

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 White Bear Lake
and Arnt Construction, Co., Inc.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for an evidentiary hearing before Administrative Law Judge Eric L. Lipman on May 18, May 19 and May 28, 2009. Following the receipt of Post-Hearing Memoranda from the parties, the hearing record closed on July 10, 2009.

Lawrence W. Pry, Assistant Attorney General, appeared on behalf of the Minnesota Pollution Control Agency (MPCA or the agency). Roger A. Jensen, of the law firm of Jensen, Bell, Converse & Erickson, P.A., appeared on behalf of the Respondent City of White Bear Lake (the City). Charles E. Keenan, Christoffel & Elliott, P.A., appeared on behalf of the Respondent Arnt Construction, Co., Inc (Arnt).

STATEMENT OF THE ISSUES

1. Did the Respondents violate the requirements of Minnesota Rules and the National Pollutant Discharge Elimination System/State Disposal System Permit governing construction activity, as set forth in the Notice and Order for Expedited Hearing issued January 8, 2009?

2. Did the MPCA have a reasonable basis to impose an administrative penalty of \$5,600?

The Administrative Law Judge recommends that the Commissioner of the Pollution Control Agency affirm-in-part the Administrative Penalty Order against the City of White Bear Lake and Arnt Construction, Co., Inc.

Based upon the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent City of White Bear Lake ("City") is a Minnesota home rule charter city located in Ramsey County.¹

¹ *Notice and Order for Hearing*, at 2.

2. Respondent Arnt Construction Co., Inc. (“Arnt”) is a Minnesota corporation whose principle place of business is 2190 Phelps Road, Hugo, Minnesota 55038.²

3. The Lake Avenue Project involved the reconstruction of approximately 1.5 miles of roadway and sidewalks between Highway 61 and 10th Street in the City of White Bear Lake. The project site was adjacent to the west side of White Bear Lake, and for much of the length of the project site, was separated from the Lake waters by a steep embankment.³

4. Prior to the construction project, Lake Avenue was a narrow road that had difficulty accommodating access by emergency vehicles or any vehicle that had an accompanying trailer.⁴

5. Similarly, the storm sewer that was in place along Lake Avenue in early 2007 was outdated. This system was originally installed in 1928.⁵

6. In addition to refurbishing the existing thoroughfare, the City improved a bike path that lay parallel to Lake Avenue and upgraded the existing storm sewer and storm water management controls. Among the City’s objectives in undertaking the project were to improve the safety features of the roadway, upgrade the storm water management controls that were in place and reduce the levels of erosion by sediment-laden storm water.⁶

7. The Lake Avenue Project was a difficult and politically controversial undertaking. During a series of public meetings around the City of White Bear Lake, 15 different design alternatives for the project were considered and discussed, before a final plan was adopted by the City.⁷

8. Moreover, because of the scope and scale of the improvements to the roadway, the City assumed greater regulatory risk. By undertaking more substantial repairs and improvements than a simple overlay to the existing roadway, the City was obliged to seek coverage under the Minnesota Pollution Control Agency’s (MPCA) National Pollutant Discharge Elimination System State Disposal System general storm water permit (NPDES Permit).⁸

9. Notwithstanding the greater engineering, political and regulatory risks to the City of undertaking a wide range of improvements to Lake Avenue, the City Council

² *Notice and Order for Hearing*, at 2; Exhibits A, C and K.

³ Exs. B and 10; Testimony of Thomas Petersen.

⁴ Testimony of Mark Burch.

⁵ *Id.*

⁶ Testimony of Mark Sather.

⁷ *Id.*

⁸ Exs. B, C, D and G.

approved a broader set of improvements. The City had earlier completed an Environmental Assessment Worksheet on the Lake Avenue Project. The assessment concluded that a reduction in lake erosion would follow installation of the improvements, and that, as a result, White Bear Lake would benefit from the project.⁹

10. Construction activities on the Lake Avenue Project began on or around June 7, 2007 and ended on or around October 31, 2007.¹⁰

11. The City was the owner of the improvements and Arnt was its general contractor. In order to ensure that Arnt fulfilled its contractual obligations, the City deployed inspectors from its engineering department to oversee the progress of the work during each work day, and senior officials of the City, including its Engineer and City Manager, toured the project at the end of their respective workdays during the construction period.¹¹

12. During their impromptu reviews of the construction site, City Engineer Mark Burch and City Administrator Mark Sather would focus on the cleanliness of streets and whether environmental controls were in place.¹²

13. Alongside much of the Twin Cities metropolitan area, the Lake Avenue Project was battered by heavy rainfall during the summer and autumn of 2007. During September and October of 2007, for example, there were more than 20 days of rainfall; with some rain events including more than an inch of precipitation.¹³

14. Storm water presents a difficult and important challenge for the state's environmental regulators. The principal concern follows from the fact that pollutants adhere to sediment in turbid water. Sediment-laden storm water can act as a "vehicle" which carries pollutants into protected waters of the state, and the pollutants themselves can have dramatic impacts upon water quality and habitat. Thus, state regulators are eager to foreclose the routes by which pollutants can enter important waters of the state – including White Bear Lake.¹⁴

15. Combating the large and unusual amounts of storm water on the project site was a genuine challenge for City officials and Arnt. Because even an upgraded Lake Avenue is narrower than many roadways in Ramsey County, there were fewer storm water management practices that could be employed to contain sediment and effectively filter storm water.¹⁵

⁹ Test. of M. Sather.

¹⁰ Ex. K.

¹¹ Test. of M. Burch; Test. of M. Sather.

¹² *Id.*

¹³ Exs. 11 and 12.

¹⁴ Testimony of Brian Gove; Test. of M. Burch.

¹⁵ Testimony of Nicholas Arnt.

16. To meet this challenge, the City and Arnt employed a pyramiding series of storm water and sediment management strategies. At the curb and gutters along Lake Avenue, Arnt laid a specially-manufactured vinyl fabric that permits storm water to filter into the storm sewer but retains dirt and sediment above-ground. The sewer systems then ran to an upgraded sump system which itself filtered the storm water and drew out debris. Water from the sump system then ran through pipes to a set of riprap boulders that were placed above a sediment collection basin. As the storm water ran over the riprap, its energy was dissipated and sediment filtered out on to the boulders.¹⁶

17. Because of the volume of precipitation that fell during the construction period was greater than expected, City officials decided to temporarily transform a portion of Matoska Park into a temporary sediment basin. The basin lay at the bottom of the drainage path adjacent to Lake Avenue between 4th and 5th Streets, beneath a slope from the roadway of less than 30 degrees. Storm water from the area around the construction site was collected for filtering and later “de-watering.”¹⁷

18. In the Storm Water Pollution Prevention Plan (“SWPPP”) submitted by the City with its NPDES Permit application, the City pledged that “[d]ewatering or basin draining activities of turbid or sediment laden water will be discharged to temporary sediment basins or treated with appropriate BMPs”¹⁸

19. The temporary collection basin was “de-watered” by pumping the basin water on to a field with a very slight grade. At the bottom of this slight grade, in the lake bed, Arnt positioned a silt fence and a silt curtain so as to prevent any deposits of sediment into the waters of White Bear Lake.¹⁹

20. The use of vinyl fabric coverings under the storm sewer grates on Lake Avenue, so as to capture sediment, proved to be an unpopular measure with some City residents. As high volumes of rain water fell, and the collections of sediment captured by the fabric slowed the filtration of water into the storm sewer, ponds of water several inches deep began to form on Lake Avenue. In order to eliminate the ponds of water from the street, some residents slashed the vinyl covers, or removed them from the storm sewer grates, so as to permit higher volumes of unfiltered water to drain into the storm sewer. This form of “self-help” was effective in draining Lake Avenue of storm water but at odds with the City’s and Arnt’s objectives to capture sediment in the vinyl fabric. Large amounts of sediment-laden water did enter the storm sewer.²⁰

¹⁶ Test. of N. Arnt; Test. of M. Burch; Exs 5A – 5C; Exs. 6A – 6E.

¹⁷ Exs. 3, HH, II, JJ and KK; Test. of N. Arnt; Test. of M. Burch.

¹⁸ Ex. G.

¹⁹ Exs. JJ and BBB.

²⁰ Ex. W-7, W-9 and LLL; Test. of M. Burch.

21. The MPCA and Ramsey County have a Joint Powers Agreement under which the two agencies share information and coordinate enforcement activities within Ramsey County.²¹

22. Acting on behalf of the MPCA under this agreement, staff of the Ramsey Conservation District (“RCD”) conducted nine inspections at the Lake Avenue Project between June 2007 and April 2008. These inspections were undertaken to assess Arnt’s and the City’s compliance with the terms of the NPDES Permit.²²

23. During the inspections that occurred in the autumn of 2007, MPCA and RCD staff identified several violations of the Permit at the Lake Avenue Project.²³

September 19, 2007 Inspection:

24. Receiving the referral of a citizen complaint from the Rice Creek Watershed District, Thomas Petersen of the Ramsey Conservation District undertook an inspection of the Lake Avenue Project site on September 19, 2009. Before making his way to the site, Peterson asked Brian Gove, MPCA Compliance Coordinator for State Compliance Inspectors, to join him during the inspection. Gove agreed.²⁴

25. As detailed in a later investigation report, Petersen noted that exposed and potentially erodible soils had not been adequately protected, excessive sediment had been accumulating in Lake Avenue near storms and there were insufficient efforts to filter water discharged from the temporary sediment basin.²⁵

26. Additionally, Mr. Petersen noted in his inspection report that no sediment was seen entering White Bear Lake.²⁶

September 21, 2007 Inspection:

27. After a significant rainfall on September 20, Petersen returned to the Lake Avenue Project site on September 21, 2007 for a follow-up inspection.²⁷

28. During his inspection tour, Mr. Petersen noted deficiencies that were present during the earlier inspection tour on September 19; specifically, stockpiles of

²¹ Ex. Q; Test. of T. Petersen.

²² Ex. Q.

²³ Exs. H, I and J.

²⁴ Test. of T. Petersen.

²⁵ Ex. H.

²⁶ Ex. H at 3.

²⁷ Exs. I; Test. of T. Petersen.

topsoil in Lake Avenue, accumulations of sediment in the street and poorly functioning inlets.²⁸

29. It cannot be determined from the evidence in the record that the stockpiles of topsoil in Lake Avenue, accumulations of sediment in the street and poorly functioning inlets, observed by Mr. Petersen on September 21, were the same stockpiles, accumulations of sediment and poorly functioning inlets observed on September 19, 2007.²⁹

October 2, 2007 Inspection:

30. Petersen returned to the Lake Avenue Project site for a follow-up inspection on October 2, 2007.³⁰

31. During his inspection tour, Mr. Petersen noted deficiencies that were present during the earlier inspection tour on September 19; specifically, accumulations of sediment in the street and poorly functioning inlets. Further, Petersen noted exposed soils within a short distance of White Bear Lake and sediment-laden water approaching the Lake.³¹

32. Michael Goodnature, Conservation Specialist with the Ramsey Conservation District accompanied Petersen on the October 2, 2007 inspection tour. During the tour, Goodnature took a series of digital photographs. The photographs were received into the evidentiary hearing record as Exhibits X through MM.³²

33. Mr. Goodnature retrieved a sample of water from White Bear Lake by stepping into the lake bed east of the temporary sediment basin in Matoska Park, placing an open bottle down by his feet and letting nearby lake water flow into the bottle. Inspecting the sample, Mr. Goodnature concluded that sediment-laden water from the Project was discharged into White Bear Lake.³³

Post-Inspection Events:

34. The grading of Matoska Park that was needed to return the site of the temporary sediment basin into a permanent rainwater garden was completed on

²⁸ *Id.*

²⁹ Test. of T. Petersen; Ex. I ("My follow-up inspection on 9/21/07 found that the stock piles seen on 9/19/07 were removed"); see *also*, Test. of B. Gove.

³⁰ Ex. J.

³¹ *Id.*

³² Testimony of Michael Goodnature.

³³ Test. of M. Goodnature; Ex. W-16.

October 3, 2007. The planting of plants and grasses for the Rainwater Garden occurred on October 4, 2007.³⁴

35. The installation of sod along the curb sides of the Lake Avenue Project began on October 8 and was completed on October 26, 2007.³⁵

36. On April 24, 2008, the MPCA issued an Alleged Violations Letter to Respondents.³⁶

37. On May 16, 2008, the Agency issued an Administrative Penalty Order. In the Order, the MPCA asserted that the Respondents failed to comply with following requirements of the NPDES Permit:

- (a) Part IV, Section B 2, relating to erosion controls for exposed soils;
- (b) Part IV, Section B 4, relating to energy dissipation by pipe outlets;
- (c) Part IV, Section C 1, relating to minimum sediment control practices;
- (d) Part IV, Section C 4, relating to protections for storm drain inlets;
- (e) Part IV, Section E 4, maintenance of sediment control measures; and,
- (f) Part IV, Section E 4 f, removal of accumulated sediment.

The Administrative Penalty Order noted that because the Lake Avenue Project was complete and fully stabilized, the MPCA did not require further corrective action from the City or Arnt.³⁷

38. As part of the Joint Powers Agreement Enforcement Referral Forum, agency officials enhanced the base penalty in this case by fifteen percent – for a total of \$338 – on the grounds that the City and Arnt failed to comply with corrective actions as directed by agency inspectors.³⁸

39. The Administrative Penalty Order imposed a nonforgivable penalty of \$5,660.³⁹

40. On June 12, 2008, Arnt mailed a letter to the MPCA requesting administrative review of the Order.⁴⁰

³⁴ Test. M. Burch; Exs. 7C – 7G; 9A – 9S.

³⁵ Exs. K and 14-D; Test. M. Burch; Test. G. Lehner.

³⁶ Ex. L.

³⁷ Ex. A.

³⁸ Ex. Q at 7.

³⁹ Ex. Q at 9.

41. So as to facilitate settlement discussions between the parties, on June 27, 2008, Arnt waived its right to an evidentiary hearing within thirty days of its written request for review.⁴¹

42. On August 21, 2008, the City mailed a letter to the MPCA requesting administrative review of the Order.⁴²

43. In advance of the third day of the evidentiary hearing, MPCA and Arnt Construction, Inc. arrived at a settlement of the agency's claim against that firm.⁴³

Based upon these Findings of Fact, and for the reasons detailed in the Memorandum below, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Minnesota Pollution Control Agency have jurisdiction to consider the violations against Respondents pursuant to Minn. Stat. §§ 14.50 and 116.072, subd. 6.

2. Respondents received proper and timely notice of the violations and of the time and place of the hearing. This matter is, therefore, properly before the MPCA and the Administrative Law Judge.

3. The MPCA has complied with all relevant procedural legal requirements.

4. Pursuant to Minn. Stat § 116.072, subd. 1, the commissioner of the MPCA has the authority to issue an order requiring that violations of the agency's rules and governing statutes be corrected, and assessing penalties for such violations. The commissioner may issue an order assessing a penalty up to \$10,000 for all violations, based on consideration of factors set forth in Minn. Stat. § 116.072, subd. 2.⁴⁴

5. The requirements of Appendix A in the MPCA General Permit Authorization to Discharge Storm Water Associated with Construction Activity under the National Pollutant Discharge Elimination System/State Disposal System Permit

⁴⁰ Ex. R.

⁴¹ Ex. S.

⁴² Ex. U. In its letter, the City asserted that its request for review was timely because the MPCA had not properly served the Administrative Penalty Order. The City asserted that mailing the Administrative Penalty Order to the City's Public Works Director, rather than to the Mayor or the City Clerk, was not proper service. The City stated that it had submitted its request for review within thirty days of its attorney receiving actual notice of the Order. *Id.* at 1- 3. The Agency does not dispute that the City's appeal was timely made.

⁴³ Evidentiary Hearing Digital Recording (May 28, 2009).

⁴⁴ See *also*, Minn. Stat. § 115.03, subd. 1.

(NPDES/SDS) Program are incorporated by reference into the rules of the MPCA, pursuant to Minn. R. 7090.0060.

6. The MPCA has shown by a preponderance of the evidence that Respondents violated NPDES Permit Part IV. B. 2, by failing to stabilize slopes that were within 200 lineal feet of White Bear Lake within 14 days of the construction of the temporary sediment basin.

7. The MPCA did not demonstrate by preponderance of the evidence that Respondents violated NPDES Permit Part IV. B. 4.

8. The MPCA has shown by a preponderance of the evidence that Respondents violated NPDES Permit Part IV. C. 1, by failing to minimize sediment from entering the gutter systems and storm sewer inlets.

9. The MPCA did not demonstrate by preponderance of the evidence that Respondents violated NPDES Permit Part IV. C. 4

10. The MPCA did not demonstrate by preponderance of the evidence that Respondents violated the inspection requirements of NPDES Permit Part IV. E. 4

11. The MPCA has shown by a preponderance of the evidence that Respondents violated NPDES Permit Part IV. E. 4. F, by failing to remove off-site accumulations of sediment in a manner sufficient to minimize off-site impacts.

12. Upon this evidentiary record, the Administrative Law Judge cannot conclude that any sediment from the Lake Avenue Project was discharged into White Bear Lake. The methods used to sample lake water on October 2, 2007 raise genuine doubts as to the accuracy and reliability of the staff conclusion that sediment from the Lake Avenue Project was discharged into White Bear Lake.

13. Because the agency did not establish that the City and Arnt failed to comply with corrective actions as directed by agency inspectors, enhancement of the base penalty by fifteen percent is inappropriate. The Commissioner should reduce the penalty amount by \$338.

14. The MPCA has shown by a preponderance of the evidence that, based on the factors set forth in Minn. Stat. § 116.072, subd. 2, application of a nonforgivable penalty is reasonable.

15. Any of the Findings of Fact more properly designated Conclusions are hereby adopted as such.

Based upon these Findings of Fact and Conclusions, and for the reasons explained in the Memorandum that follows below, the Administrative Law Judge makes the following:

RECOMMENDATIONS

The Commissioner of the Minnesota Pollution Control Agency should:

1. AFFIRM-IN-PART the Administrative Penalty Order against the City of White Bear Lake and Arnt Construction, Co., Inc.;
2. Reduce the \$5,600 administrative penalty by \$338.

Dated: August 10, 2009.

/s/ Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Pollution Control Agency will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 116.072, subd. 6 (e), the Commissioner's decision shall not be made until this Report has been available to the parties to the proceeding for at least five (5) days. Parties should contact Paul Eger, Commissioner, Pollution Control Agency, 520 Lafayette Rd., Saint Paul, MN 55155, telephone (651) 296-7301, to learn the procedure for filing exceptions.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The MPCA has the authority to require NPDES/SDS permits prior to commencement of construction activity, so as to assure that the activity is conducted in accordance with the permit and applicable rules, and to assess a penalty for violations of the permit and rules. The administrative law judge must affirm the penalty unless the MPCA fails to prove that the violations occurred and that the amount of the penalty is reasonable.⁴⁵ The amount of the penalty shall be set aside only if it represents a clear abuse of the agency's discretion.⁴⁶

Claim Regarding a Violation of NPDES Permit Part IV, Section B 2:

The MPCA asserts that the City and Arnt failed to stabilize the side slopes of the temporary sediment basin in Matoska Park. The MPCA asserts that because the slopes to the temporary sediment basin were within 200 lineal feet of White Bear Lake, the Permit required the City and Arnt to stabilize these areas within 14 days of constructing the basin.⁴⁷ The basin was constructed on or about August 14, 2007.⁴⁸

By way of reply, the City offers three defenses to liability under this portion of the Administrative Penalty Order: (1) the NPDES Permit merely requires that stockpiles of soil around the sedimentation pond be ringed with silt fences;⁴⁹ (2) the start-date for the period within which the slopes of the basin must be stabilized runs from the date on which the first inspection occurred;⁵⁰ and (3) the period within which the slopes of the basin needed to be stabilized never began to run because the temporary sediment basin was always "actively worked."⁵¹ None of these arguments are availing.

The NPDES Permit obliged the City and Arnt to stabilize the slopes that were within 200 lineal feet of the basin. The best and most natural reading of the Permit obliges the stabilization work to be complete no later than 14 days after the temporary sediment basin was first constructed. Adopting the City's reading of the Permit would, conceivably, authorize the postponing of stabilization work for as long as workmen were performing construction-related duties near the basin; a reading that is at odds with the purpose of the erosion-prevention requirements.⁵²

⁴⁵ Minn. Stat. § 116.072, subds. 2 and 6 (b) and (c).

⁴⁶ *In re Henry Youth Hockey Ass'n*, 511 N.W.2d 452, 456 (Minn. App. 1994); see also, *In the Matter of the Administrative Penalty Order Issued to Paul-William Environmental, Inc.*, 1995 WESTLAW 311742 at *4 (Minn. App. 1995).

⁴⁷ Compare, MPCA's Memorandum of Law at 2 with Ex. E, Part IV, ¶ (B) (2).

⁴⁸ See, Exs. 8A and 8F - 8L.

⁴⁹ Compare, City's Memorandum of Law at 3 and Exs. 8L and TT with Ex. E, Part IV, ¶ (C) (5).

⁵⁰ Compare, City's Memorandum of Law at 4 with Ex. E, Part IV, ¶ (B) (2).

⁵¹ Compare, City's Memorandum of Law at 5 with Ex. E, Part IV, ¶ (B) (2).

⁵² Compare, Ex. E, Part IV, ¶ (C) (2) ("The timing of the installation of sediment control practices may be adjusted to accommodate short-term activities such as clearing, or grubbing or passage of vehicles. Any

Because the slopes that were within 200 lineal feet of White Bear Lake were not stabilized within 14 days of the basin's construction, the Commissioner should sustain this portion of the Administrative Penalty Order.⁵³

Claim Regarding a Violation of NPDES Permit Part IV, Section B 4:

The MPCA asserts that the City and Arnt failed to install adequate energy dissipation measures at the storm water pipe outlet to the temporary sediment basin. In the view of the MPCA, the set of rip rap boulders beneath the outlet pipe were too few in number and spaced too widely apart to meet the applicable anti-erosion standard.⁵⁴

By way of reply, the City asserts that it did deploy sufficient riprap, silt fences and engineering features in the temporary sedimentation basin to meet the applicable standard.⁵⁵ The Administrative Law Judge agrees.

The applicable standards in the NPDES Permit are:

Pipe outlets must be provided with temporary or permanent energy dissipation within 24 hours of connection to a surface water.

....

Dewatering or basin draining ... related to construction activity that may have turbid or sediment laden discharge water must be discharged to a temporary or permanent sedimentation basin on the project site whenever possible.... The Permittee(s) must ensure that discharge points are adequately protected from erosion and scour.⁵⁶

Not only did Messrs. Burch and Arnt testify credibly that the anti-erosion measures in place adequately dissipated the energy of the storm water entering the temporary sedimentation basin, the record does not include evidence of significant erosion or scour at the discharge point to the basin.

For these reasons, the Commissioner should dismiss this portion of the Administrative Penalty Order.

short-term activity must be completed as quickly as possible and the sediment control practices must be installed after the activity is completed. However, sediment control practices must be installed immediately after the activity is completed. However, sediment control practices must be installed before the next precipitation event even if the activity is not complete").

⁵³ See, Exs. W-6, BB, FF, II and JJ.

⁵⁴ MPCA's Memorandum of Law at 2-3.

⁵⁵ City's Memorandum of Law at 5.

⁵⁶ Ex. E, Part IV, ¶¶ (B) (4) and (D)(1).

Claim Regarding a Violation of NPDES Permit Part IV, Section C 1:

The MPCA asserts that the City and Arnt failed to install adequate sediment control measures on the curb along Lake Avenue during the construction process. The agency maintains that this failure resulted in “untold amounts of soil and sediment to wash into the curb and gutter.”⁵⁷

By way of reply, the City asserts that any silt laden storm water washing over the exposed boulevards would be restrained by one or more of series of countermeasures – including, an indentation at the top of the curve line; silt fabric over the inlets to storm sewers; an underground sump infiltration system; riprap at the Matoska Park inlet to the temporary sedimentation basin; and a series of silt fences and curtains at the outlet point in White Bear Lake.⁵⁸ The Administrative Law Judge disagrees.

The applicable standard in the NPDES Permit is: “Sediment control practices must minimize sediment from entering surface waters, including curb and gutter systems and storm sewer inlets.”⁵⁹

While mindful that there was an atypical and unusually large amount of rainfall during the construction of the Lake Avenue Project, the indentation on the curb line was not designed for the purpose of restraining sediment-laden storm water and was not effective in minimizing sediment from entering the gutter systems and storm sewer inlets.⁶⁰ Similarly, downstream countermeasures were not (and could not be) effective in meeting the City’s obligation to minimize the entry of sediment into the gutter and storm sewer systems.

For these reasons, the Commissioner should sustain this portion of the Administrative Penalty Order.

Claim Regarding a Violation of NPDES Permit Part IV, Section C4:

The MPCA asserts that the City and Arnt failed to adequately protect all storm drain inlets along the Project corridor by installing functional and appropriate inlet protections. The MPCA argues that when it became clear that the use of vinyl fabric was not effectively draining storm water from Lake Avenue, the City and its contractor Arnt should have deployed other Best Management Practices – even if this obliged the purchase of other, better systems.⁶¹

⁵⁷ MPCA’s Memorandum of Law at 3.

⁵⁸ City’s Memorandum of Law at 6 – 8.

⁵⁹ Ex. E, Part IV, ¶ (C)(1).

⁶⁰ Exs. 4B – 4E, 4I, X – CC, KK and MMM; Test. of T. Petersen; Test or B. Gove; Testimony of Nicholas Arnt.

⁶¹ MPCA’s Memorandum of Law at 3-5; *compare*, Exs. 13, K through CC, YY, FF, XX, LLL and MMM; Test. of B. Gove.

By way of reply, the City asserts that the application of silt fabric over the storm drain inlet is a widely used and accepted sediment control practice, which meets the requirement of the Permit.⁶² The Administrative Law Judge agrees.

The applicable standard in the NPDES Permit is: “All storm drain inlets must be protected by appropriate [Best Management Practices (BMPs)] during construction until all sources with potential for discharging to the inlet have been stabilized.”⁶³

The fabric coverings used by the City and Arnt did protect from the storm drain inlets from receiving sediment during the construction process and were in use until nearby discharge sources had been stabilized.

For these reasons, the Commissioner should dismiss this portion of the Administrative Penalty Order.

Claim Regarding a Violation of NPDES Permit Part IV, Section E 4:

The MPCA asserts that the City and Arnt failed to adequately inspect the sediment control measures in the storm sewer inlets along Lake Avenue to assure their proper functioning. MPCA argues that on each occasion agency inspectors were on site they noted that multiple storm drain inlets that were not adequately protected from sediment.⁶⁴

By way of reply, the City asserts that under the terms of the NPDES Permit it had 24 hours within which to discover and remediate any improperly functioning sediment control device. Moreover, MPCA did not establish that any of devices that were not operating on September 19, September 21 or October 2 were likewise inoperative 24 hours later.⁶⁵ The Administrative Law Judge agrees.

The applicable standards in the NPDES Permit are:

The Permittee(s) (either the owner or operator, whoever is identified in the SWPPP) must routinely inspect the construction site once every seven (7) days during active construction and within 24 hours after a rainfall event greater than 0.5 inches in 24 hours.

....

All erosion prevention and sediment control [Best Management Practices] must be inspected to ensure integrity and effectiveness. All

⁶² City's Memorandum of Law at 8-9.

⁶³ Ex. E, Part IV, ¶ (C) (4).

⁶⁴ MPCA's Memorandum of Law at 3-4; see *also*, Exs. Z, AA, YY, FEF, LLL, MMM; Test. of T. Petersen; Test. of B. Gove.

⁶⁵ City's Memorandum of Law at 9-10.

nonfunctional [Best Management Practices] must be repaired, replaced, or supplemented with functional [Best Management Practices]....”⁶⁶

While the Administrative Law Judge is sympathetic to the inspectors’ claims that their work schedules might not permit them to return to a construction site for a follow-on inspection within 24 hours, it does not follow that because a group of storm water inlets were unprotected on September 19 and also September 21, there was a violation of the NPDES standard.⁶⁷ Without more – namely that the same inlets were in disrepair between the two inspection dates – the agency cannot establish that any particular inlet was unnoticed and in disrepair for more than 24 hours.

For this reason, the Commissioner should dismiss this portion of the Administrative Penalty Order.

Claim Regarding a Violation of NPDES Permit Part IV, Section E.4.F:

The MPCA asserts that the City and Arnt failed to remove accumulated sediment from the curb and gutter so as to prevent this debris from entering the storm sewers or causing blockages that posed safety hazards on Lake Avenue.⁶⁸

By way of reply, the City asserts that it undertook a regimen of daily street sweeping alternately deploying subcontracted and city-owned sweepers to accomplish this work. Because street sweeping was accomplished within 24 hours of significant rain events, argues the City, it met the requirement of Section E (4) (f) of the Permit. The Administrative Law Judge disagrees.

The applicable standard in the NPDES Permit is:

All erosion prevention and sediment control BMPs must be inspected to ensure integrity and effectiveness. All nonfunctional BMPs must be repaired, replaced, or supplemented with functional BMPs. The Permittee(s) must investigate and comply with the following inspection and maintenance requirements:

....

If sediment escapes the construction site, off-site accumulations of sediment must be removed in a manner and at a frequency sufficient to minimize off-site impacts (e.g., fugitive sediment in streets could be

⁶⁶ Ex. E, Part IV, ¶ (E) (1) and (4).

⁶⁷ *Compare*, Test. of T. Petersen; Test. of B. Gove with Test. of M. Burch; Test. of M. Sather; Test. of N. Arnt; Testimony of Gary Lehner.

⁶⁸ MPCA’s Memorandum of Law at 4-5.

washed into storm sewers by the next rain and/or pose a safety hazard to users of public streets).⁶⁹

Under the terms of the Permit, the City was obliged to take such measures as would minimize the off-site impacts, particularly those which might pose a safety hazard to users of the public streets. Under the strain of the unusually high amounts of rainfall, the City did not meet this very demanding standard. More countermeasures were possible, and required, so as to reduce the levels of standing water in Lake Avenue caused by the accumulation of sediment.

For this reason, the Commissioner should sustain this portion of the Administrative Penalty Order

E. L. L.

⁶⁹ Ex. E, Part IV, ¶ (E) (4) (f).