

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Administrative
Penalty Order Issued to the City of
Duluth

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Steve M. Mihalchick, Administrative Law Judge, on May 14, 1996, in Duluth, Minnesota.

Appearing on behalf of the City of Duluth (the City) was Bryan F. Brown, Deputy City Attorney, 410 City Hall, Duluth, Minnesota 55802-1198.

Appearing on behalf of the staff of the Minnesota Pollution Control Agency (the Agency) was William P. Hefner, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127.

The hearing concluded at the end of the day on May 14, and the record closed on May 23, 1996, upon receipt of post-hearing briefs from both sides.

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the Commissioner of the Pollution Control Agency shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with the Commissioner.

STATEMENT OF ISSUES

1. Is the City responsible for the acts and omissions of its employee, the City Plumber, with regard to violations of Minn. Stat. § 115.061 and Minn. R. 7001.1030?

2. Is the Administrative Penalty Order, imposing a unforgivable penalty of \$4,375 for such violations unreasonable under Minn. Stat. § 116.072?

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

FINDINGS OF FACT

1. The old Duluth National Guard Armory (the Armory) is located just northeast of the central downtown area. It is between London Road and Jefferson Street, between 13th Avenue East and 14th Avenue East. There is nothing between the Armory and Lake Superior except for London Road, a parking lot, the new I-35 freeway, and a lakeside park and trail. On the other side of the Armory is the hillside which characterizes this part of Duluth. It is about 600 feet from the Armory to Lake Superior. Exs. N and S.

2. The date of construction of the Armory is unknown in this record, but there is anecdotal evidence to suggest it was built in the first two decades of this century. At some time prior to that, a large culvert (the Culvert) was built to carry Chester Creek under the streets and buildings in the area. Chester Creek begins in the highlands above the City, near what is now the present airport, and proceeds in a southeasterly direction down the hill to Lake Superior. It enters the Culvert about two blocks above the Armory. It then runs through the Culvert, under the Armory, under London Road, under I-35, and exits the Culvert at the shore of Lake Superior. Ex. S.

3. Chester Creek is a designated trout stream. It is listed in Minn. R. 6262.0400, subp. 4 (1995). Ex. 7. As such, it is automatically deemed to be an outstanding resource value water by the Minnesota Pollution Control Agency, and has special treatment and protection given to it by that agency, as well as the Department of Natural Resources. The designation includes the area in question, which is the area immediately upstream of the mouth of the creek at Lake Superior.

4. Lake Superior itself is also an outstanding resource value water, giving it the same protections from the Pollution Control Agency.

5. At the time that the Armory was built, a drainage system was installed to carry storm water from the roof of the Armory, as well as floor drains from various parts of the building, into the Culvert underneath the building. This meant that these waters flowed into Chester Creek.

6. In addition to the waters from the Armory, Chester Creek serves as a depository for much non-point surface water runoff, as well as for catch basins in the streets. For example, Ex. Q shows catch basins in 13th Avenue East being piped into the Culvert that carries the creek.

7. The Culvert is constructed of concrete and rock and is approximately ten feet high and eight feet wide. It is shown on the Exhibits U and V. Its intake is shown on Ex. T. It has also been referred to in these proceedings as a tunnel, which may be more descriptive of its character.

8. In 1978, ownership of the Armory was transferred from the State of Minnesota to the City of Duluth. While the building had been used principally as a National Guard Armory, it had also been used for the Duluth Symphony Orchestra and various circus performances. After acquiring the building in 1978, the City used it for storage of documents, storage of street maintenance equipment, storage of lawn

maintenance equipment, and as “office-warehouse space” for the Duluth CAP Program, which at that time was part of the City.

9. At some point in the 1980s, the Duluth CAP Program became independent, but it continued to have offices, storage space, and parking for its vehicle in the old Armory.

10. The CAP Program had offices on the London Road level of the building, commonly known as the basement. The City also used some of the basement-level space. The City had exclusive use of the first floor. The City parked vehicles on the first floor, as well as in the basement level. The CAP Program parked vehicles in the basement level and also stored insulation and other weatherization products there.

11. Drains led from the floor of the first floor (where the City parked its vehicles) to the ceiling of the basement level. Collector pipes ran from the ceiling of the basement level to a 55-gallon drum located on the floor of the basement. As the drum filled up, water would overflow into a floor drain on the basement level. The drum acted as a waste trap whose purpose was to catch heavy sediments, such as sand, before they flowed into the basement drain. Ex. R.

12. The basement floor drain empties into a pipe that goes down through a sub-basement, then empties into the Culvert through an opening in its ceiling. Ex. G.

13. The basement floor drain was also near a wash rack, which was used for washing of City vehicles as well as CAP vehicles. The City maintained a high-pressure washing system there, but the City took it out at some point. Both before and after the high-pressure wash system was removed, however, the City routinely washed street maintenance vehicles, such as road graders, dump trucks, automobiles, and large lawnmowers there. The waste water from this washing went down the drain on the floor of the basement. In addition, the drain received waste water from ordinary cleaning, such as emptying of mop pails. Finally, the drain received waste water from cleaning of paint brushes (the City painted their hockey boards at this location).

14. The drain in the basement floor had a trap, or catch basin box, designed to trap out sand and other debris before it went down the drain. In the ordinary course of business, this trap would fill up with grit, sand, petroleum residue, and other materials. Since the CAP offices were located on the same level as the drain, it fell to Dale Klinschmidt, the CAP purchasing coordinator, to clean it out. Every several months, he would lift the drain cover up, place it out of the way, and then shovel the “goo” out of the trap. The City would then take the “Goo” away. This cleaning was not done on any regular basis -- whenever the water stopped going down the drain, and stood on the floor, Klinschmidt knew it was time to clean out the trap, and he did it. In fact, there was never any formal arrangement between the City and CAP with regard to this activity. Klinschmidt just undertook it, voluntarily, and the practice evolved.

15. In March or April of 1994, Klinschmidt cleaned out the trap, but water still would not go down the drain. He tried to flush out the pipe with a hose, but it did not work very well. So Klinschmidt called the City’s Property Management Division, and asked them to send down someone to figure out the problem. Two City plumbers appeared. One of them was Steve Shoberg, who Klinschmidt knew casually. The other

was unknown to Klinschmidt. The two plumbers tried to unplug the pipe with a short snake, and then with a longer one, but neither were successful. So Klinschmidt and the two City plumbers unlocked the door to a sub-basement to see how long the pipe was. The sub-basement contains boilers and an old rifle range used by the national guard. Klinschmidt and the two plumbers followed the pipe from the drain to the point where it went into the floor of the sub-basement. Shoberg then offered to show Klinschmidt the tunnel under the building, and took him to a manhole on the floor of the sub-basement. This manhole is depicted in Ex. R, the last photograph. They opened up the manhole, and climbed down rungs on the side of it to and along the side of the vault until they reached the bottom of the vault where the creek was flowing. While there was some light in the tunnel, they were using flashlights as well. They walked away from the manhole down the tunnel when suddenly the pipe from the drain “let go”, a “black, oily plug” dropped into the creek, and Klinschmidt noticed a smell of petroleum products. They remarked about the drain having opened up, and then continued to look around the vault area. After a few minutes, they climbed back up the manhole, and went about their business.

16. Shoberg, the City Plumber, never notified the PCA or his supervisors of the fact that the basement floor drain discharged directly into the Culvert and Chester Creek.

17. Roughly ten months later, in February of 1995, Klinschmidt happened to be performing an energy audit for Darrin Saari, an employee of the Pollution Control Agency in Duluth. In the course of their conversation, Klinschmidt reported the incident to Saari and indicated that as far as Klinschmidt knew, the City had not done anything to reroute the floor drain away from the creek. Saari relayed the information to Jeff Stollenwerk, a water quality specialist in the Agency’s Duluth Regional Office. Due to the press of other complaints and other water quality matters, the matter sat on Stollenwerk’s desk for several months until Klinschmidt inquired about its progress. At that point, the two had a lengthier discussion about what Klinschmidt had observed and about the fact that the City had done nothing to correct the problem.

18. On September 14, 1995, Stollenwerk met with Stephen Lipinski, who is in the City’s Department of Public Works, and other City personnel. They performed a dye test and confirmed that the floor drain on the basement floor did, in fact, drain into the Culvert. They also noted the floor drains from the upper level parking area that discharged into the creek.

19. The Agency’s Water Quality staff conduct an “enforcement forum” to determine the appropriate response to the discovery. The forum determined that at least as a preliminary matter, an Administrative Penalty Order would be the appropriate agency response to the situation.

20. On November 1, 1995, the Agency sent it first “ten-day letter” to the City. The letter notified the City, formally, that violations may have occurred, and asked for a response. The letter cited Minn. Stat. § 115.061, the Duty to Notify of a Discharge, and Minn. R. 7001.1030, which requires a permit for a point source discharge. The letter also requested a list of other City buildings that may have similar drain systems which

discharge into waters of the state. Finally, the letter requested information about the history of the drain and what waste might have been discharged into it. Exs.1 and E.

21. On November 20, 1995, the City replied. The City indicated that it was in the process of disconnecting the wash bay water supply, modifying the 55-gallon barrel, and moving the discharge from the floor drain from the creek into the regular sanitary sewer line. This was anticipated to be done on November 21. The City went on to provide some history of the operation in the Armory, indicating that it was not aware that the drain went into the creek. The letter disclosed that the City had just discovered a similar situation on the opposite end of the building, and that it had retained an engineering firm to design the flammable waste traps and other items required for a permanent connection to the sanitary sewer system. Exs. 2 and I. At that point in time, Shoberg was still denying any prior knowledge of the floor drain discharging into the Culvert.

22. The Agency was unhappy with the City's response, particularly the City's denial that it had any prior knowledge of the drain discharging into the creek. Stollenwerk felt that the response was incomplete and conflicted with the true facts.

23. On December 21, 1995, a second "ten-day letter" was sent to the City, indicating that additional information was needed regarding what type of materials may have entered the floor drains, asking for a more specific plan to investigate other City-owned buildings which might have similar unpermitted discharges, and challenging the City's assertion that it didn't know the drain went into the creek. Exs. 3 and J.

24. On January 9, 1996, a meeting was held between Agency staff and City staff in an attempt to resolve the matter. On January 11, the City responded to the second request with more information about what wastes might have gone down the drain and offered to prepare a formal action plan to investigate other City buildings within a thirty-day period. The City noted that it had received an estimate of \$40,000 to correct the main drain, and \$20,000 to correct the drain at the other end of the building. Exs. 4 and K. On January 24, 1996, the City faxed the MSDS for the vehicle cleaner to Stollenwerk. The strongest cleaner known to have been used by the City since 1978 is Johnson J-Wax "Believe" Mass Transit Vehicle Cleaner. The MSDS appears to show it as a "moderate" hazard, but it is difficult to read. Ex. 5.

25. At some point shortly after January 11, the Water Quality staff had a second enforcement forum to decide on an appropriate penalty for the City.

26. Shoberg, the City Plumber, did not testify at the hearing, but did give an unsworn statement to a City investigator on April 19, 1996, when the City's Attorney's office was preparing for a hearing. In that statement, Shoberg indicated that he had been in the National Guard at the time that the Guard owned the Armory and used it, and that "when the National Guard was there, boy they used some strong cleaners and stuff on that equipment to get it clean". Ex. F, p. 6. Shoberg told the investigator that he thought the drains that opened into the Culvert were the roof drains from the Armory, and that that was not a problem. According to the investigator, who testified at the hearing, it was not until about a week prior to the hearing that Shoberg first "remembered" that he may have been aware that the floor drain also discharged into the Culvert.

27. The enforcement forum determined that both a statute (the duty to notify set forth in Minn. Stat. § 115.016) and a rule (Minn. R. 7001.1030, requiring an MPDES permit) had been violated by the City's maintenance of a point source discharge in the old Armory Building. In determining the amount of fine, the Agency uses a two-step process. First, a base penalty amount is calculated, and then, the penalty amount is adjusted depending upon a variety of factors.

28. The base penalty amount is determined from a matrix, which contains figures from \$0 to \$10,000 based on two factors. The first is "deviation from compliance", while the second is "potential for harm". The staff determined that the deviation from compliance should be rated as "serious" because the staff considers self reporting as fundamental to the State's pollution control system. The staff believes that situations such as the Duluth drain constitute a threat to the system because of the failure of the City to report. The staff points out that the City plumber, Shoberg, knew that the drain emptied into the Culvert, and that the Culvert carried the creek. They argue that this knowledge should have caused the City to report the drain and obtain a permit. The fact that the City did not report it caused the Agency to rate the deviation from compliance as "serious".

29. The second factor in calculating the base penalty amount is the "potential for harm". The staff rated this as "moderate" for the City's drain because there was little actual evidence of what kinds of substances had been allowed to enter the creek through the drain, and in what quantities. The staff recognized that this was not a continuous discharge, but was rather intermittent. Nonetheless, the staff also reasoned that detergents, salt, petroleum products and paint could affect invertebrate and vertebrate populations in the creek, as well as allow for the bioaccumulation of metals such as lead. However, the lack of data about what actually had occurred led the staff to reason that "moderate" was the appropriate category necessitating the potential for harm.

30. The base penalty amount given those two determinations is set at \$2,000 to \$5,000 by the matrix. The Agency staff took the midpoint of those two figures, \$3,500, to be its base penalty amount.

31. The staff then "enhanced" (raised) the penalty by 25 percent to reflect the culpability/willfulness of the City. The staff reasoned that the City plumber actively participated in cleaning the drain, saw the "goo" discharge into the creek, took no actions to eliminate the discharge, and said nothing about it to anyone. This enhancement, which amounts to \$875, raised the total penalty to \$4,375.

32. The enforcement forum further determined that the penalty should be made nonforgivable because the violation was considered "serious" on the "deviation from compliance" scale. The statute, at Minn. Stat. § 116.072, subd. 5 (1994), provides that if the Commission determines that a violation has been corrected, then a penalty must be forgiven unless there is a repeated or serious violation, in which case the Commissioner may issue a nonforgivable penalty.

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the Pollution Control Agency have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 116.072.

2. The City is a person subject to the requirements of Minn. Stat. Chs. 115 and 116. Minn. Stat. §§ 15.01, subd. 10, and 116.06, subd. 17. The City, as a municipal corporation and employer, is responsible for the acts and omissions of its employees acting, or failing to act, within the scope of their employment with regard to requirements imposed upon the City by Minn. Stat. Chs. 115 and 116; Minn. Stat. § 466.02. *Lorshbough v. Township of Buzzle*, 258 N.W.2d 96 (Minn. 1977); *Laurie v. Mueller*, 78 N.W.2d 434, 248 Minn. 1956; *P.L. v. Aubert*, 527 N.W.2d 142 (Minn. App. 1995), review granted April 27, 1995.

3. The City is responsible for the failure of its employee, the City Plumber, to report the fact that the basement floor drain in the Armory discharged into the Culvert below the building, and thereby, Chester Creek, to his supervisors or to other appropriate agencies. The employee's knowledge is imputed to the City.

4. The failure of the City to report the existence of the ongoing discharge from the basement floor drain under its control into Chester Creek and its failure to recover any of the discharged pollutants violated Minn. Stat. § 115.061.

5. The discharges from the basement floor drain into Chester Creek over the period of time the City owned the Armory constituted "pollution of water" because it consisted of the discharge of sand, oil, chemicals, and other materials into the waters of the state so as to be potentially harmful, detrimental, or injurious to the public health, safety or welfare, other legitimate uses, or to animals, birds, fish or other aquatic life, all as defined in Minn. Stat. § 115.01.

6. The discharge of the pollutants through the basement floor drain into Chester Creek during the period of ownership of the Armory by the City without an NPDES Permit violated Minn. R. 7001.1030.

7. The penalty assessed against the City of an unforgivable amount of \$4,375 is not unreasonable. Because the knowledge of the City Plumber is imputed to the City and because the City is responsible for the City Plumber's failures to take appropriate action in this case, the Agency properly determined the penalty in light of the City's "knowledge", with reasonable consideration of the potential harm to Chester Creek and Lake Superior, and with adequate consideration of all the factors listed in Minn. Stat. § 116.072, subd. 2. The Agency's determination that the deviation from compliance was serious based upon the failure to self-report the discharge or to self-initiate corrective action is not unreasonable. Such action is required by the statute and rules and should be encouraged and failure to take such actions must be discouraged. The Agency's policy of labeling the failure to take such action as serious is an appropriate measure of the need for compliance with the statute and rule. Likewise, the enhancement to the penalty and making it unforgivable are not unreasonable for the reasons given by the Agency.

8. Because the amount of the proposed penalty is not unreasonable, it should be affirmed. Minn. Stat. § 116.072, subd. 6(c).

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

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that the Commissioner of the Pollution Control Agency AFFIRM the proposed Administrative Penalty Order.

Dated this 24th day of June 1996.

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Tape recorded,
Not transcribed.
Four tapes

MEMORANDUM

The City argues that the Agency did not prove that there was any pollution occurring from the discharge of the basement floor drain into Chester Creek. The City's evidence and argument is that the Agency did no sampling or testing and produced no evidence of any degradation of the water quality in Chester Creek from the Armory down to Lake Superior. The City is correct on that point. The evidence in this case is that the discharge consisted of the material washed off the outside of cars, trucks, mowers, and similar equipment parked in the Armory and sometimes washed there. No vehicle maintenance was done at the Armory and there is no evidence of any large amounts of oil or grease or similar products finding their way down the floor drain. Moreover, the City argues, the hundreds of vehicles on the roads and parking lots in the area that drain into Chester Creek are also a significant source of the same material that went down the floor drain.

On the other hand, the Agency presented evidence of sand, salt, oil, gas, paint, waste water and grass clippings released down the drain on many occasions over the period the City owned the building. One witness testified as to the oil and gas residue in the floor drain on the occasions that he cleaned the trap and to smelling the petroleum smell on the occasion he went into the Culvert with the City Plumber at the time the plug in the drain "let go". The concentration of parked vehicles and the cleaning of them in the Armory obviously creates a source of potential pollution which makes it

inappropriate to empty the floor drain into Chester Creek. The Administrative Law Judge agrees with the Agency that at least the potential for pollution existed.

The City also argues that it is not responsible for the violation because it should not be responsible for the failure of its City Plumber to act appropriately. The City argues that it cannot be vicariously liable for its employee because it did not hire him to purposely mislead it about the facts of the drain. It bases this argument on *In the Matter of Dougherty*, 42 N.W.2d 485 (Minn. App. 1992). In that case, the court ruled that a corporate president could be held liable, under the responsible corporate officer doctrine, for his corporation's hazardous waste violations because he was in a position of responsibility to influence corporate policies or activities, he could have influenced corporate actions which constituted the violations, and his action or lack of action facilitated the violation. The City contends that it and its employees, other than the plumber, are in the position of the manager in *Dougherty* but had no knowledge. The City's argument is misplaced. This is not a case of attempting to hold the owner or chief executive officer of a corporation personally liable in addition to the liability of his corporation. This is a case of holding the municipal corporation liable for the acts or omissions of its employees. That has long been the policy in tort law as applied to nonpublic corporations and now also applies to municipal corporations. Minn. Stat. § 466.02; *Lorshbough v. Township of Buzzle*, 258 N.W.2d 96 (Minn. 1977).

As the Agency argues, it is entirely appropriate to apply the tort theory of *respondeat superior* to the situation here. The City is a legal entity. The City is not the managers and employees other than the City Plumber. In this case, especially, it is the City Plumber that one would expect to ensure that the water supplies and waste discharges are properly and legally connected. The City has hired its employees to perform their duties legally and it must take responsibility for their actions.

There is some attraction to the City's argument that its managers and public works people other than the City Plumber have cooperated fully with the Agency in the past and promptly responded to the floor drain situation as soon as they became aware of it. There is also the fact that the Agency seems to have felt, erroneously, that even the managers were misleading it when they denied any prior knowledge of the drain by the City. The Administrative Law Judge also has some doubt about the efficacy of one agency of the state fining another agency of the state in order to achieve compliance. However, that is the system established by the Legislature. In light of all the evidence presented at the hearing, it cannot be said that the amount and type of penalty proposed by the Agency is unreasonable. Therefore, it should be affirmed.

S.M.M.