearby) indicates that for many years, there had been some sort of "sand-bar" or "delta" at this site. However, it was not as extensive as it is now. Richard Kinney stated that in the early 1930's, it was impossible

to walk across to the island at the south outfall site. Richard Clubb stated that as a boy, he fished off a sandbar in the an--a but that the channel was wider then as it would have been "impossible to throw a rail-road spike across it" at that time. That would have been in the 1930's also.

Harold Johnson, Clubb and both Mr. and Mrs. Gerald Burington testified that from at least the 1940's to 1971, the east shoulder of Doane Trail was extremely narrow and there was a sharp drop-off from the side of the road to the river.

The testimony regarding navigability varied. Ron Tenney testified that in 1971 or 1972, he could navigate the channel with a 16-foot boat that required at least 18 inches of water. Russell Thompson testified that in 1975, he could get through the south outfall with a small boat, but only if the outboard motor were tipped up. fie also stated that following the August, 1977 rain, the south outfall was "really blocked up". Bob Langes-lay testified that he could not get past the site with a 42-foot boat in 1972. However, Gerald Burington recalled that "large cruisers" could get through in the 1958-1960 period. Mrs. Claire Sampson wrote, in Public Ex. 3, that in 1970 and 1971, a 16-foot boat without a motor could pass through. Mrs. Gerald Burington wrote, in Public Ex. 44, that she recalled that in 1956, "large cruisers" could navigate the channel. Warren Gish, who has lived in the area since 1965, recalls that there has always been same sediment. However, he believed that as the river level varied during different seasons, the percentage of the channel blocked by visible sediment varied.

In summary, it is found that the blockage of the channel at the south outfall has varied, depending on the year and the time of year. Prior to 1971, there is evidence that it has ranged between being completely blocked in July of 1964, to being only a small sandbar at some time during the 1930's. However, in 1971 and 1972, there was a change which, as will be discussed below, dramatically altered the character of this area.

THE LAMETTI DUMPING - SOUTH OUTFALL

34. In connection with the multi-purpose construction work discussed above, the contractor, Lametti & Sons, Inc., dumped a large amount of fill primarily large rocks, at this site. This was done after consultations with the then-Village of Inver Grove Heights and was with the knowledge and acquiescence of the Village. That much is clear. What is unclear is why

the fill was placed where it was and how much of it was placed into the river itself.

35. There is conflicting testimony above the motivation of dumping the fill at the southern outfall site. Harold Johnson, who granted the easement for the storm sewer at the north outfall, testified that prior to any dumping, Eugene Lindholm of Ellison-Philstran, Inc. (the designers of the overall project), came to him and asked him whether it would be possible for rock to be dumped onto his property. Johnson would not agree, and it was not dumped there. Soon thereafter, Johnson began seeing dumped rock accumulating at the southern site.

Lirdholm n testified that the rock fill was placed at the southern site

because it was both a logical storage area and because Doane Trail needed

stabilization at that point. These motivations were supported by the tes-

timony of John Davidson who became the City Engineer and Director of pub-

lic Works in 1973. Davidson stated that it was his understanding that the

rock had been placed at the site to stabilize Doane Trail and for storage

purposes. Ed Kurth, the street superintendent since 1967, explained that

in the period 1965-1968, it was necessary to block off Doane Trail three or four times to clear it of erosion which had washed down from a gully, and that the rock was placed on the site to stabilize the roadway.

The precise motivation for die dumping lies somewhere between all of

these. It is found, from the testimony taken as a whole, that the rock was

placed at that site because (a) it had to go somewhere; (b) that site was a convenient place to put it where it could be removed as needed for future

work, and (c) it was needed as a stabilizing force for the steep bank of Doane Trail.

36. A second question which must be resolved is whether the Lametti

dumping was so located as to "change or diminish the course, current or cross-section" of the river within the meaning of the prevailing statute.

Again, there is a conflict in the testimony. Public witnesses testified that they saw Lametti workers actually dump stone into the water (Richard

Clubb and Harold Johnson) . Witnesses for the City, on the other hand, tes-

tified that Lametti dumped onto the existing sand delta but not into the water (Eugene Lindholm and Ed Kurth).

The Examiner finds, based upon his assessment of the various witnesses,

that there was at least some Lametti dumping directly into the water. To the extent that the Lametti dumping was onto a sand delta, rather than

into the river, it virtually guaranteed that the delta would not wash away

in times of high flows, and thus, what was an impermanent, varying delta has become a permanent feature, albeit now covered with bedrock. While the Prestin testimony regarding the percentage of the channel blocked by sediment and fill included a discussion of the variations attributable to

erosion from upstream (which will be discussed below), an important fact to

bear in mind is that the level of the river varies.

37. Unfortunately, neither of the parties introduced into the record

evidence relating to river levels at the various relevant points in time.

However, such facts are susceptible to judicial notice. The nearest professionally

maintained river gauge which the Examiner is aware of is at the

Grand Avenue Pumping Station in South St. Paul, where the U.S. Geological

Survey and the U.S. Army Corps of Engineers maintains a gauge. This is to

the north of the area in question. To the south, the nearest gauge is just

above Lock & Dam No. 2. at Hastings, which gauge is maintained by the U.S.

Army Corps of Engineers.

Data from those stations is presented below:

Date of Reading (15th of mo.)	Grand Avenue Pumping Station	Lock & Dam No. 2
4/71	692.54	686.45
7/71	687.80	686.57
10/71	687.15	686.85

4/72	689.46	686.40
7/72	687.46	686.75
10/72	687.24	686.67
4/73	N/A	686.35
7/73	687.33	687.10
10/73	688.70	686.55
4/74	689.14	686.45
7/74	687.10	686.75
10/74	687.30	686.95
4/75	687.93	686.60
7/75	688.84	686.45
10/75	687.33	687.05
4/76	688.16	686.50
7/76	686.87	686.55
10/76	687.18	687.10
4/77	687.50	687.00
7/77	687.09	686.75
10/77	N/A	687.05
4/78	691.33	686.85
7/78	689.08	686.40
10/78	687.44	686.85
9/19/78	687.67	686.60

It is clear from maps of the river that the Grand Avenue gauge is much closer to the area in question than is the Lock & Dam No. 2 gauge. In addition, the operation of the dam appears to skew the figures from that location so much that for any given year, the date of the highest level at Grand Avenue usually corresponds to the date of the lowest level

at Lock & Dam No. 2. Therefore, the Examiner believes that the data from

Hastings should be disregarded for purposes of this inquiry. Rather, at-

tention will be focussed on the Grand Avenue data. However, the Examiner

notes, and urges all others to note as well, that Grand Avenue, South St.

Paul is not the outfall area in Inver Grove Heights, and no precision will be attributed to the data in using it to reach conclusions about Inver

Grove Heights. For example, the only river level reading in the record for the outfall area was taken by Bruce Sandstrom and Ronald Harndck of the Department on September 19, 1978. Using the invert of the culvert at the

north outfall as a reference point, Sandstrom testified that the river level on that date was 687.28. The datum from Grand Avenue for that date

is 687.67, while Lock & Dam No. 2 reported 686.60. While Grand Avenue is

closer to the measured level than is Lock & Dam No. 2, clearly the measured level is between the two. Thus, extreme care should be used in ap-

plying the data to Inver Grove Heights.

38. In the years following the Lametti dumping, the blockage at the

south outfall has been exacerbated by five additional factors, all inter-

related:

- a. Erosion from the upstream watershed;
- b. Deposition of materials at the site by the river;
- c. "Post-Lametti" dumping of materials by the City;
- d. Erosion from materials at the site; and
- e. Public dumping.

The interrelation of these is extremely complex and the individual contribution of each to the total problem is susceptible of varying opinions. Each will be discussed separately below.

EROSION FROM UPSTREAM WATERSHED - SOUTH OUTFALL

39. The water that enters the river at the south outfall comes from a drainage area of approximately 500 acres and follows a course determined primarily by, natural topography, and only in part by the works of man.

Ra-

ference to the earliest photographs, Agency Exs. 22A and 22B (taken in 1940), shows a natural drainage path, or watercourse, extending from the south outfall to the west, passing under Doane Trail, Dickman Trail, Concord Street, and well into the then-agricultural lands to the west of Concord Street. A stark comparison is seen when the same area is viewed in

the most recent photographs, Agency Exs. 17A and B (taken in 1977). what used to be primarily agricultural land to the west of Concord Street is now

a suburban housing development, and the land on either side of the natural drainage channel has all but disappeared from the photographs, having been converted into housing sites and backyards.

Testimony indicated that the drainage channel, when viewed from the ground, has not disappeared, and if anything, now carries more water to the river than it used to, due to the housing development's substitution of

impervious streets, driveways and roofs for the more porous agricultural land. Because a very substantial issue exists as to the City's responsi-

bility for any sediment or debris which enters the river from the south outfall, some time must be spent in determining the nature of the drainage system which leads to it.

40. . The westernmost part of the system leading to the south outfall is a trapezoidal ditch which runs through the backyards of some of the houses in the subdivision. This ditch may be seen in Agency Ex. 6, photos

1-6. these streets interfere with its passage, culverts have been placed under the streets (see Agency Ex. 6, photo 2). In addition to carrying off

water from backyards, the ditch also carries off water from streets in the subdivision. Photo 3 shows an engineered spillway leading from a street

into the ditch. -It should be noted that this ditch is the only storm sewer

system serving a large portion of the housing development, at least as it existed at the time of a report prepared in 1974.

41. Proceeding easterly from this backyard ditch and street system, the water passes past the eastern boundary of the housing subdivision (Dawn

Avenue) under a large culvert which directs the water into a ravine which flows through an open-space area, owned by the City, which was referred to as a "park" or "park-like area". The topography of this area appears to be

much the same as it was in 1940 with the dominant feature being the ravine which has steep banks leading down to it. The path of the water through this area is shown on Agency EX. 6, photos 7 through 15.

42. Proceeding easterly from this area, the water flows through a box

culvert which carries it beneath Concord Avenue. The eastern end of this

culvert is located approximately 15 feet above the surface of a gravel pit.

This elevated culvert can be seen in Agency Ex. 6, photos 19 and 20, and in

Petitioner's Exs. 41 and 42. The culvert discharges its output into the western end of the gravel pit. As can be seen on Petitioner's Exs. 41 and 42, a second, but smaller, culvert also discharges water at this same point. This second culvert comes from the eastern side of Concord Street.

The topography of the gravel pit is such that the water flows from these two culverts at the western end, across the surface of the pit for nearly its whole width and exits at the eastern end. As will be discussed more fully below, one can hardly imagine a better source of sand and gravel sedimentation than a pit such as this. Unfortunately, rather than being used to make concrete or aggregate, some of this sand and gravel ends up in the Mississippi at the south outfall. But that's getting ahead of the story.

The gravel pit really encompasses two different areas over which water flows. The first area is described above - the water is dispersed over the surface of the pit. It is shown in Agency Ex. 6, photos 19, 20 and 21. The second area, although still within the property of the B-Tu-Mix Co., which owns the pit, is different. In this second area, which is on the eastern side of the pit, the dispersed water flows back together again in a narrow ravine. This is illustrated by photos 22 to 27 of Agency Ex. 6. The watercourse at the bottom of this ravine is devoid of vegetation and contains either exposed bedrock or sand. The ravine at the east end of the gravel pit terminates in another large culvert which extends under Dickman Trail and the railroad tracks. This culvert is shown on photos 27, 28 and 29.

43. Easterly of the railroad tracks, the culvert empties into a short rock-strewn watercourse illustrated on photo 29. This watercourse leads to the westerly side of Doane Trail. In order to allow water to pass under Doane Trail, there are two culverts, side by side, which direct the water to the river through another short, rock-lined watercourse.

44. In summary, then the essential segments of the "system" from the westernmost point of the watershed to the river on the east are as follows:

- a. Backyard open ditch and street runoff devices in housing subdivision;
- b. Culvert across Dawn Avenue linking backyard ditch to ravine in "Park";
- c. Ravine in "park";
- d. Culvert across Concord Street linking park ravine to gravel pit;
- e. Culvert from Concord Avenue to gravel pit;
- f. Dispersed flowage across gravel pit;
- g. Narrow ravine at east end of gravel pit;
- h. Culvert under Dickman and railroad tracks;
- i. Rocky watercourse from tracks to Doane Trail;
- j. Twin culverts under Doane Trail;
- k. Short watercourse to river.

Many, but not all, of the above contribute sand, gravel, rock and other debris to the accumulation that now exists at the south outfall. In particular, Items a, c, e, f, g and i were all identified as sources of material. However, when witnesses were asked to apportion the percentages of material which came from each place, they were (understandably) unable to do so. Rather, the testimony dealt with broader generalization based upon either personal inspections or aerial photographs. Based upon the testimony, it is found that items a, c, e, f, g and i all contribute some part to the overall problem, but that the principal contributors of material are c and f -- the ravine in the "park", and the gravel pit. Those two, because of their relatively greater importance, will be examined in detail below. However, it should be noted that the amount of sedimentation contributed by those two depends upon the amount of water flowing through them. Without a substantial flow of water, there would not be a substantial sediment contribution from any source, including either of the two principal sites. Therefore, one must look at the sources of water as well as the sources of deposition. While no witness attempted to apportion percentages of water from each source, there was sufficient testimony to permit a finding of increased flow coming from the area of the housing subdivision in comparison with the flow contributed by that same area when it was in agricultural use.

45. The use of the word "park" to describe the first principal contributor may be a misnomer. It arises from a sign posted within the area which

reads:

MOTORIZED VEHICLES PROHIBITED:
INVER GROVE HEIGHTS PARK PROPERTY

It was stipulated by the parties that this property, which is outlined in red on Agency Ex. 27, is owned by the City. Unfortunately, not only do the banks of this ravine exhibit the effects of erosion, but members of the public have dumped all manner of material on the banks of, and into, the ravine.

John Davidson, who was employed by the City from 1973 to 1978, admitted that prior to his coming to work for the City, there was an intentional placement of "demolition fill" by the City such as rocks, concrete, pieces of lumber and broken bituminous to stabilize a steep slope that had eroded over the years into the platted portion of Dehrer Way, which is on the south and west sides of the ravine. This fill acted as both slope stabilization and also created an area where snowplows could turn around. However, in addition to this intentional filling by the City, others have obtained permission from the City to dump there. Davidson stated:

"Normally, people would call and ask . . . where can they dump their concrete driveway -- they were having it replaced - and they would be referred to that location -- that type of thing."

When asked whether there has been loose fill placed there, Davidson said people have done so without authorization. When the City has caught them in the act, they have been forced to remove it. Asked whether it was gen-

eral knowledge in the community that this was an area where people could dump, Davidson stated that if you consider that some have been told it could be done in the past, then yes, it was general knowledge.

If there were no substantial water flows through the ravine, that dumping would be of no relevance. However, during periods of substantial rain, the velocity of the runoff is such as to transport some of the heavier and more of the finer materials downstream. While many settled out in the B-TU-Mix pit, others continued on to the river.

Testimony interpreting the aerial photographs indicates that erosion from this ravine was not significant before 1957. However, in that year, the photographs show the beginnings of the housing development then being constructed to the south and west of the ravine. When compared with earlier photographs, the 1957 photos showed sediment from the development being carried to the south side of the ravine where it entered it and flowed east toward Concord Street.

This increase of deposition in the ravine continued to be seen in the 1964 photos. By that date, the housing had expanded into the old drainage ditch area, and the old ditch had been artificially realigned, and, for the first time, it ran through backyards and culverts under streets. However, it should be recalled that the ravine in the park, which was the site of both City and public dumping, has remained essentially unaltered.

46. The second area which must be examined in some detail is the B-tu-Mix Company's gravel pit.

This pit appears from the aerial photos to have commenced operations sometime prior to 1940. Later photos illustrate its constant expansion and development, with its total size increasing in each photograph.

In 1956, the then Village of Inver Grove Heights issued an excavation permit under the provisions of its Ordinance No. 44. That ordinance, originally adopted in 1948, makes no mention of erosion control.

In 1959, the Minnesota Highway Department apparently entered into some sort of agreement with B-tu-Mix Company permitting the company to mine sand and gravel within ten feet of the Concord Street (S.T.H. 56) right-of-way. The slopes of the relatively steep banks leading from the east side of Concord to the pit (between 1.7:1 to 2:1) were allegedly approved by the Highway Department in connection with this 1959 agreement. See Petitioner's Ex. 10.

47. On March 26, 1973, the then Village enacted two related ordinances. One of these amended the existing Village Zoning Ordinance to provide special zoning provisions for sand and gravel operations. This zoning ordinance was denominated Ordinance No. 178.

The second ordinance adopted that day was one which prohibited the excavation, removal or storage of rock, sand, dirt, etc. without a permit and contains criteria regulating such operations. This permitting ordinance was denominated Ordinance No. 168. The two ordinances fit together into a complete package that regulates activities such as those carried on at the B-tu-Mix pit.

John Davidson testified that he became aware of the fact that B-tu-Mix had failed to file an application for the permit required by Ordinance No. 168 and notified the Company of its obligation to do so. The Company believed that it had been "grandfathered in" to the new ordinance and was thus absolved of any requirement to obtain a permit. [Davidson told the

Company that such was not the case, and so, in March of 1974, the Company filed an application entitled:

Application to Continue Excavation of Sand and Gravel in Inver Grove Heights, Minnesota.

This document was labelled as Petitioner's Ex. 10.

The Department alleges that the City has failed to exercise its municipal powers so as to discharge its responsibility to prevent deposition into the river from the pit. Therefore, an examination of the ordinances, the Application, and the pit is in order.

48. The zoning ordinance begins by setting forth its intent and purpose. one of the five purposes noted is "Controlling pollution caused by erosion or sedimentation." It then goes on to enumerate criteria which the Village Council must find to exist before establishing a Sand and Gravel Zoning District.

The only criterion of interest to this case is one which states, "Existing uses within the area will not be adversely affected." The ordinance indicates that its intent is to provide a framework for the regulation of activities during die operation and the restoration of the site after activities are completed. It indicates that areas will be permanently zoned for other purposes (in the case of B-tu-Mix, for example, the land is permanently zoned I-1 "Light Industrial"), that that a temporary zoning of "SG" ("Sand and Gravel') may be granted if the conditions of the Ordinance are met. It further defines "non-conforming use" to mean a sand and gravel operation which existed prior to the adoption of the ordinance and which does not conform to the ordinance. With respect to such non-conforming uses (which the Examiner assumes would include the B"tu-Mix operation), the ordinance provides:

Any sand and gravel operation existing and in compliance with Village ordinances on the date of the adoption of this ordinance, shall be permitted to continue subject to the following:

Such non-conforming use shall be immediately subject to the performance standards of this ordinance and shall comply where it is reasonable to do so, as determined by the Village, with said provisions within six (6) months or the use shall be terminated and the Village shall complete the restoration if it is not completed by the developer in accordance with Sections 10.6(0) and 10.6(P).

An excavation permit shall also be required for all non-conforming uses.

one of the performance standards referred to above is entitled "Topsoil." It provides that graded or backfilled areas shall be covered with topsoil except that no greater depth of topsoil or percentage of organic material shall be required than that originally existing an the property prior to commencement of operations. Another performance standard is entitled "Landscaping", and provides that upon replacement of the topsoil, trees, shrubs, grasses or other ground cover shall be planted "in order to avoid

erosion as far as practicable." Such restoration shall be on a
continuing
basis as excavation is completed and no area shall be left unattended for

more than one year following excavation. The ordinance provides that temporary

SG zoning is not intended for those operations where 60% or more of the deposits used on an annual basis in "allied operations" (operations allied to the extraction or mining of sand and gravel deposits) must be hauled to the site. Such allied operations shall be phased out, consistent

with the depletion of deposits, and shall not be considered non-conforming uses after mining is completed. The ordinance provides for variances. Its

final operative section provides that the Village shall initiate action to remove the temporary SG zoning from any property where the sand and gravel operation is completed before the term of the temporary zoning.

The second ordinance, No. 168, is the permit and standards ordinance. Like the zoning ordinance, it is premised on the assumption that excavation or storage of sand, gravel, etc. will be a temporary operation, and that following the use of land for that purpose, it will be restored for other uses. It requires that an application for a permit be made and sets

forth necessary contents of an application. One of the items to be disclosed is the "method and schedule for restoration and measures to control erosion during and after the work." It also requires the applicant to show

that his excavation "is not harmful to the health, safety or welfare of the

citizens of the Village." In discussing procedures following an application, it requires the Village Council to require the applicant to take steps to "minimize or stop . . . erosion during or after excavation". It provides that "maximum depth and slopes shall be the same as required by the Village Sand and Gravel District Ordinance (section 10.6)."* The ordinance also provides for annual inspections by Village staff, annual renewals of permits, and approval of annual renewals by "the Administrator"

unless he believes that the operation, as conducted, is not in accordance with the terms of the permit, in which case, he shall refer the matter to the Village Council. The ordinance concludes with a provision empowering the Council to grant variances based on "hardship" or "unusual topographical conditions", as well as a provision for fines, injunctions, or revocations for violations of the ordinance or a permit.

In its application for a permit, the Company addressed the concerns of the two ordinances. The Company stated that continued excavation and removal of sand and gravel will allow it to reshape the topography of the site to a "uniform graded building site for industrial purposes," a process which was estimated (in March of 1974) to require approximately four years to complete. The Company stated that it may or may not act as developer of

the industrial site. It described its sand and gravel excavations as

"A continuation of an existing use with the ultimate objective of preparing the site for industrial development pur-

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Section 10.6 of Ordinance 178 is one of the performance standards applicable to non-conforming uses, which B-tu-Mix is assumed to be. Section 10.6(B)(1) states that excavations must be graded or backfilled so that all banks are left with a slope of not greater than 1:10, unless greater slopes substantially conform to the immediately surrounding area.

Section

10.6 also includes the "Topsoil" and "Landscaping" sections described above.

poses. This objective conforms with the present industrial zoning and is consistent with the City is Guide Plan."

With respect to erosion control, Ordinance 168 required the Applicant to indicate:

Method and schedule for restoration and measures to control erosion during and after the work.

In response to this, the Company stated:

Top soil originally on the site was relatively shallow in depth and granular in composition. Thus top soil has already been removed from operating areas.

The slope along the westerly portion of the site adjacent to S.T.H. 56 ranges from 1.7:1 to 2:1. This slope is generally the natural angle of repose of the materials in the slope and is consistent with die agreement with the Minnesota Highway Department in 1959. the agreement with MHD allowed the applicant to mine within 10 feet of the easterly right-of-way line of S.T.H. 56.

Due to drainage improvements along S.T.H. 56 and in the residential area west of the highway, erosion on the site is virtually non-existent. Vegetative cover material has been placed on the westerly slope and will continue to be placed until mining is completed. The lower portion of the site will be graded for industrial development purposes with drainage south and easterly to a drainage sewage under Dickman trail.

The Application also requests variances from some of the performance standards of section 10.6 of Ordinance No. 178 (the zoning ordinance). of primary importance is section 10.6(B) (1) , which requires that slopes be no greater than 10:1 unless steeper slopes are in substantial conformity to the immediately surrounding area and, in the opinion of the Village Council, such steeper slopes will not adversely affect future development. the

Company stated that at the present time, slopes along the south and west boundaries of the mining area are from 1.7:1 to 2:1 and that it proposed to continue with the same slopes.

The Application proposed that the Company be granted a permit until March 31, 1976, and that it would comply with the annual report and renewal requirements of Ordinance 168 thereafter. On December 16, 1976, an Annual

Report for the Company's operations was submitted. This Report (which is the last page of Agency Ex. 29) indicates that the Company estimated that March, 1978 was still its estimated completion date. Under the heading "Restoration", the Report indicates that there is no top soil on the site and that the Minnesota Highway Department had, in 1959, approved 1.7:1 aid 2:1 slopes ten feet from its right-of-way (for Concord Street). Under the heading "Erosion Control", the Report states, "Vegetation on west slopes and industrial development proposed." Under "Remarks", the Report states, "Excavation conforms to development plan. Slopes not complete."

On February 18, 1977, the Company applied for a renewal of its permit.

That renewal application contains the following items and responses:

item: Purpose of removal, storage, excavation or filling.

Response: Production of bituminous surfacing material and
pit run fill material.

Item: Estimated time requires to complete the work.

March, 1978.

The Application for Renewal was recommended for approval by John Davidson.

on December 21, 1977, the Company submitted another annual report. Its contents are exactly the same as the 1976 annual report, with one exception. Under the heading "Remarks" is handwritten:

NOTE: THE ESTIMATED COMPLETION DATE IS MAR 1978. A WRITTEN REQUEST FOR EXTENDED USE IS IN ORDER.

On March 22, 1978, the Company submitted another application for renewal of its permit. It is exactly the same as the 1977 application but with one exception. The estimated time to complete the work has been changed, from March, 1978 to March, 1979. This application was recommended for approval by Davidson.

At the hearing, Davidson testified that the mining of the pit has essentially terminated, but that recently, sand and gravel has been trucked to the pit from near Lakeville to supply the plant presently existing on the site. Davidson testified that when he first met with Bruce Sandstrom, he told Sandstrom of the planned termination of activities on the site and that he (Davidson) thought there was a possibility of using at least a part of the site for a detention ponding facility.

49. The Examiner finds that there is insufficient evidence in the record to show that the City has failed to enforce the ordinances. The Examiner is concerned about the apparent conflicts between the intent of the temporary zoning ordinance and the reality of what is happening at the pit, but in the maze of issues which were included in this hearing, there was

insufficient attention devoted to this one to permit any conclusion other

than that the Department failed to meet its burden with respect to the or-

ordinances. That is not to say, however, that the City is absolved of any

responsibility for sediment from B-tu-Mix.

In the case of *Huber v. City of Blue Earth*, 213 Minn. 319, 6 N.W. 2d 471 (1942), a downstream landowner sued the City to recover damages arising-

from the pollution of waters by virtue of operation of the City's sewer-

ers. A canning factory drained the effluent from its operations into the

City's sewers. The City's principal defense was that some years after the

canning factory was established, the City had enacted an ordinance which

forbade effluent such as that from the factory to be discharged into city

sewers. The City, however, never enforced its ordinance against the factory.

tory.

The Supreme Court stated:

That a city passes such an ordinance as is here involved does not logically exempt it from liability. Such an ordinance merely enables the city, if so disposed, to protect itself from liability by preventing the pollution of streams which carry away its sewage. The ordinance has no effect on the rights of persons suffering from its violation.

The duty of maintenance, repair, operation, and the keeping of the sewer from creating a nuisance rested on the city. It could not by mere passage of an ordinance relieve itself from its fundamental duty or delegate its responsibility for injuries to those who connected with the sewer. (Emphasis supplied)

The key to the B-tu-Mix question is not the ordinances. Rather, it is the

City's action or inaction with respect to contributors of sediment to
its

sewer. If, as a matter of law, the drainageway leading to the south out-

fall is a city storm sewer, then the treatment of B-tu-Mix ought to be the same as the treatment of the canning factory in Huber: the City is responsible for it.

50. Although the City did obtain a sanitary sewer easement across the B-Tu-Mix property, it has never sought or obtained a similar-storm sewer easement. There is a tiny easement for the actual space occupied by the end of the culvert that crosses Concord, but that is all.

51. Another piece of evidence must be examined before finally resolving the issue that underlies all of this. That evidence is the awareness and response of the City to the sediment deposition resulting from this drainageway at the south outfall.

In 1964, after the bulk of the relevant subdivision had been built, and after the original drainageway had been converted into the backyard ditch system with provisions for street discharges into it, Robert J. El-

lison, Consulting Engineer, prepared a document for the City entitled "A Proposed Plan for Storm Sewers for South Grove Additions." This was marked

as Agency Ex. 23. The report begins by stating:

At the present time, all of the storm water drainage in South Grove is carried on the surface of the streets, the grades of which have been specifically designed for that purpose.

The report goes on to point out that this method of drainage has capacity

limitations, and as the development has expanded, flooding of lawns adja-

cent to streets has occurred. The writer opines:

The only solution to the problem lies in the construction of adequate storm sewers to carry the drainage underground.

The report then discusses the area in greater detail, describes a method for selecting an appropriate size of an underground storm sewer system, and ends with a cost estimate for a proposed system.

In its more detailed discussion of the area to be served, the report

noted the following:

We have not proposed in this system to enclose the drainage in the gully from Highway 56 to the Mississippi River. We recognize that there have been difficulties in the past with the deposition of sand and gravel in the river at the outlet of the gully. This material has been washed down from those portions of South Grove that were undergoing construction and from the area of the gravel pit that was being worked. As the streets and lawns in the development are completed, the amount of wash from this source will decrease, while the construction of storm sewer from Dawn Avenue to Highway 56 will eliminate the erosion from that part of the gully. As the operation of the gravel pit recedes from the immediate banks of the gully, it would appear that wash from that source should also diminish.

It should be noted that 1964 was the year in which the aerial photographs indicated the channel to be completely blocked by the sediment delta at the

south outfall. This was well before the Lametti dumping in 1971-72. Its

later reduction in size can be understood if the reader takes note of the

fact that one of the most substantial Mississippi River floods of this century took place in the spring of the next year, 1965.

According to a subsequent report (the 1974 Report discussed below), a public hearing on the proposed storm sewer was held, but the system was subsequently abandoned "in favor of the surface drainage system as it exists today."

52. A 1972 Village Council Resolution No. 1031, marked Petitioner's Ex. 11, is entitled "Resolution Providing for Control and Treatment of Storm Water Runoff." It is brief enough to be reproduced in its entirety below:

WHEREAS, the Village of Inver Grove Heights, Minnesota is desirous of preserving the integrity of the existing lakes, streams and ditches within the Village; and

WHEREAS, it is apparent that development of large residential, commercial and industrial areas and the necessary storm sewers contribute to the deterioration of said lakes, streams and ditches;

NOW, THEREFORE, BE IT RESOLVED BY THE VILLAGE COUNCIL OF INVER GROVE HEIGHTS, MINNESOTA: That all large land developments that increase the runoff from any area, shall provide for the partial removal of additional pollutants and further provide ponding and/or storm sewers designed to preserve and maintain the integrity of the existing lakes, streams and ditches within die Village;

BE IT FURTHER RESOLVED, that the Village has the long-range objective of establishing an overall storm drainage plan for the Village and a corresponding policy related thereto. Said plan shall designate the location of holding ponds and existing lakes, streams and ditches to be utilized in the drainage system. Said policy shall outline the means for acquiring holding ponds and the method to be used in storm sewer assessments.

53. The City's expressed desire to establish an overall storm drainage plan proceeded with the commissioning and delivery, in 1974, of a Report from its consulting engineer. Authored by E. A. Lindholm of Ellison-Pihlstrom, Inc., and entitled "Report on Storm Water Drainage for the Northern Two-Thirds of the City of Inver Grove Heights". This was introduced as Agency Ex. 11 and will be referred to as the 1974 Report.

Unlike the 1964 Report, which dealt with a relatively small area and proposed the construction of a relatively small storm sewer drainage system, the 1974 Report is a long-range study of a very large area, with only generalized suggestions for construction. Its relevance to this proceeding is two-fold: (1) in its general discussion, it contains observations about the effect of urbanization on storm water and proposes methods to deal with that effect; and (2) it proposes an overall plan whereby the south outfall

would serve as the terminus of a far larger drainage area than it presently serves.

54. The 1974 Report's observation of the change in storm water runoff pattern as urbanization increases are consistent with testimony from the Department's witnesses. The Report states:

The increasing development of the city brings with it inherent storm water drainage problems. Drainage facilities provided for individual small clusters of development will usually have little effect on the surrounding land area, however. As the clusters increase in number and area the accumulative effects of drainage result in problems requiring solution on a drainage basis and/or on a city-wide basis.

With development of the city will come the transition from the natural, rural drainage to an urban drainage system necessary to accommodate increased rates and larger volumes of run-off.

It is the purpose of this report to provide the basis for the control of development in and adjacent to the lands required for the ultimate accomplishment of a drainage system and to guide the city officials in the establishment of a program of land reservation or acquisition to accommodate the system.

The Report then goes on to outline the fact that in light of the topography in the City, the use of depressions and ponds for storm water detention and retention will result in a number of benefits, including "provision for sediment and debris collection."

The Report then divides the northern two-thirds of the City into eleven major drainage districts and proposes a plan for each. The southern outfall is proposed as the terminus of the drainage from Districts IV, V, and VI. At present, it serves only the southern half of District VI.*

In discussing the present situation in District VI, the Report states: The present drainage system within the developed South Grove Additions consists of overland flow in the street gutters collecting in an open drainage channel on the back lot lines in the area of 71st Street and continuing in a gully and culvert under Concord Boulevard, across the Bituminous Surface Treating Company gravel pit, under the railroad tracks and on to the river.

55. The City Council apparently directed that preliminary engineering studies be prepared with respect to at least some of these areas because Minutes of a City Council meeting held on March 6, 1978 (after the Department had indicated its concern about the sediment problem, but before the Department's Order to Restore on April 28, 1978), indicate that a number of different municipal improvement projects were considered. Of particular interest is Project 1978-13, entitled "South Grove Storm Sewer". (This project is not adequately described so as to enable a person reading the minutes to know, in detail, its provisions.) However, the Council voted unanimously to abandon the project. The minutes contain the following explanation:

Council members concluded the plan proposed for the South Grove Storm Drainage was not a long-term solution; in a very short time, they would be looking at the project again.

RIVER-BORNE SEDIMENT AND DEBRIS - SOUTH OUTFALL

56. The next source of material in the channel at the south outfall can be dealt with more briefly: it is the sediment and debris which has floated down the river and has been deposited at the site.

There is no question but that debris, in the form of huge logs and smaller items (such as a section of dock) has floated down the river and become "hung up" at the south outfall site. In addition to such items, sand and silt has also been deposited there. More complex is the question

While the Report proposes the use of ponds and natural depressions as detention and retention facilities for Districts IV, V, and the northern part of VI, it does not propose the use of any ponding sites for the south-

ern half of District VI, tne area presently contributing to the south out-fall.

of responsibility for this material, and in particular the State's assertion that, but for the Lametti dumping and the deposition from the outfall, the material from upriver would not have been deposited at this site but would have floated past the site and onward downstream.

Residents testified that in earlier years, there had been a substantial current in this area, so substantial, in fact, that they had been warned by their parents not to swim in the area and not to walk on the ice (indeed, in some years, the current was such that there was no ice) . However, in more recent years, people testified they had felt free to walk and even snowmobile on the ice. Obviously, there has been a change in the velocity of the flow through the channel.

This change in velocity is found to be the cause of some of the sediment and debris at the south outfall. As the width of the open channel decreased, the ability of larger logs and debris to pass through decreased. Because of this new debris, flows were further reduced, and sediment was deposited. This is a vicious cycle and has been responsible for a portion of the blockage shown in the picture.

The question of whether the City is responsible for this portion, however, is a close one. While the burden of proof was upon the Department, the standard needed to meet that burden was slight: a preponderance of the evidence. The Examiner finds that but for the Lametti dumping and the deposition resulting from the drainageway's outfall, the site would have been wider, providing a bigger passageway for large debris and less restrictions of flow for sediment-laden waters.

OTHER SOURCES OF DEPOSITION - SOUTH OUTFALL

57. Another source of sediment and debris which must be examined is "post-Lametti" dumping and levelling on the site by the City, as well as "scavenger dumping" by the public.

Since the Lametti dumping, the City has both added to, and removed from, the rock fill on the site. Consistent with one of the motivations for allowing Lametti to dump there in the first place, the City has, from time to time, removed material from the site for use in other projects. Ed Kurth, the City's Street Superintendent, estimated that the City had removed about 100 truckloads of fill for use in other places and that each such load would have measured 1.5 to 2 yards of material. John Davidson confirmed this usage.

The City has deposited additional material on the site. Kurth also testified that as late as the fall of 1977, the City had used the site for storage of rock fill from other projects. In addition, during the recent Dutch Elm Tree Removal Program, the site was used for a yarding and chopping area. John Davidson testified that the site was suitable for this use because it had been levelled off sometime between 1973 and 1975.

Davidson also testified that people were using the south slope of the site for boat launching. To stop this, the City placed large tree trunks across the area to prevent access to the river.

58. A relatively minor source of sediment in the channel comes from erosion of materials off the dump fill site into the river. This was ap-

parently a particular problem following the August, 1977 rainstorm and larger rains in 1978. While this has exacerbated deposition in the "boat ramp" area on the southeast corner of the site, it really goes to demonstrate the problems encountered when materials are placed near the river in such a way as to cause them to be susceptible to erosion in times of heavy rain.

59. The final source of materials at the site is indiscriminate dumping of asphalt, tree branches, concrete, and other debris (including a refrigerator) by members of the public. The City's reaction to this has been to place "NO DUMPING" signs at the site. In addition, one of the reasons given by Ed Kurth for the City's levelling off the site from time to time is to clean up the site and make it look less like a dump so that the public wouldn't think it was an appropriate dumping site. Other than fencing it off completely, the Examiner is satisfied that the City has acted reasonably with respect to this public dumping.

60. The City has, from time to time, removed trees and other debris from the river as part of its general maintenance.

61. There was a statement in the record suggesting that at some time in the past, the City had dredged the channel at the south outfall. The Examiner finds that there was insufficient proof of this fact to give it any credence. In fact, in light of the absence of any reference to it by residents (who testified about most everything else that had occurred on the site for many years), the Examiner strongly questions whether it ever occurred.

LEGAL ANALYSIS - SOUTH OUTFALL

62. Keeping in mind the fact that the material at the south outfall site comes from a variety of sources,* the question then arises as to the City's responsibility for removing it.

In order to preserve some clarity in the face of such a complex fact situation, each source of sediment will be dealt with separately.

63. With respect to the Lametti dumping in 1971-1972, it has been found that this dumping was done with the knowledge of, and at the direction of, the Village. It has also been found that it did change the cross-section of the river. Whether it meets the Kulvar test of public detriment, however, is a difficult question because of the public testimony of navigation before and after 1972. Based upon a review of that testimony, the Examiner concludes that the Lametti dumping does meet the Kulvar test, primarily because of its constriction of the channel which has resulted in (a) increased "hang-ups" of trees and other river-borne debris, and (b) increased deposition of river-borne sediment. These were a "reasonably likely" future consequence of the Lametti dumping, and thus, under Kulvar, justify invoking the sanctions of Chapter 105.

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The sources are Lametti dumping, watershed drainage, river deposition, post-Lametti City dumping, erosion from the site itself, and public dumping.

The City argues that at the time of the Lametti dumping, the statute contained an exception to the basic prohibition of changing the cross-section without a permit. That exception read:

Except in the construction and maintenance of highways when the control of public waters is not affected, it shall be unlawful

The City's position is that since the bedrock dump by Lametti at the site was placed there for the "sole and specific purpose" of stabilizing Doane Trail, the activity falls within the exception. The Examiner rejects this argument because of his earlier finding relating to the motivation for the dumping at that site. The stabilization of Doane Trail was a secondary purpose and certainly not the "sole" purpose.

64. With respect to the sedimentation resulting from the operation of the natural drainageway above the south outfall, if the natural drainageway is, legally, no different than the underground system at the north outfall, then the result should be the same. The City, however, claims that there is a decisive difference between the two -- that this southern system is an unimproved and natural surface water drainage area which predates the existence of both the City and the Village, and that at no time has it been improved or adopted by the City into its "storm water discharge system." See, City's Memorandum of Law, pp. 2 and 7.

There is no question that the ditch stretching from well west of Concord to the south outfall has been in existence well before 1940. There is also no question that sediment has passed through this ditch and ended up in the river at least as early as 1940, if not before. However, for the City to disclaim responsibility for the sediment from the ditch today, in 1979, ignores the following:

1. The development of the housing subdivision with the intentional designing of streets and the backyard ditch to collect and disperse water into the drainageway;
2. The use of the "park" ravine to transport water, and the placing of dumped materials both by the City and by the public (at the suggestion of the City) in such a location that it could reasonably be anticipated that it would be eroded into the path of the water in the ravine;
3. The 1964 and 1974 Reports, putting the City on notice of the problems, with the City's rejection of the 1964 proposal in favor of "the surface drainage system";
4. The contraction of the channel by the Lametti filling, which could be reasonably anticipated to lead to the accumulation of debris at the site.

The author of the 1964 Report, while probably no expert in the law,

recognized that the erosion and deposition was a City problem when, at the City's request, he recommended that the City construct a sewer which would constitute a solution to the problem. That project, however, was never built. Ten years later, the 1974 Report noted that the 1964 proposal "was subsequently abandoned in favor of the surface drainage system as it exists today."

65. Both sides make extensive reference to common law tort theories. The Department, acknowledging that this was principally a statutory pro-

ceeding, argued that its position was consistent with the common law, which

would have placed responsibility upon the City. On the other hand, the City argued that even if it had "adopted" the natural ditch as a storm sewer,

the common law provided a "reasonable use" standard which would absolve

the City for responsibility for the sediment because, under the particular facts of this case, its actions were reasonable.

The Examiner would note at the outset that his authority is limited to that granted to him by statute, and in no event can it exceed that of the Commissioner (except with respect to certain minor procedural matters

specifically set forth in Chapter 15 or the Rules of the Office of Hearing Examiners). Reference to the common law tort principles would be entirely

appropriate were this matter being presented to a District Court, or other appropriate court having jurisdiction over tort cases. The Examiner

believes that such jurisdiction lies neither in himself, nor in the Commissioner.

In *McKee v. County of Ramsey*, Minn. 245 N.W.2d 460 (1976),

a general assistance recipient asked the Ramsey County Welfare Department

for permission to incur medical expenses at a hospital other than the one

normally required to be used. The Department denied the request. The recipient

incurred the expenses anyway and then sought reimbursement. The Department again denied the request, and the recipient sought an administrative

appeal on the grounds that the denial of reimbursement was in violation

of the general assistance statute. A hearing was held, and the ensuing

decision affirmed the denial.

McKee then waited a time, but eventually sought relief in the District

Court, alleging for the first time that the Department had been negligent

in its handling of his original request, and that as a result, he was forced to incur the expense. The District Court ruled that the delay in

appealing the administrative decision was fatal (the District Court action

had not been filed within the statutory appeal period), and that McKee was

barred from raising any claims at the District Court level which could have

been raised had the appeal been taken within the statutory period.

McKee appealed to the Supreme Court, which reversed the trial court,

holding that the doctrines of exhaustion of administrative remedies and res judicata did not bar McKee from asserting, and the District Court from

adjudicating, matters which were beyond the jurisdiction of the administrative process. Of particular interest is the Court's discussion of the negligence claim where it cited State ex rel Spurck v. Civil Service Board, 226 Minn. 253, 32 N.W.2d 583 (1948) for the proposition that lack of statutory authority in an administrative agency betokens lack of subject matter jurisdiction, and then proceeded to hold that since McKee's negligence claim was beyond the jurisdiction of the Department, it had to be heard by the District Court.

The Department's claim of negligence, and the City's defense of reasonableness, is in the same category as McKee's negligence claim. It cannot be used by the Commissioner, either to support his original Order or to decide this administrative appeal. Nor is the City's defense applicable at

this time. At such time as this matter gets to the District Court level, then, and only then, may the tort issue be joined and litigated.*

Therefore, the tort theory must be set aside and analysis must focus only on the statutory basis for the Department's claim. The Examiner believes, for the reasons set forth above, that the City is as responsible for sediment coming from the south outfall as it is for sediment coming from the north outfall. The City argues that it has virtually no storm sewer easements along the southerly drainageway, but to base a decision solely on that fact would be to improperly elevate form over substance. The City has not had to acquire easements because the channel has been in existence for decades, if not centuries. However, the City elected to continue using it rather than adopt the 1964 proposal. Had the City built the proposed new system, surely it would not disclaim responsibility. Electing to continue using the old system ought not to give rise to a different result.

66. The City also argues that it ought not to be held responsible for sedimentation from the housing subdivision because the subdivision was constructed prior to the adoption of Resolution No. 1031 and that had the same plan of development been suggested after the adoption of that resolution, it would not have been approved by the City. The City would use the Resolution as a shield to avoid responsibility for pre-resolution activities. The Examiner does not accept this argument because the statutory prohibition against changing the cross-section to the detriment of the public interest has been in force since 1947, and the timing of the housing development was well after that date. The Resolution has no impact upon the question of whether or not the City violated the statute.

67. With respect to river deposition, the key question to ask is whether the City's activities have contributed to sedimentation of river debris and silt which would not be at the outfall site but for the City's activities. As outlined earlier, the answer is that the City has done so. While siltation from upstream sources is a natural phenomenon, and would not normally give rise to responsibility, when the City is responsible for intervening events which substantially increase the amount of deposition, then the City must bear the responsibility.

68. With respect to post-Lametti dumping at the site by the City, there was insufficient evidence regarding the scope and location of such dumping to support an order directing to the City to remove it.

69. With respect to erosion from materials at the site into the river, that erosion would not have occurred unless the materials were at the site in the first place. Therefore, one must ask how the materials got there. The bulk of them got there by virtue of the Lametti dumping, the deposition from the natural drainage way, post-Lametti City dumping, City

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As an aside, The Examiner must admit that he did not reach this conclusion until after he had spent several hours of legal research on the common law and its "reasonable use" rule. For the benefit of the parties, he would direct their attention to State v. Deetz, 66 Wisc. 2d 1, 224 N.W.2d 407 (1974), which might be of interest to them in dealing with the tort issue in another forum.

leveling operations, and public dumping. In theory, the City should only be responsible for removal of erosion from materials it placed there. This cannot be apportioned with precision. The best that can be said is that the dumping for which the City is not responsible (the post-Lametti City dumping and the public dumping) is a small portion, probably less than 15% of the total. Therefore, the City is responsible for curing any blockage due to erosion from materials at the site.

70. As indicated above, public dumping has played same part, albeit small, in the overall problem. As suggested earlier, the City has taken reasonable steps to stop this dumping, and thus cannot be liable for its removal .

STATUTORY AUTHORITY TO ORDER PREPARTION OF A STORM SEWER PLAN

71. The Department has ordered the City to prepare a storm water plan "that will reduce the need for future maintenance dredging" and to forward the plan to the Department prior to any action for implementation.

It should be noted at the outset that the 1974 Report is a long-term plan and that it was supplied to the Department by the City at the time of Bruce Sandstram's first visit to the site. While the City Councils actions of March 6, 1978 indicate some difficulties in implementation of aspects of the Plan, the minutes also indicate that tne various projects laid on the table may soon be resurrected. Unfortunately, the adversary posture of the City and the Department requires that the issue of the propriety of the Department's Order be placed in issue rather than having the two work together toward an acceptable plan.

The Department believes it had the authority to order the plan because the City's continued use of the drainage way leading to tne south outfall and the storm sewer leading to the north outfall will both constitute continuing violations of Chapter 105 due to continuing sediment deposition. In addition, the Department relies upon the declaration of policy set forth in Minn. Stat. sec. 105.38, subd. 3, as amended in 1973, which states:

The state shall control and supervise, so far as practicable, any activity . . . which will change the . . . cross-section of public waters, including but not limited to die construction of . . . waterway obstructions in any of the public waters of the state.

The City, on the otner hand, argues that the statutes contain no

grant of authority for the Department to issue such an Order and that merely because there may be a perceived problem, the Department may not extend the statutes so as to "create" authority to solve the problem.

Again, reference to case law provides an answer. Two cases are of importance. In *State ex rel. Spurck v. Civil Service board*, 226 Minn. 352, 32 N.W.2d 583 (1948), the Court was faced, for the third time, with issues arising out of a state employee's claim that he was entitled to employment at a certain classification. While the fact situation is too complex to warrant a complete description here, suffice it to say that the employee was discharged, and pursuant to statute, sought to appeal his discharge to the Civil Service Board. The statute in question read, in relevant part, as follows:

. . . After hearing and considering the evidence for and against the disciplinary action, the board shall approve or disapprove the action. In the case of approval, the disciplinary action shall be deemed final as ordered. In the case of disapproval the board shall reinstate the employee under such conditions as it deems proper and may order full pay for lost time. (Emphasis supplied)

The Board approved the dismissal. The employee then appealed the Board's

approval to the district court. The district court reversed the Board's

action. The Board then decided to reinstate the employee in a lower-paying

classification for which there was not even a vacancy. The employee was

placed on a waiting list for possible employment when a vacancy occurred.

The employee then sought a writ of mandamus to compel his immediate employ-

ment, at the higher paying classification. The district court denied the

writ. The Supreme Court reversed on the grounds that when the statute required "reinstatement," the Board could not use its rights to impose condi-

tions on such reinstatement which resulted in (a) not immediately employing

the person, and (b) lowering his classification. The Court determined that

"reinstatement" meant immediate employment at the higher classification,

and, pertinent to the Inver Grove Heights matter, the Court held that the

Board lacked the statutory authority, and thus, the subject matter juris-

diction to do anything other than immediately reinstate the employee.

In the words of the Court:

Jurisdiction of an administrative agency consists of the powers granted it by statute. Lack of statutory power be-tokens lack of jurisdiction. It is therefore well settled that a determination of an administrative agency is void

. . . where it is made either without statutory power or in excess thereof.

The second case of interest is less complex, but no less on point.

it is state, by Spannaus, v. Fry Roofing Co., Minn. 246 N.W.2d

696 (1976). In that case, the Pollution Control Agency had adopted a rule empowering the director to order persons responsible for emission of air

contaminants to make certain tests, at their own expense, and report the

results of the tests to the Director. Pursuant to this rule, the Direc-

tor ordered Fry to conduct tests. Fry refused, and the Director sought an injunction compelling Fry to conduct the tests. The district court refused to grant the injunction holding that the Agency had no statutory

authority to promulgate the rule. The Agency appealed and the Supreme Court affirmed.

On appeal, the Agency admitted that nowhere in the relevant statute

was it explicitly vested with authority to issue either orders or rules authorizing orders of the type at issue. Rather, the Agency tried to infer

the existence of the power from other powers which were explicitly gran-

ted to it by statute. For example, in the water pollution area, the Agency was authorized to

. . . adopt, issue or enforce reasonable orders, permits, variances, standards, regulations . . . in order to prevent, control, or abate water pollution. . . .

However, in the case of air pollution, the Agency was empowered to:

adopt, amend and rescind regulations and standards . . . relating to any purpose within the provisions of Laws 1969, Chapter 1046, for the prevention, abatement or control of air pollution. . . .

The Court focussed on the absence of language empowering the Agency to issue orders in the air pollution field, agreeing with the district court that had the legislature so intended, it could have easily taken the water pollution language and included it in the air pollution statute. The Court concluded that the Agency: I . . . lacked statutory authority to issue an order, or a regulation authorizing an order, requiring Fry to conduct area emission tests at its own expense.

Clearly, the Court is calling for a strict construction of statutory authorizations. In this light, Chapter 105 must be reviewed to determine whether the Department can order the City to prepare a plan.

While there is no question but that the Commisisoner (unlike the PCA PCA Director in Fry) does have the power to issue orders, tne Examiner finds that the power is limited to certain types of orders. These do not include the Order to prepare a Plan.

The power to issue orders which is directly applicable to this matter is found in Minn. Stat. sec. 105.462, as amended in 1977. That section (quoted in full in Finding No. 28) states that whenever the Commissioner determines that the public interest so requires, he may investigate:

any activities being conducted in relation to public waters without a permit as required by sections 105,37 to 105.55. (Emphasis supplied)

The statute then goes on to provide:

With or without a public hearing the commissioner may make findings and issue orders as otherwise may he issued pursuant to sections 105.37 to 105.55. (Emphasis supplied)

The key to the question then turns on whether sections 105.37 to 105.55 apply to this issue so as to require a permit for the planning of a storm sewer system. The answer is that they do not, at least as of April 28, 1978.* The essential distinction may be understood by comparing the pre-

paration of a plan with the construction or maintenance of an outfall. As has been concluded above, the City failed to obtain a permit in connection with the maintenance of the north outfall and certain of its activities at the south outfall. However, had the City formally adopted the Plan set forth in the 1974 Report, the adoption of that Plan would not, per se, require the obtaining of a permit. The requirement for obtaining a permit occurs at the point of implementation of the Plan, by constructing an outfall, for example. While, for practical reasons, a city may desire to obtain permits at an earlier stage, so as to avoid wasting effort in the event that the permit would require modification of its plans, it is not required, under sections 105.37 to 105.55, to obtain a permit, either at the time that it commissions a Plan, or adopts one. That being the case, The commisaioner is without statutory authority to require a Plan, and Minn. Rule 6 MCAR sec. 1.5020 - 5026 may have altered this, but those rules did not become effective until after April 28, 1978, the date of the Commissioner's order.

thus, both he and the Examiner lack subject matter jurisdiction to order the City to prepare one.

The Department has some compelling arguments with respect to the logic, reasonableness and practicality of a statutory scheme which would allow it to order the City to remove sediment but would not allow it to order the City to prepare and implement a plan to correct the underlying problem which resulted in the sedimentation. Absent such a plan, the Department fears it may be forced to go through this whole process again and again. The only answer* which the Examiner can give to the Department is the same answer which the Supreme Court gave to the PCA in the Fry case:

. . . the proper place for it to seek such authority is the legislative body which created the agency and specified its authority.

Based upon the foregoing Findings, the Examiner hereby makes the following:

CONCLUSIONS OF LAW

1. The complexity of this matter prevented a coherent separation between Findings of Fact and Conclusions of Law. Therefore, any of the foregoing Findings which should be more properly deemed Conclusions are hereby adopted as such.

2. That the Department duly acquired and has jurisdiction in all aspects of this matter except that it lacks subject matter jurisdiction to order the preparation and submittal of a storm sewer plan.

3. Both parties have fulfilled all relevant, substantive and procedural requirements of law or rule.

4. The Department has demonstrated that it would be in the public interest to have sediment and other debris removed from public waters at both the north outfall and the south outfall.

5. The City did not violate Minn. Stat. sec. 105.42 (1971) at the time it constructed or installed the north outfall.

6. The City did violate Minn. Stat. sec. 105.42 (1976) by its maintenance of the storm sewer system leading to the north outfall.

7. The City did violate Minn. Stat. sec. 105.42 (1971) by permitting Lametti & Sons, Inc., to dump bedrock and other debris at the site of the south outfall.

8. The City did violate Minn. Stat. 105.42 (1974) by maintaining the use of the drainageway leading to the south outfall.

9. The City did violate Minn. Stat. sec. 105.42 (1974) by maintaining

an obstruction of public waters which resulted in greater than natural de-
position of river-borne sediment and debris at the south outfall.

10. The City did not violate Minn. Stat. sec. 105.42 (1974) by using
the south outfall site for post-Lametti dumping.

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Another possible route for this Department to follow in attempting to re-
quire a plan is the district court route where equity jurisdiction
might

lie base! upon a tortious nuisance theory. The has no
knowledge

or opinion of the probabilities of success or failure of such an
attempt.

11. The City did violate Minn. Stat. sec. 105.42 (1974) by permitting materials for which it was responsible for placing at the south outfall site to be positioned in such a way as to result in erosion from those materials into public waters at the south outfall site.

12. The City did not violate Minn. Stat. sec. 105.42 (1974) with respect to any dumping by the public at the site of the south outfall.

13. The Department's Order to restore the public waters at both the north outfall and the south outfall "to the condition existing before unlawful activities . . . were undertaken" /Minn. Stat. sec. 105.461 (1977 SuPP.17 is proper in all respects except as it purports to order removal of materials at the south outfall placed there by post-Lametti City dumping or public dumping. While it is impossible to apportion the percentages at the north outfall, virtually all of the sediment is subject to the Order. At the south outfall, the significant majority (approximately 85%) of the material is subject to the Order. See the attached Memorandum for a suggested procedure to deal with this differential.

Based upon the foregoing, the Examiner hereby makes the following:

R E C O M M E N D A T I O N

That the Department's Order of April 28, 1978, be affirmed in all respects except the following:

1. As it would require the preparation and submission of a storm sewer plan.
 2. As it would require the removal of publicly dumped materials or post-Lametti City-dumped materials.
- Dated this 16th day of April, 1979,

ALLAN W. KLEIN
Hearing Examiner

M E M O R A N D U M

As has been mentioned throughout this Report, there is a problem of apportioning, by source, the materials at the south outfall. The decisions reached above, affirming the Commissioner's order to remove approximately 85% of the materials, are decisions mandated by the legal process. It is the firm belief of the Examiner that before any implementation of his decision occurs, representatives of the parties ought to "switch gears" and talk with each other in practical terms rather than legal terms, in order to determine just what ought to be removed.

Clearly, the thrust of Chapter 105 (and the Supreme Court in Kulvar) is to permit the Department, as trustee for the public, to enforce the public's rights to navigate and otherwise utilize public waters. The protection of these rights ought to be the concern of both the Department and the City, for both represent the public and are charged with acting in the public interest. The decision of which materials to remove ought to be based upon maximizing the public interest, and thus, it is hoped that the decision will be based on the practical consideration of removing those materials which are the greatest detriment to the public interest, regardless

of their source. It is entirely possible that the public interest could be vindicated if only 50%, 60%, or some portion less than 85% were removed. The Department should recognize that saving taxpayers' dollars is also in the public interest, and thus it is hoped that its representatives would not insist on removal of more fill and debris than is necessary to promote the public's interest in navigation and other uses of the river.

The City Council should also face the fact that some day, in some way, it will have to deal with the southern drainageway. While the Examiner lacks both the authority and the knowledge to even suggest what method should be used, the present situation cannot be permitted to continue ad infinitum. A starting point may be the Davidson-Sandstrom. Conversation relating to using a portion of the B-tu-Mix gravel pit for a siltation pond. But regardless of what approach is finally decided upon, prudence and reasonableness demands some long-term solution to the problem of the southern drainageway.

Finally, the Examiner hopes that this matter can be resolved by cooperation, rather than confrontation. The expense to the taxpayers of the City and the State of further confrontations, as well as the intangible expense to the public of continued channel blockages, all suggest that it is cheaper, in the long run, to work toward a long-term solution to the problems than to do nothing more than the minimum required. The City may feel that such long-term solutions are too expensive. However, it must realize that it has a special duty to find satisfactory solutions. As the Minnesota Supreme Court stated in an environmental case* involving a county:

Indeed, as a political subdivision of the state, the county has a greater duty than does a private individual to see that legislative policy is carried out. As a creature of the state deriving its sovereignty from the state, the county should play a leadership role in carrying out legislative policy.

ALLAN W. KLEIN

N O T I C E

This Report is a recommendation, not a final decision. The Commissioner of Natural Resources will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. sec.

15.0421, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely

affected by this report to file exceptions and present argument to the Commissioner. Parties should contact Tibor M. Gallo, Special Assistant Attorney

General, Department of Natural Resources, 3rd Floor, Centennial Office Building, St. Paul, Minnesota - 55155, to ascertain the procedure for filing exceptions or presenting argument.

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County of FreeBorn v. Bryson, 309

178, 243 N.W. 2d 316 (1976)

