

SEP 15 2022



ZONING APPEAL APPLICATION

To/From Board of Zoning Appeals

Dept. of Safety & Inspections
Zoning Section
375 Jackson Street, Suite 220
Saint Paul, MN 55101-1806
(651) 266-9008

To / From Planning Commission

Dept. of Planning & Econ. Devt.
Zoning Section
1400 City Hall Annex, 25 W 4th St.
Saint Paul, MN 55102-1634
(651) 266-6583

Zoning Office Use Only

File # 22-097024Fee Paid \$ 462.00Received By / Date 9/15/22Tentative Hearing Date 10/5/2022

APPELLANT

Name(s) Friends of Pigs Eye Lake Park - Tom DimondAddress 2119 Skyway Drive City Saint Paul State MN Zip 55119Email tdimond@q.com Phone 952-207-6923PROPERTY
LOCATIONProject Name Discharge of PFAS pollutant from Chemolite Plant into Protected Critical Area and drinking waterAddress / Location Pig's Eye Lake Regional Park

TYPE OF APPEAL: Application is hereby made for an appeal to the:

- ☐ **Board of Zoning Appeals**, under provisions of Zoning Code § 61.701(c), of a decision made by the Zoning Administrator.
- ☐ **Planning Commission**, under provisions of Zoning Code § 61.701(c), of a decision made by the Planning Administrator or Zoning Administrator.
- ☒ **City Council**, under provisions of Zoning Code § 61.702(a), of a decision made by the Board of Zoning Appeals or the Planning Commission.

Date of decision September 6th, 20 22File Number 22-072764

GROUND FORS APPEAL: Explain why you feel there has been an error in any requirement, permit, decision or refusal made by an administrative official, or an error in fact, procedure or finding made by the Planning Commission or Board of Zoning Appeals. Attach additional sheets if necessary.

see attached

☐ If you are a religious institution you may have certain rights under RLUIPA. Please check this box if you identify as a religious institution.

Appellant's Signature

Thomas B. Dimond

Date September 14, 2022

Friends of Pig's Eye Lake Park – Tom Dimond
2119 Skyway Drive
Saint Paul, MN 55119

Appeal of BZA Decision

Neighborhood residents pay a thousand dollars so the City Council can protect our environment and drinking water from pollution.

7/8/2022 - Friends of Pig's Eye Lake filed the Appeal with the BZA.

8/8/2022 - BZA 1st meeting - vote was split 2-2

8/22/2022 – BZA 2nd meeting - remained split

9/6/2022 – BZA 3rd meeting - the attorney was out sick and BZA short of members - the BZA Chair announced the BZA remained split and would not act on the appeal. Facing another 2 week or indefinite delay in a 2 month long appeal process, we asked the BZA to take action – Dangerous PFAS pollution is being discharge while the City does nothing to protect residents and the water we drink – We suggested moving it forward without a recommendation – Staff said the BZA can't – BZA membership supporting the Appeal changed their vote, allowing the appeal to move forward to the City Council.

Required reviews by Saint Paul to Protect and Enhance the Critical Area and Protect our Water Supply have not happened. The Friends of Pigs Eye Lake Park appeal seeks to ensure compliance with the required Planning Commission public hearing, site plan review and permit requirements for Critical Area grading and filling. Discharge of fill containing *any* pollutant or nutrients is prohibited by State Law.

Question 1. The BZA “BE IT RESOLVED” incorrectly states Friends of Pig's Eye Lake filed an appeal alleging that the Zoning Administrator erred in denying a request to issue a “stop work order”.

What the appeal really asked to have addressed is: “Discharge of 80 Million Gallons of Pollutant into Pig's Eye Lake

July 8, 2022 Appeal of DSI decision – Grading 80-million-gallon discharge of fill/pollutant without Planning Commission site plan review and approval or issuance of a grading permit Friends appeals the DSI decision that asserts Saint Paul has no zoning, planning, or permitting authority when a developer fills, and grades land that is above the Ordinary High-Water Level (OHWL). The opposite is true. The City has the authority and responsibility to plan and regulate Development of land. There is an even greater responsibility in the floodplain, and Critical Area. The decision incorrectly claims Development is “entirely” within the basin” “No site plan review or Development permit, as required for work on land is the question. “

It is the City's zoning code that calls for a hold on work until an appeal is decided.

Question 2. What is the Ordinary High Water Level (OHWL) of Pig's Eye Lake?

Saint Paul has authority above the OHWL. MN DNR below the water. The long standing OHWL is 686.8 feet. The DNR Hydrologist agrees to this fact.

However, the Hydrologist wants to substitute *Mississippi River top of bank* measurement or 692.9 feet. The 692.9 feet applies to a Memorandum of Understanding (MOU) between the Corps and MN DNR. The MOU is specific to Mississippi River channel maintenance dredging. Pig's Eye Lake is not part of the agreements.

MN Statute requires a different measurement for lakes and reservoirs. MN Statute 103G.005 requires use of the operating elevation of the normal summer pool as the OHWL of reservoirs. The OHWL is 686.8 feet. The Mississippi River top of bank in the MOU is set at 6.1 feet higher than the Statutory OHWL of the reservoir. DNR records show the lake has maximum depth of 4 feet deep. If the 6.1 feet depth increase were actual, the lake would be 10.1 feet deep. *If this was the OHWL for the lake Saint Paul would lose authority over a lot of real estate along the river and in our parks. The DNR would gain sole authority over parkland 692.9 feet or lower. Much of the park is below this elevation.* Existing statutory authority includes land above 686.8 feet.

Question 3. When will the City hold the Planning Commission Public Hearing?

MN Statute 103G.005 Subd. 14 (3) for reservoirs and flowages, the OHWL is the operating elevation of the normal summer pool (686.8 feet)

Saint Paul has jurisdiction and is required to act when there is fill or grading above the OHWL

State Statute 103G.005.

Subd. 14. **Ordinary high-water level.**

"Ordinary high-water level" means the boundary of water basins, watercourses, public waters, and public waters wetlands, and:

(3) for reservoirs and flowages, the ordinary high-water level is the operating elevation of the normal summer pool.

Pig's Eye Lake is part of Pool 2 that is a reservoir. The normal summer pool for Pig's Eye Lake is 686.8'. According to State Statute 686.8 feet is the OHWL.

This is the OHWL that has been used for Pig's Eye Lake.

This natural lake is part of the (Pool 2) reservoir created by Hastings Dam. The OHWL of a reservoir is the operating elevation of the normal summer pool of 686.8 feet. The 686.8 feet level is documented in the project Environmental Assessment.

Friends provided photo documentation that shows grading and fill work above the Ordinary High Water line (OHWL). Friends provided copies of MN Statute 103G.005 (see below) that sets the OHWL of a reservoir at the operating elevation of the summer pool. Friends provided a copy of the Corps operating elevation of the summer pool which is part of the project record. Friends provided hydrologic information for Pool 2 from 1935 to 2019. Photos show fill and grading 20 feet above the water and above 692.9 feet. **State Statutes give Saint Paul**

jurisdiction above the OHWL of 686.8 feet. The Critical Area Zoning, and Comprehensive Plan must be followed.

Question 4. The work including bulldozers grading large amounts of fill exceed both 686.8 feet and 692.9 feet by 20 feet based on photos. Fill and grading work is happening above the OHWL and outside the basin no matter which OHWL is used. When will action be taken by the City regarding grading permit application and compliance with the Critical Area zoning code? The permit from DNR applies to work below the water. Where is the fill and grading permit for work above the water?



Question 5. Environmental Justice. Saint Paul requires public review to ensure compliance with Critical Area, Floodplain, Comprehensive Plan, and Zoning that the City Council has approved for this area. It is essential for the public to have a voice in their neighborhood. Environmental Justice requires including the voices of BIPOC Majority neighborhoods that surround this discharge of PFAS and other pollutants. The discharge of fill with any pollutant into a lake is prohibited by State Law. When is the neighborhood going to have a voice at the Planning Commission?

The East Metro Area Hydrologist at DNR asserts the OHWL is 692.9' - **This is incorrect**
The Hydrologist asserts fill is placed entirely below the high water level - **This is incorrect**
One of the straw man arguments is the assertion the reservoir behind Dam 2 is used for navigation purpose instead of flood control so it is not a reservoir

There is no basis in MN Statute to exclude the OHWL standards based in law because of this specious claim. Many of the arguments against compliance with the zoning code, public review and permitting are based on similar attempts to divert attention from what is really going on. Work above the water requires review and permits period.

MN Statute 103G

103G.005 DEFINITIONS.

Subdivision 1. Applicability.

The definitions in this section apply to this chapter.

Subd. 3. Altered natural watercourse.

"Altered natural watercourse" means a former natural watercourse that has been affected by artificial changes to straighten, deepen, narrow, or widen the original channel.

Subd. 14. Ordinary high-water level.

"Ordinary high-water level" means the boundary of water basins, watercourses, public waters, and public waters wetlands, and:

(1) the ordinary high-water level 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 ordinary high-water level is the elevation of the top of the bank of the channel; and

(3) for reservoirs and flowages, the ordinary high-water level is the operating elevation of the normal summer pool.

Subd. 14d. Project.

"Project" means a specific plan, contiguous activity, proposal, or design necessary to accomplish a goal as defined by the local government unit. As used in this chapter, a project may not be split into components or phases for the sole purpose of gaining additional exemptions.

Subd. 15e. Shallow lake.

"Shallow lake" means a body of water, excluding a stream, that is greater than or equal to 50 acres in size and less than or equal to 15 feet in maximum depth.

Subd. 16. Water basin.

"Water basin" means an enclosed natural depression with definable banks, capable of containing water, that may be partly filled with waters of the state and is discernible on aerial photographs.

Definitions

a reservoir is a manmade lake that is created when a dam is built on a river. River water backs up behind the dam creating a reservoir. USGS

Impoundments (also known as reservoirs) are artificially created standing waterbodies, produced by dams on streams or rivers. WI DNR

Reservoirs are typically created to serve specific municipal or water resource management needs, such as drinking water supply, agricultural irrigation, industrial cooling for a water supply, flood control, fisheries, recreation, or navigation. They are often created by damming rivers or streams and flooding the surrounding floodplain. US EPA

The navigation dams created a stairway of reservoirs or navigation pools from Minneapolis, Minnesota to St. Louis, Missouri. WI DNR

Question 6. Does the City really have no authority to protect the public and environment from pollutant discharge? Why is prohibited fill from the most polluted section of the river including the outfall of the 3M Chemolite plant being shipped up river and dumped in our drinking water and park lake where we canoe and fish. See the more detailed concerns about discharge of pollutant include with the appeal. The pollutant discharge has higher PFAS levels than found in the lake. The supposedly protected birds in the State Scientific and Natural Area Rookery have been found to have some highest levels of pollution found in birds eggs in the world. How does adding more pollution benefit the public and wildlife?

Also see attached Page from the Project Environmental Assessment that establishes the OHWL at 686.8 feet.

MPCA has sent notices to Highwood neighborhood families with wells polluted by PFAS/PFOS. As part of the 3M settlement, they are installing and maintaining special whole house water filtration systems. There seems to be a real disconnect between installing whole house filtration systems and expanded illegal dumping of highly polluted fill that threatens our aquifer. Dumping any pollutant is prohibited by State Law and City zoning.

MN Rules 6115.0190 Filling Into Public Waters and 6115-0215 Restoration Of Public Waters – a project must meet all the requirements: B. the fill consists of clean inorganic material that is free of pollutants and nutrients; Prohibited work. ...work is prohibited when the work: F. uses materials that are not clean and free of pollutants, nutrients, and exotic species sources;

(b) *Compliance of uses or occupations required.* No use or occupation of any lands, for any purpose whatsoever, shall hereafter be permitted within the River Corridor District without full compliance with the terms of this chapter and other applicable laws.

(c) *Compliance of structures, fill, etc.* No structure, fill, material or object shall hereafter be placed on or removed from lands within the River Corridor District, and no structures or other object shall hereafter be located, used, constructed **Sec. 68.103. - Compliance.**

Permit required. A permit issued by the zoning administrator in conformance with the provisions of this chapter shall be secured prior to the erection, addition, or alteration of any building, structure, or portion thereof; prior to the use or change of use of a building, structure or land; prior to the change or extension of a nonconforming use; and prior to the placement of fill, excavation of materials, or the storage of materials or equipment within the flood plain.

, extended, converted or altered within the district without full compliance with this chapter and other applicable laws.

(d) *Submission of site plan.* A site plan shall be submitted to and approved by the planning commission in accordance with [section 62.108](#) before a permit is issued for any development on property wholly or partially located within the River Corridor District. For any development in the RC1 and RC2 districts, the site plan shall include the regulatory flood protection elevation; the proposed elevation of fill; the proposed elevation of the lowest floor of new structures, altered structures and additions to existing structures; and the proposed elevation to which structures will be floodproofed.



Pool 2 PFC Sediment Sample Data Summary

Available Studies

Date	Agency	Area	average PFOA ¹	average PFOS ¹
2011-12	MPCA	Pool 2 Poolwide*	-	0.5
2007	MPCA	Pig's Eye Lake	1.3	2.9
2011-12	MPCA	Lower Pool 2 Subset	-	9.1
2007	Wenck	Pigs Eye Dump	3.6	14.4
2014	Bay West	Pigs Eye Dump	23.7	12.7
2011-12	MPCA	3M Discharge Subset	-	28.4
2016	USACE	Pig's Eye Lake	0.9	1.1

* 3M Discharge Samples removed.

¹ All data reported in ng/g dry weight

POOL 2 - POOLWIDE

2011-2012 - MPCA - 58 Samples

PFOS	
AVG	3.4
MAX	80.2
MIN	0.0

* If 3M Subset removed, Average = 0.52

PFOA		PFOS	
AVG	23.7	12.7	
MAX	169.0	77.4	
MIN	0.0	0.2	

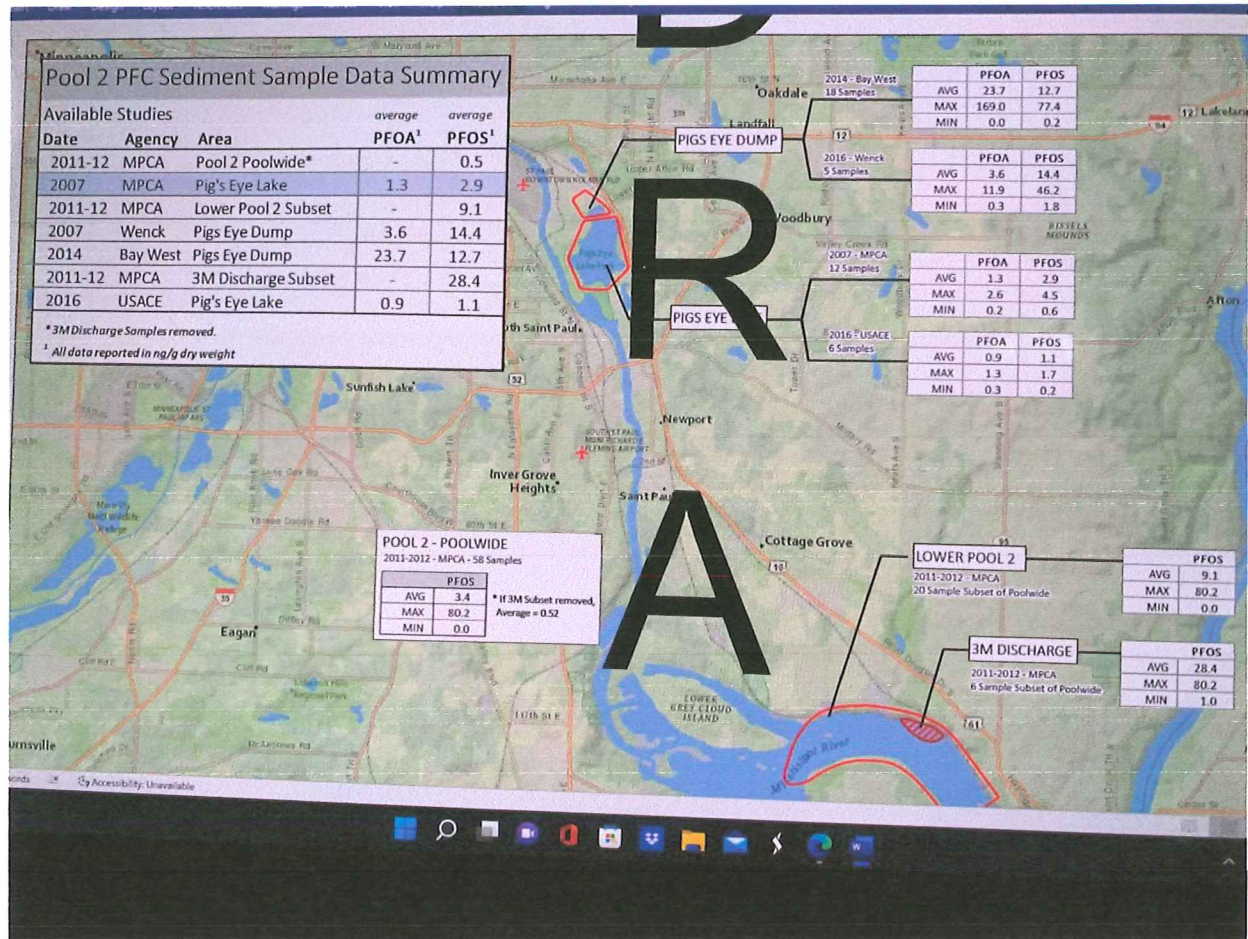
PFOA		PFOS	
AVG	3.6	14.4	
MAX	11.9	46.2	
MIN	0.3	1.8	

PFOA		PFOS	
AVG	1.3	2.9	
MAX	2.6	4.5	
MIN	0.2	0.6	

PFOA		PFOS	
AVG	0.9	1.1	
MAX	1.3	1.7	
MIN	0.3	0.2	

PFOA		PFOS	
AVG	9.1		
MAX	80.2		
MIN	0.0		

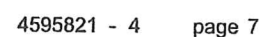
PFOA		PFOS	
AVG	28.4		
MAX	80.2		
MIN	1.0		



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.

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File # 22-072764

Fee Paid \$ 547.00

Received By / Date KE - 7/8/2022

Tentative Hearing Date 8/8/2022

APPELLANT

Name(s) Friends of Pig's Eye Lake Park - Tom Dimond

Address 2119 Skyway Drive City St. Paul State MN Zip 55119

Email tdimond@q.com Phone 952-207-6923

PROPERTY LOCATION

Project Name Discharge of 80 Million Gallons of Pollutant into Pig's Eye Lake

Address / Location Pig's Eye Lake Park - Pig's Eye Lake Road

TYPE OF APPEAL: Application is hereby made for an appeal to the:

- ☒ **Board of Zoning Appeals**, under provisions of Zoning Code § 61.701(c), of a decision made by the Zoning Administrator.
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Date of decision June 30th, 20 22

File Number _____

GROUND FORS APPEAL: Explain why you feel there has been an error in any requirement, permit, decision or refusal made by an administrative official, or an error in fact, procedure or finding made by the Planning Commission or Board of Zoning Appeals. Attach additional sheets if necessary.

See attached



☐ If you are a religious institution you may have certain rights under RLUIPA. Please check this box if you identify as a religious institution.

Appellant's Signature

Thomas R. Dimond

Date

7-8-2022

Tom Dimond
2119 Skyway Drive
Saint Paul, MN 55119

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.