

Tom Dimond
2119 Skyway Drive
Saint Paul, Mn 55119

Appeal of BZA decision that Saint Paul Planning and Zoning have no authority to enforce zoning and planning laws

The appeal is about the failure to comply with Saint Paul's required site plan review, and Saint Paul's required Development permit for filling and grading within the river corridor. Start of work without City approval is prohibited. Dumping fill containing pollutant and nutrients is prohibited. Allowing unpermitted work to continue while on appeal is prohibited.

More than one entity can have responsibility and authority for review and permitting of a project. MN DNR requires compliance with Saint Paul's River Corridor and flood plain regulations.

1. BZA report acknowledges the Ordinary High Water Level (OHWL) is a boundary of responsibility. However, it does not acknowledge that more than one authority can have responsibility.
2. The report states the elevation of the pollutant/fill/islands will be 692.6 feet.
3. The report states that based in part in consultation with the DNR's East Metro Hydrologist who estimated that the OHWL for Pigs Eye Lake at 692.9 feet.
4. The report states: "the Administrator reasonably concluded that the Project's islands are below the OHWL and therefore within the basin of Pigs Eye Lake which is within the DNR's regulatory authority and outside of the City's jurisdiction.
5. The report indicates the pollutant dumping sites are underwater. The top of pollutant/fill/islands at 692.6 feet and water level of 692.9.
6. The report indicates that there is no filling or grading above the water (OHWL).
7. It is obvious to all who have observed the filling and grading of Pig's Eye Lake that it includes filling and grading above the water (OHWL).
8. The report to the BZA does not include the Environmental Assessment Appendix F.2.5 Settlement and F.6 Conclusions and Recommendations. They recommend that 2.5 ft settlement be assumed for fill heights above the waterline, and 1.5 ft settlement for fill heights below the waterline. This calls for 4 feet of additional pollutant/fill and grading to allow for settlement.
8. Deposit of fill and grading above the final grade is required to establish a final grade
9. Because of Dam 2 the OHWL of Pig's Eye Lake is based on the summer stage. The May 2018 Environmental Assessment states the river stage for Pig's Eye Lake is 686.8 feet. Figure 3 Elevation chart shows it as 686.73 feet (Appendix G Hydrology)
10. A water level of 686.8 and the need for 4 feet of additional filling and grading bring the project well over the OHWL. City zoning requires a site plan submittal, review, and Planning Commission approval and fill, grading permit application and approval prior to start of construction.
11. The BZA report does not address the inconsistency of BZA's claim that the DNR has exclusive authority. The BZA report states that on June 20, 2022 RWMWD issued a construction permit for the project. MN DNR prohibited work until June 30 to protect fish spawning. The contractor asked for and received a variance to start on June 15th. I spoke to the

contractor staff and pointed out that they do not have the required St. Paul site plan approval or fill and grading permit. After our discussion, the watershed district issued a construction permit. If the watershed can require permits the DNR clearly does not have exclusive authority. The watershed district does not address St. Paul zoning code and comprehensive plan compliance that is required in law. St Paul is legally bound to administer Critical Area and flood plain protections.

12. St. Paul and the State of Minnesota prohibit the discharge of fill containing pollutant and nutrients. According to the public record there are known pollutants and nutrients. In particular 3M and the State of MN have settled a \$800 million case over concerns of PFAS/PFOS in our waters. The Federal EPA June 15th PFAS/PFOS Advisory called for dramatically lower levels of these chemicals in our environment to near zero. The public record of dredge spoil pollutant levels from lower pool 2, show the worst PFAS/PFOS levels in this stretch of the river. They are significantly higher than existing levels in Pig's Eye Lake. The record shows this fill contains pollutant and nutrient that is prohibited by State and City Laws.

13. We live on the bluffs about 200 feet above Pig's Eye lake. We get our water from a well that is over 200 feet deep. We just received an August 4, 2022 letter from the Minnesota Pollution Control Agency. Because our well exceeds 0.5 for PFAS as part of the MPCA 3M settlement the MPCA is going to install a whole-house carbon filter and maintain it for 30 years. Keep in mind PFAS/PFOS is not found in nature. The pollutant being dumped into Pig's Eye Lake comes from an area that in 2011-2012 tested PFOS at 80.2 with an average of 9.1 to 28.4. For comparison, in 2016 Pig's Eye Lake tested at 1.7 with an average of 1.1.

14. Testing at the Colonial Nesting Bird Rookery at Pig's Eye Lake has found in eggs some of the highest pollution levels found in the world.

15. Case law for public waters in the State provide shoreline rights to all shoreline owners and rights to the public. Those rights include use of the entire lake by all. No matter how much shoreline is owned by one party, that party cannot restrict use of the entire lake. Discharge of large amounts of pollutant that fill much of the lake and degrade other parts would limit existing opportunities to boat, fish, and limit protected scenic views. Existing rights of the public to use the entire lake would be lost without acquisition of those rights from property owners and the public.

Is it not the definition of insanity to provide funds to clean up the Pig's Eye Dump, install filters in people's homes, and then spend millions to haul this pollutant from down river and dump it into our park lake?

If we cannot get help from our government on this, God save us all.

Tom

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City cites: No authority to protect the public and environment from pollutant discharge

Protecting our health and environment depend on compliance with EPA's June 15, 2022 PFAS/PFOS pollutant advisory, St. Paul's comprehensive plan and zoning requirements. Discharge of 80-million-gallons of pollutant does not comply with EPA's health risk advisory for PFAS/PFOS. The pollutant discharge is prohibited by our zoning code, flood plain regulations, and Critical Area regulations. Site plan review and approval are required. A development permit application, review and approval are required. A Planning Commission public hearing is in order.

At this time, our City has failed to take any required action to protect nature and the public. Does discharge of pollutant into a BIPOC majority neighborhood lake have any bearing? What is the chance of no action taken, if the pollutant discharge was filling Como Lake? No action has been taken to enforce adopted zoning requirements that apply to discharge of 80 million gallons/400 thousand cubic yards of pollutant into our park lake. State Critical Area designation is for protection and enhancement of exceptional natural and recreation areas.

"Today's announcement should set off alarm bells for consumers and regulators." Said Melanie Benesh a legislative attorney at the Environmental Working Group. These proposed advisory levels demonstrate that we must move much faster to dramatically reduce exposures to these toxic chemicals."

The Minnesota Legislature just approved \$800,000 for the cleanup of the Pig's Eye Dump. The dump contains PFAS and other pollutants. We must stop dumping pollutant into the park.

We must protect the fish, birds, and public. We must ensure that toxic chemicals are not dumped into our public lands and waters.

The EPA health advisory limit is 0.004 parts per trillion of PFOA.

The EPA health advisory limit is 0.02 parts per trillion for PFOS.

Pig's Eye Lake tested at 1.1 parts per trillion of PFOS. 55 times higher than the EPA health advisory limit.

The pollutant being discharged into our lake tested at averages of 9.1, and 28.4 with a 80.2 maximum.

28.4 is 25 times more toxic than existing PFOS pollution in Pig's Eye Lake

Lower Pool 2 is where the pollutant/fill is being hauled up river from. 80 million gallons of pollutant from the most polluted section of the river in MN is being hauled up river and dumped into our park/nature preserve. limit. See PFAS/PFOS maps. They are discharging more toxic chemicals, that do not degrade. This endangers park visitors, recreational opportunities, fish, and birds. The Park has Federal and State designations to protect the Scientific and Natural Area Rookery, birds, wildlife, and recreational opportunities. Tests of bird eggs at the Pig's Eye Lake SNA have already shown some of the highest pollutant levels found in birds worldwide. Discharging more toxic pollutant undercuts efforts to protect and restore habitat for wildlife and recreation.

Testing of heron eggs in the SNA Heron Rookery found eggs with extremely high PFOS levels. Carp in the lake registered PFOS levels of 10.2. Discharge of toxic pollutant impacts the food chain. Higher PFOS levels in birds eating fish with high levels of PFOS demonstrates one of the cumulative effects of PFOS pollution.

St. Paul is the Local Unit of Government assigned the responsibility to ensure required permits, public review, and compliance with plans and zoning. In the Mississippi River Critical Area, Mississippi National River and Recreational Area, and flood plain zoning a development permit must be applied for and approved before any work can start. Site Plan review and approval is required. **St Paul has not approved this development. Start of work is prohibited until the required site plan review, approval and permits are in place.**

When an appeal is filed, the continued discharge of pollutant is prohibited until a determination has been made. An appeal was filed a month ago and pollution discharge into the environment has continued unabated.

The MN DNR Permit is conditioned on compliance with City zoning. MN DNR Permit 2020-1818 – Public Waters Work Permit states: This permit is granted subject to the following **CONDITIONS:** (partial list)

Applicable Federal, State, or Local Regulations: The permittee is not released from any rules, regulations, requirements, or standards of any applicable federal, state, or local agencies; including, but not limited to ,city and township zoning.

Wetland Conservation Act: Where the work authorized by this permit involves the draining or filling of wetlands not subject to DNR regulations, the permittee shall not initiate any work under this permit until the permittee has obtained official approval from the responsible local government unit as required by the Minnesota Wetland Conservation Act.

Discharging 80 million gallons of pollutant containing PFAS/PFOS that exceeds health advisory levels creates greater health risks for people, fish, and birds based on the latest EPA health advisory dated June 15, 2022. We must not repeat the mistakes of the Pig's Eye Dump.

It is criminal to allow discharge of 80 million gallons of pollutant into waters Minnesotans drink and enjoy for recreation. Our City must protect the public, birds, recreational opportunities, and the ability to safely eat fish from our lakes. The Environmental Protection Agency "Health Advisory" calls for a near zero level of PFAS pollutants in our environment. The Department of Safety and Inspections and our City Council must immediately stop the discharge of PFAS/PFOS. The area already exceeds EPA's Health Advisory without discharge of more toxic pollutant. Saint Paul is legally and morally bound to stop pollutant discharge before more harm is done. Federal Register 87 - June 21, 2022

The interim updated health advisories for PFOA and PFOS are based on human epidemiology studies in populations exposed to these chemicals. Human studies have found associations between PFOA and/or PFOS exposure and effects on the immune system, the cardiovascular system, human development (e.g., decreased birth weight), and cancer. The most sensitive non-cancer effect and the basis for the interim updated health advisories for PFOA and PFOS is suppression of vaccine response (decreased serum antibody concentrations) in children. While there is evidence that PFOA is likely to be carcinogenic to humans, EPA has not derived a cancer risk concentration in water for PFOA at this time. There is suggestive evidence of carcinogenic potential of PFOS in humans. Cancer analyses are ongoing for both PFOA and PFOS.

MN Rule 6115.0215 Restoration of Public Waters Sub.3 Prohibited Work. Public waters alteration, protection, or restoration work is prohibited when the work: D. violates the regulations of any local zoning authority or water management agency;

It is hard to reconcile the idea local zoning authority has no authority when State Rules specify that the work is prohibited if it violates local zoning authority regulations.

Prohibited work also includes: F. uses material that are not clean and free of pollutants, nutrients, and exotic species sources;

It is hard to reconcile the known pollutant and nutrients in dredge spoils as clean and free of pollutants and nutrients.

MN Rule 6115.0190 Filling Into Public Waters. Subp. 1. Goals. It is the goal of the department to limit the placement of any fill material into public waters in order to: C. maintain consistency with floodplain, shoreland, and wild and scenic rivers management standards and ordinances.

It is hard to reconcile required consistency with floodplain, shoreland, and Critical Area ordinances if local government has no authority.

Subp. 5. Permits Required. Permits are required for the placement of fill in public waters,....and a project must meet all of the following requirements: B. the fill consists of clean inorganic material that is free of pollutants and nutrients;

It is hard to reconcile how the fill can meet the requirement to be free of pollutants and nutrients when dredge spoils are a defined pollutant

H. The proposed filling is consistent with applicable floodplain, shoreland, and wild and scenic rivers management standards and ordinances for the waters involved;

I. the proposed filling is consistent with water and related land management plans and programs of local and regional governments, provided such plans and programs are consistent with state plans and programs.

MN Rules require compliance with local government plans and programs.


It is hard to reconcile requirements for clean inorganic fill that is free of pollutant, consistency with local zoning, flood plain and shoreland ordinances, and local land management plans if local government has no authority.

1.1.2 Mississippi River/Dam 2 Operation

The following figure shows the Operating Curve for Lock and Dam 2 on the Mississippi River. The green curve shows the Control Point in South Saint Paul. This control point is directly across the river from Pigs Eye Lake. The river stage at Pigs Eye Lake is held constant at 686.8 feet NAVD (687.2 (1912 datum) for discharges below 12,500 cfs. At a river discharge of 12,500 cfs, the river stages begin to rise with discharge.

Office of the Revisor of Statutes

Minnesota Administrative Rules

Authenticate 

6115.0190 FILLING INTO PUBLIC WATERS.

Subpart 1. **Goals.** It is the goal of the department to limit the placement of any fill material into public waters in order to:

- A. minimize encroachment, change, or damage to the environment;
- B. regulate the quantity and quality of fill and the purposes for which filling may be allowed based upon the capabilities of the waters to assimilate the material; and
- C. maintain consistency with floodplain, shoreland, and wild and scenic rivers management standards and ordinances.

Subp. 2. **Scope.** Filling as used in this part involves placement of unconfined or loosely confined materials in public waters.

Subp. 3. **Prohibited placement.** Placement is prohibited in the following cases:

- A. to achieve vegetation control;
- B. to create upland areas, except where expressly provided herein;
- C. to stabilize beds of public waters which cannot support fill materials because of excessive depths of muck, steep bank, bed slope, or other conditions;
- D. to stabilize or impound the site of active springs;
- E. to dispose of rock, sand, gravel, or any other solid material resulting from activities carried out above the ordinary high water level;
- F. to construct a roadway or pathway, or create or improve land accesses from peripheral shorelands to islands, or to facilitate land transportation across the waters; however, when a project is proposed by a federal, state, or local government agency and this provision would prevent or restrict the project, or create a major conflict with other public purposes or interests, the commissioner may waive this provision if:

- (1) there is no other feasible and practical alternative to the project that would have less environmental impact; and
- (2) the public need for the project rules out the no-build alternative; or

G. filling posted fish spawning areas.

Subp. 4. **No permit required.** No permit is required for the following activities unless prohibited under subpart 3:

- A. to install a beach sand blanket if:
 - (1) the sand or gravel layer does not exceed six inches in thickness, 50 feet in width along the shoreline, or one-half the width of the lot, whichever is less, and does not extend more than ten feet waterward of the ordinary high water level;
 - (2) the beach sand blanket does not cover emergent vegetation, unless authorized by an aquatic plant management permit; and
 - (3) local watershed district and local zoning officials are given at least seven days notice by the landowner;
- B. for one additional installation of a sand or gravel layer subsequent to an initial installation at the same location and not exceeding the same amounts and dimensions allowed under item A; or
- C. to place fill in a public watercourse having a total drainage area, at its mouth, of five square miles or less, if the watercourse is not an officially designated trout stream and the placement of fill does not result in:
 - (1) any diversions of water from the drainage area;
 - (2) any impoundment of waters by damming the watercourse; or
 - (3) any actions that would result in erosion and cause sedimentation of downstream waters as determined by the county or local soil and water conservation district.

Subp. 5. **Permits required.** Permits are required for the placement of fill in public waters, except as provided under subparts 3 and 4, and a project **must meet all of the following requirements:**

- A. the project does not exceed more than a minimum encroachment, change, or damage to the environment, particularly the ecology of the waters;
- B. the fill consists of clean inorganic material that is free of pollutants and nutrients;
- C. the existence of a stable, supporting foundation is established by appropriate means, including soil boring data where deemed necessary by the commissioner;

6115.0215 RESTORATION OF PUBLIC WATERS.

Subpart 1. **Goals.** It is the goal of the department to encourage the restoration of public waters to:

- A. improve and protect fish and wildlife habitat and the diversity of the habitat;
- B. preserve the natural character of public waters and their shoreline zones;
- C. encourage the use of natural materials for shoreline zone protection and restoration;
- D. limit the removal of natural materials from the beds of public waters; and
- E. prevent erosion and siltation of public waters, while maintaining natural processes.

Subp. 2. **Scope.** This part applies to placement, construction, reconstruction, repair, relocation, abandonment, or other work needed to restore or protect public waters or to removal of any materials, structure, fill, water level control, excavation, or drainage device placed on or in public waters. For purposes of this part, "restoration" means the repair, reconstruction, or recreation of essentially natural or native conditions of a public water and its shoreline or banks. This part does not apply to restoration orders issued by the commissioner consistent with part [6115.0255](#).

Subp. 3. **Prohibited work.** Public waters alteration, protection, or restoration work is prohibited when the work:

- A. is detrimental to significant fish and wildlife habitat and there are no feasible, practical, or ecologically acceptable means to mitigate the effects;
- B. takes threatened or endangered species listed in chapter 6134 without authorization by the commissioner according to parts [6212.1800](#) to [6212.2300](#);
- C. obstructs navigation or creates a water safety hazard, as determined by the commissioner;
- D. violates the regulations of any local zoning authority or water management agency;
- E. results in the creation of land above the ordinary high water level that is not deemed essential by the commissioner as part of the project;
- F. uses materials that are not clean and free of pollutants, nutrients, and exotic species sources;
- G. manipulates water levels solely to satisfy private interests; or
- H. will adversely impact public infrastructure, particularly roads and drainage systems.

Subp. 4. **No permit required.** No permit is required for the following activities, unless prohibited elsewhere in parts [6115.0150](#) to [6115.0280](#):

A. to perform bank or shoreline zone restoration work using willow wattles, willow posts, brush matting, brush layering, fiber roll breakwaters, plant carpets, root wads, and other natural materials installed by hand for the purpose of shoreline zone restoration work, if:

- (1) the project is approved by the commissioner and designed or reviewed by the local soil and water conservation district or the local watershed district;
- (2) the design does not interfere with navigation or other riparian uses of the waterbody;
- (3) the project is done during times of the year when it will not interfere with fish spawning or the nesting of protected bird species;
- (4) local origin native plant species, adapted for the site, are used;
- (5) an aquatic plant management permit is obtained, when aquatic macrophytes are used;
- (6) the waterward encroachment is the minimum necessary for the purpose of the project; and
- (7) a maintenance plan is developed for the project and a copy submitted for review to the department area fisheries office;

B. to remove or grade an ice ridge, if all of the following conditions are met:

- (1) the ice ridge resulted from ice action within the last year;
- (2) the project is either exempt from local permits or is authorized by issuance of a local government permit;
- (3) the total length of shoreline zone to be affected does not exceed 200 feet;
- (4) all ice ridge material that is composed of muck, clay, or organic sediment is deposited and stabilized at an upland site above the ordinary high water level of any public water;

Introduction

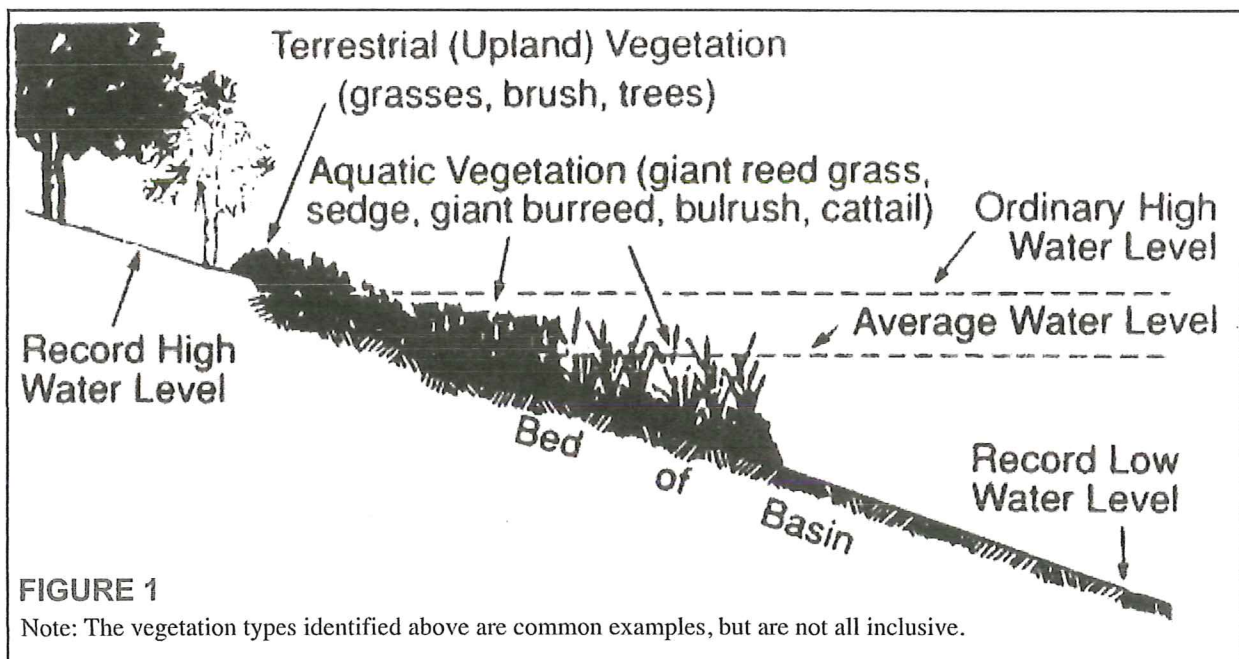
Minnesota Statutes, Section 103G.005, subdivision 14 defines "ordinary high water level" (OHWL) as the boundary of waterbasins, watercourses, public waters, and wetlands and:

- (1) the OHWL is an elevation delineating the HIGHEST water level that has been maintained for a sufficient period of time to leave evidence upon the landscape, commonly the point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial;
- (2) for watercourses, the OHWL is the elevation of the top of the bank of the channel; and
- (3) for reservoirs and flowages, the OHWL is the operating elevation of the normal summer pool.

The OHWL is the landward extent of DNR jurisdiction over anyone who works in the bed of public waters or public waters wetlands (collectively referred to as public waters) - see Figure 1. It is commonly used in public waters work permits and by local zoning authorities to determine lot size, structure setback, and drainfield location and elevation. It is **NOT**:

- a runout elevation;
- an average water level;
- an extreme high water level;
- nor an arbitrary elevation set by an individual, group or agency.

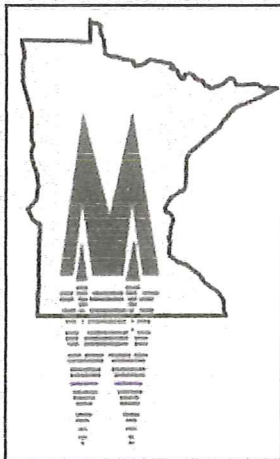
It has no significance with respect to private ownership.



GUIDELINES FOR ORDINARY HIGH WATER LEVEL (OHWL) DETERMINATIONS

by John Scherek and Glen Yakel

St. Paul, MN



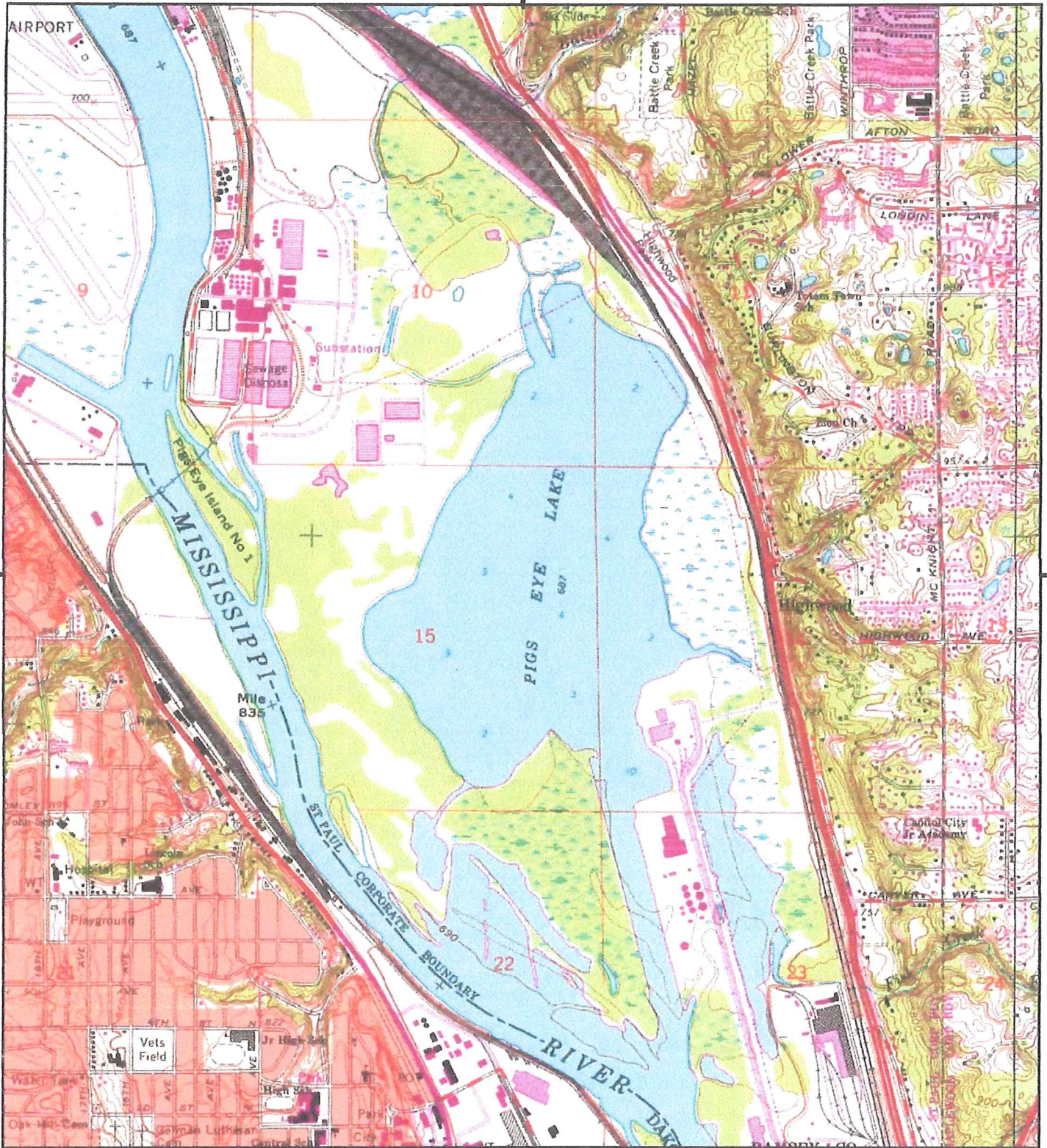
Technical Paper 11

**Minnesota
Department of Natural Resources
Waters**

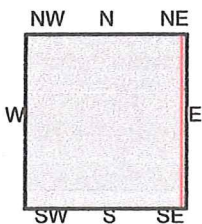
June 1993

1.1.2 Mississippi River/Dam 2 Operation

The following figure shows the Operating Curve for Lock and Dam 2 on the Mississippi River. The green curve shows the Control Point in South Saint Paul. This control point is directly across the river from Pigs Eye Lake. The river stage at Pigs Eye Lake is held constant at 686.8 feet NAVD (687.2 (1912 datum) for discharges below 12,500 cfs. At a river discharge of 12,500 cfs, the river stages begin to rise with discharge.



This report includes information from the following map sheet(s).



TP, St Paul East, 1993, 7.5-minute
E, Lake Elm, 1993, 7.5-minute

SITE NAME: Pigs Eye Lake
ADDRESS: Pigs Eye Lake Rd / Childs Rd
Saint Paul, MN 55119
CLIENT: Army Corp of Engineers

