

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

Our File # 536

RULES REVIEW CHECKLIST

DATE RULES RECEIVED 8-30-79 Temporary Rule _____

Resubmitted and Received 10-1-79 - ~~10/26/79~~

DUE DATE 9-19-79 - 10-11-79 - ~~11/5/79~~

a. Returned to Agency w/o filing w/Secy of State 9-12
b. Approved 10-2 Date Sent Back to Agency _____

- -

1. Rules as Adopted ✓
2. Rules as Proposed ✓
3. Certificate of Board's Authorizing Resolution, where applicable N.A.
4. Order for Hearing ✓
5. Notice of Hearing ✓
   (i) Sufficiency ✓
6. Secretary of State's List ✓
7. Certificate of Acquisition of Secretary of State's List ✓
8. Affidavit of Mailing ✓
   (i) At least 30 days prior to hearing ✓
9. Statement of Need and Evidence ✓
10. Hearing Examiner's Report ✓
11. Agency's Findings of Fact ✓
12. Certificate of Board's Resolution Adopting Rules, where applicable N.A.
13. Order Adopting ✓
14. Report of Chief Hearing Examiner ✓
    (i) Finding of No Substantial Change ✓
    (ii) Permission to Incorporate by Reference, where applicable N.A.
15. Certificate of Compliance with Rulemaking Procedures ✓
16. Copy of Notice of Intent to Solicit Outside Opinion, where applicable N.A.
17. Petition by Public, where applicable N.A.

① Does signer of Notice, etc. have delegation? Bill Clapp says yes 9-6-79

② p. 2 - incorp. by ref of Appendix O?

③ retroactivity - p. 9

Department of Natural Resources

Rules Providing Criteria For Regulating Agricultural Dike Construction Along The Red River Of The North And Bois De Sioux Rivers.

6 MCAR § 1.5400.

A. General purpose.

The purpose of these rules is to provide for the orderly and consistent review of permit applications to construct, relocate, rebuild or alter agricultural dikes along the Red River of the North and Bois de Sioux Rivers in order to assure that the granting of such permits would be in the best interests of the people of Minnesota and North Dakota. These rules are mutually applicable in both states. The authority to establish these joint criteria is granted to the Commissioner of Natural Resources in Minnesota Statutes, Sections 105.42, 105.49 and 471.59 and to the North Dakota State Water Commission by Sections 61-02-24 and 61-16-15 of the North Dakota Century Code. The two states recognize that establishment of these rules governing the issuance, review and denial of permits to construct, relocate, rebuild or alter agricultural dikes along the boundary rivers is but the first step in the exercise of joint control over those

activities which could contribute to an increased flood potential of these rivers. The two states further recognize the need to exercise this joint control in that water management decisions which appear logical in a local or statewide context may have negative interstate and international impacts.

These rules are being established at this time because there is a current need to provide a basis for the review of existing, unauthorized agricultural dikes and permit applications for the construction of additional agricultural dikes along the boundary waters. Local land owners view such dikes as interim solutions to local flood problems.

B. Jurisdiction.

These rules governing the review, issuance and denial of permits to construct, relocate, rebuild or alter agricultural dikes along the boundary rivers pertain to all such dikes located within the flood plains of the Red River of the North and the Bois de Sioux Rivers. Floodplain areas of the Red River of the North are defined by Appendix O, Volume 8 of the Souris-Red-Rainy Basins Comprehensive Study as "Red River of the North Main Stem Regional Floodplain Area" and the floodplain of the Bois de Sioux River is defined by the U. S. Geological Survey one percent chance of recurrence area flood quadrangles. These rules apply to dikes constructed on tributaries within the floodplains of these boundary rivers. These rules shall be superseded by local authority adoption

of Commissioner approved floodplain ordinances which include agricultural diking provisions as conditional uses.

C. Definitions.

For the purposes of these rules certain terms or words used herein shall be interpreted as follows:

"Boundary Rivers" means the Red River of the North and the Bois de Sioux River as they form a natural boundary between the States of Minnesota and North Dakota.

"Dike" means an embankment constructed of earth and/or other suitable materials to protect agricultural lands.

"Farmstead" means a farm dwelling and/or associated farm buildings.

"Flood Frequency" means the average frequency, statistically determined, for which it is expected that a specific flood stage or discharge may be equalled or exceeded. This frequency is usually expressed as having a probability of occurring, on the average, once within a specified number of years.

"Flood Waters" means those waters which temporarily inundate normally dry areas adjoining a watercourse. This inundation results from an overflow of the watercourse caused by excessive amounts of rainfall and/or snowmelt which exceed its capacity.

"Public waters" means all natural and altered natural watercourses with a total drainage area greater than two square miles, except that trout streams officially designated by the Commissioner shall be public regardless of the size of their drainage area.

"Watercourse" means a channel in which a flow of water occurs either continuously or intermittently in a definite direction. The term applies to either natural or artificially constructed channels.

D. Severability.

The provisions of these rules shall be severable, and the invalidity of any paragraph, subparagraph, or subdivision thereof shall not make void any other paragraph, subparagraph, subdivision, or any other part.

E. Design criteria.

1. Dike setbacks and elevation. Dikes are to be constructed at a location and elevation so as not to cause an increase in elevation of the 100-year frequency flood of more than one-half foot at any point along the river. Calculation of the effects of the dikes shall be based on an assumed equal degree of encroachment along the opposite side of the river. If mutual agreement has been reached between persons on both sides of the river, dikes on one side may utilize up to the entire increase in flood elevation allowable. In all instances the applicants maintain the liability for damages resulting from any and all activities.

2. Dike dimensions. Dike top width shall not be less than six (6) feet. Side slopes shall not be steeper than 3:1, except where slope stability analysis and slope erosion control can justify steeper slopes. No organic soil or material shall be allowed in the foundation of the fill of dikes.

3. Vegetative cover and riprap. A protective cover of grasses shall be established on all exposed surfaces of the dike. Riprap shall be used where required for control of erosion.

4. Interior drainage. Dikes shall have provisions for interior drainage. The design shall include plans to handle the discharge from the drainage area based on drainage design requirements for the local area.

F. Hydrologic data for design.

The North Dakota State Water Commission and the Minnesota Department of Natural Resources shall provide the discharges and corresponding elevations of the various frequency floods (and other available flood data), in relation to known historic floods, for use in dike design.

G. Dikes across natural waterways and legal drains.

Dikes shall not be constructed across public waters or watercourses without permit from the Commissioner of Natural Resources.

Dikes constructed across legal drains or public ditch systems shall require the approval of the appropriate local authority (watershed district, county, city, etc.).

H. Farmstead diking.

Within an existing dike system, ring dikes around

individual farmsteads shall not require dike permits if they are not provided with tie-backs to existing roadways or dikes. Ring dikes provided with tie-backs shall be considered part of the overall dike system and will be required to secure diking permits. Outside the dike system there shall be no limitations on tie-backs of dikes around farmsteads. However, appropriate authorization must be obtained from the local land use authority consistent with adopted codes or ordinances.

I. Administration.

1. Application for permit. All applications submitted by the owner to construct, to relocate, rebuild or alter dikes shall be made on forms provided by the Commissioner and shall be accompanied by two (2) complete sets of plans and specifications. Such plans and specifications shall include the following:

a. A general location map with a minimum scale of 1"=800' showing the following:

(1) Location of the dike with respect to the watercourse;

(2) Location of field inlets to provide for internal drainage; and

(3) Location of legal drains and natural channels tributary to the main river channel.

b. Detailed cross-sections of the dike showing elevations, in relation to mean sea level, and side slopes.

c. Other data as deemed appropriate by the Commissioner to properly evaluate the application for permit.

After review of the information required above and other available data, the state agency to which the application is made shall determine the location and number of required cross-sections of the river channel and overland areas. These locations shall be provided to the applicant who shall then provide the required cross-section data. The applicant shall undertake and agree to pay the expenses incurred in securing these cross-sections.

2. Joint permit applications. Joint permit applications involving two or more landowners or a permit application on behalf of two or more landowners will be accepted by the State agencies. These permit applications, taken together, must meet the above rules.

3. Joint administration. A copy of each application for a permit shall be forwarded by the state agency receiving the initial application to the other state for comment and recommendation before final approval is granted.

If no response is received within 30 days, the Commissioner shall process the permit without such comments or recommendations.

4. Permit revocation. The applicant shall provide for certification by a registered land surveyor, engineer, or other qualified person or agency that the finished dike elevations are not higher than those approved by the Commissioner. The permit will be revoked for failure to provide this certification.

The permit may be revoked for failure to construct the dike in accordance with the plans and specifications submitted. Structural alteration of the dike without permission of the appropriate state agency will also result in having the permit revoked.

5. Reconstruction/maintenance. Reconstruction of any authorized dike may be performed after notification to the Commissioner of the repair needed. Permittee shall again certify the repair concurrent with this section. The maintenance of dikes must include periodic removal of woody vegetation (for example, trees and shrubs) which may become established on the embankment.

6. General administration. All applicants for permit to construct dikes shall be subject to the provisions of 6 MCAR 1.5026.

J. Exception to the criteria.

Under special circumstances, exceptions to the dike rules may be authorized on an individual basis but they must have the concurrent approval of the N.D. State Engineer, local water management board in North Dakota, Minnesota Department of Natural Resources and local watershed district in Minnesota. Factors that will be considered include but shall not be limited to dike setback line, location of farmsteads, property lines, existing roads, stream velocity, environmental effects, and acquisition of flowage rights. Request for exceptions must be accompanied by a plan satisfactory to all agencies.

K. Application to existing dikes.

1. These rules shall apply to all unauthorized dikes constructed in the past for the protection of those agricultural lands located within the floodplains of the Red River of the North and the Bois de Sioux, as defined in Section B of these rules. Exceptions are farmstead dikes if they meet the provisions of Section H of these rules.

2. The Commissioner shall have the authority to order removal, modification, or reconstruction of dikes not conforming to these rules.

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area: If any provision of the orderly annexation joint resolution resolves to annex an area designated for orderly annexation, the board shall, after accepting the joint resolution, treat this provision as a separate resolution initiating annexation.

C. Evidentiary requirements for annexation within the designated area: The party proposing an annexation within the designated area shall demonstrate that the proposed annexation is consistent with the joint agreement.

D. Reporting requirements: One year after the joint agreement has been accepted by the board, and every year thereafter, for as long as the joint resolution is in effect, the parties shall inform the board of any changed conditions within the area designated for orderly annexation. If there have been no changed conditions, the parties shall so inform the board.

E. Amending the joint agreement: The joint agreement can only be amended by joint resolution submitted to the board by the parties to the joint agreement. The board may accept the amendment if it is consistent with the applicable state law and the remainder of the joint agreement.

F. Effective of noncompliance: If a party to the joint agreement continually does not comply with its provisions, the board or an aggrieved party by resolution may initiate a hearing, conducted pursuant to Minn. Stat. § 414.09. If the evidence demonstrates that there has been continuing noncompliance, and, further, that, as a result of this noncompliance, the basis of the agreement has been substantially undermined, the board may rescind the agreement and any pending annexations being considered within the designated area.

Department of Natural Resources

Proposed Rules Providing Criteria for Regulating Agricultural Dike Construction Along the Red River of the North and Bois de Sioux River

Notice of Hearing

Public hearings on the above entitled rules at the following dates and places.

April 25, 1978, 9:30 a.m., Ballroom, Comstock Memorial Union Building, Moorhead State University, 6th Avenue and 14th Street South, Moorhead, Minnesota

April 26, 1978, 9:30 a.m., Grand Forks Armory, Room 36, 615 1st Avenue North, Grand Forks, North Dakota

The hearings will be conducted jointly with the North Dakota State Water Commission, for the purpose of the two states adopting identical rules for granting and denying permits to construct agricultural dikes along the subject rivers. Minnesota's statutory authority may be found in Minn. Stat. §§ 105.415, 105.42, 105.49 and 471.59. The rules govern building, rebuilding, relocating or altering agricultural dikes within the floodplains of the Bois de Sioux and Red River of the North Rivers in North Dakota and Minnesota. The rules contain criteria for deciding how close to the river a dike may be built, how high it may be and how it must be constructed. They regulate diking across tributaries, and around farmsteads. The rules establish procedures for applying for permits, for application review, and for revoking issued permits. The rules can require the relocation or removal of existing unauthorized dikes.

All interested persons will have an opportunity to participate in the hearings. Statements may be made orally and written materials may be submitted at the hearings. In addition, written materials may be submitted to hearing examiner Allan Klein at the Office of Hearing Examiners, 1745 University Avenue, Saint Paul, Minnesota 55104, either before the hearing or within five (5) days after the hearing. The hearing will be conducted as described in Minn. Stat. § 15.0412 and the Minnesota Rules HE 101-109.

A free copy of the proposed rules may be obtained by writing to the Department of Natural Resources, Division of Waters, Space Center, 444 Lafayette Road, Saint Paul, Minnesota 55101. Additional copies will be available at the hearings. A "statement of need and evidence" explaining why the agency feels the proposed rules are necessary and outlining the testimony they will be introducing will be filed with the Office of Hearing Examiners twenty-five (25) days before the hearing and will be available there for public inspection.

Please be advised that Minn. Stat. ch. 10A, requires each lobbyist to register with the Ethical Practices Board within five (5) days after he commences lobbying. Lobbying includes attempting to influence rulemaking by communicating or urging others to communicate with public officials. A lobbyist is generally any individual who spends more than $250 per year for lobbying or any individual who is engaged for pay or authorized to spend money by another individual or association and who spends more than $250 per year or five hours per month at lobbying. The statute provides certain exceptions. Questions should be directed to the Ethical

Practices Board, 41 State Office Building, Saint Paul, Minnesota 55155, phone: (612) 296-5615.

William B. Nye
Commissioner

Rules as Proposed

NOTE: The proposed rule is published in the form of an amendment to an existing agreement between Minnesota and North Dakota. Upon final adoption, each state will put the amendment into its rules format.

FIRST AMENDMENT TO

JOINT AND COOPERATIVE AGREEMENT FOR THE ESTABLISHMENT OF CRITERIA FOR AUTHORIZING DIKES AND OTHER FLOOD CONTROL STRUCTURES AND MEASURES ON THE RED RIVER OF THE NORTH AND THE BOIS DE SIOUX RIVER

1. Article IV of the agreement is hereby amended by the deletion of the existing article and the insertion of the following new article:

IV. JOINT DIKE CRITERIA FOR AGRICULTURAL DIKE CONSTRUCTION

A. GENERAL PURPOSE

The purpose of these criteria is to provide for the orderly and consistent review of permit applications to construct, relocate, rebuild or alter agricultural dikes along the Red River of the North and Bois de Sioux in order to assure that the granting of such permits would be in the best interests of the people of Minnesota and North Dakota. These criteria would be mutually applicable in both states. The authority to establish these joint criteria is granted to the Commissioner of Natural Resources in Minnesota Statutes, Sections 105.42, 105.49 and 471.59 and to the North Dakota State Water Commission by Sections 61-02-24 and 61-16-15 of the North Dakota Century Code. The two states recognize that establishment of these criteria governing the issuance, review and denial of permits to construct, relocate, rebuild or alter agricultural dikes along the boundary rivers is but the first step in the exercise of joint control over those activities which could contribute to an increased flood potential of these rivers. The two states further recognize the need to exercise this joint control in that water management decisions which appear logical in a local or statewide context may have negative interstate and international impacts.

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The criteria herein are being established at this time because there is a current need to provide a basis for the review of existing, unauthorized agricultural dikes and permit applications for the construction of additional agricultural dikes along the boundary waters. Local land owners view such dikes as interim solutions to local flood problems.

B. JURISDICTION

These criteria governing the review, issuance and denial of permits to construct, relocate, rebuild or alter agricultural dikes along the boundary rivers pertain to all such dikes located within the flood plains of the Red River of the North and the Bois de Sioux Rivers. Floodplain areas of the Red River of the North are defined by Appendix O, Volume 8 of the Souris-Red-Rainy Basins Comprehensive Study as "Red River of the North Main Stem Regional Floodplain Area" and the floodplain of the Bois de Sioux River is defined by the U.S. Geological Survey one percent chance of recurrence area flood quadrangles. These criteria apply to dikes constructed on tributaries within the floodplains of these boundary rivers.

C. DEFINITIONS

For the purposes of these regulations certain terms or words used herein shall be interpreted as follows:

"Agricultural Dike" or "Dike" means an embankment constructed of earth and/or other suitable materials to protect agricultural lands from frequently recurring floods (10-year frequency or more often) which result from overflow of watercourses or from diffused surface waters.

"Boundary Rivers" means the Red River of the North and the Bois de Sioux River as they form a natural boundary between the States of Minnesota and North Dakota.

"Farmstead" means a farm dwelling, adjacent farm buildings and those nontillable acres adjacent to the buildings.

"Flood Frequency" means the average frequency, statistically determined, for which it is expected that a specific flood stage or discharge may be equalled or

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exceeded. This frequency is usually expressed as having a probability of occurring, on the average, once within a specified number of years.

"Flood Waters" means those waters which temporarily inundate normally dry areas adjoining a watercourse. This inundation results from an overflow of the watercourse caused by excessive amounts of rainfall and/or snowmelt which exceed its capacity.

"Ring Dike" means an embankment constructed of earth and/or other suitable materials which completely encloses a parcel of land.

"Watercourse" means a channel in which a flow of water occurs either continuously or intermittently in a definite direction. The term applies to either natural or artificially constructed channels.

"Watercourse, Class I" means, in Minnesota, those natural watercourses serving as major drainage outlets, or major tributaries to those outlets, which are capable of serving a number of beneficial public purposes; smaller natural watercourses serving specific values such as trout streams and scenic waterways.

"Watercourse, Class II" means, in Minnesota, those natural watercourses serving as tributaries of Class I watercourses which are often perennial streams serving more than one beneficial public purpose.

D. SEVERABILITY

The provisions of these regulations shall be severable, and the invalidity of any paragraph, subparagraph, or subdivision thereof shall not make void any other paragraph, subparagraph, subdivision, or any other part.

E. DESIGN CRITERIA

1. Dike Setbacks. Dikes are to be constructed a sufficient distance from the river so as not to cause an increase in the elevation of flood water of the 10-year frequency flood of more than one (1) foot at any point along the river. However, when the effect of the dike extends within the corporate limits of any city the permitted increase in flood water elevation shall not exceed 0.5 feet within the corporate limits of the city. Calculation of the effects of proposed dikes shall be based on the dikes being located on both sides of the boundary water an equal distance from the center of the channel. If mutual agreement has been reached between applicants on both sides of the river as to location of the dike, the "equal distance from the center" requirements may be waived providing the limit for increase in flood stage is met.

2. Dike Elevations. Dikes are to be designed and constructed so that they will be overtopped upon the occurrence of a flood that is one foot higher than the 10-year frequency flood at that point.

3. Dike Dimensions. Dike top width shall not be less than six (6) feet. Side slopes shall not be steeper than 3:1, except where slope stability analysis and slope erosion control can justify steeper slopes. No organic soil or material shall be allowed in the foundation of the fill of dikes.

4. Vegetative Cover and Riprap. A protective cover of grasses shall be established on all exposed surfaces of the dike. Riprap shall be used where required for control of erosion.

5. Interior Drainage. Dikes shall have provisions for interior drainage. The design shall include plans to handle the discharge from the drainage area based on drainage design requirements for the local area.

F. HYDROLOGIC DATA FOR DESIGN

The North Dakota State Water Commission and the Minnesota Department of Natural Resources shall provide the discharges and corresponding elevations of the 10-year flood (and other available flood data), in relation to known historic floods, for use in dike design.

G. DIKES ACROSS NATURAL WATERWAYS AND LEGAL DRAINS

Dikes shall not be constructed across Class I or Class II watercourses in Minnesota. Dikes shall not be constructed across the following rivers in North Dakota: Wild Rice, Sheyenne, Elm, Goose, Turtle, Forest, Park and Pembina. Dikes constructed across other natural waterways, streams or rivers in Minnesota and North Dakota shall have an opening capable of passing the summer storm having a four percent chance of recurrence and have an emergency spillway to prevent overtopping of the structure when the one percent (1%) summer storm occurs. Dike setbacks along tributary waterways, within the area defined in Section B of these criteria, to the boundary water shall meet the criteria as stated in Section E.

Dikes constructed across legal drains or public ditch systems shall require the approval of the appropriate watershed district, drain board, water management district or other local authority.

H. FARMSTEAD DIKING

Within an existing dike system, ring dikes around individual farmsteads shall not require dike permits if they are not provided with tie-backs to existing roadways or dikes. Ring dikes provided with tie-backs shall be considered part

of the overall dike system and will be required to secure diking permits. Outside the dike system there shall be no limitations on tie-backs of dikes around farmsteads.

I. Administration

1. Application for Permit. All applications submitted by the owner to construct, to relocate, rebuild or alter dikes shall be made on forms provided by the Minnesota DNR or ND State Water Commission and shall be accompanied by two (2) complete sets of plans or specifications. Such plans and specifications shall include the following:

A) A general location map with a minimum scale of 1″=800′ showing the following:

1) Location of the dike with respect to the watercourse

2) Location of field inlets to provide for internal drainage

3) Location of legal drains, and natural channels tributary to the main river channel.

B) Detailed cross-sections of the dike showing elevations, in relation to mean sea level, and side slopes.

After review of the information required above and other available data, the state agency to which the application is made shall determine the location and number of required cross-sections of the river channel and overland areas. These locations shall be provided to the applicant who shall then provide the required cross-section data. The applicant shall undertake and agree to pay the expenses incurred in securing these cross-sections.

2. Joint Permit Applications. Joint permit applications involving two or more landowners or a permit application on behalf of two or more landowners will be accepted by the State agencies. These permit applications, taken together, must meet the above criteria.

3. Issuance of Permits. Dike permits will be issued only upon concurrent approval by the state and local government in which state the dikes are located. Approval of the permit will in no way relieve the owner from damages which may be caused or created by construction of the dikes.

4. Joint Administration. A copy of each application for a permit shall be forwarded by the state agency receiving the initial application to the other state for comment and recommendation before final approval is granted.

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5. Permit Revocation. The applicant shall provide for certification by a registered land surveyor, engineer, or other qualified person or agency that the finished dike elevations are not higher than those approved by the state agency to which the application was submitted. The permit will be revoked for failure to provide this certification.

The permit may be revoked for failure to construct the dike in accordance with the plans and specifications submitted. Structural alteration of the dike without permission of the appropriate state agency will also result in having the permit revoked.

6. Dike Maintenance. All dikes must be adequately maintained to the required shape, height, and protective covering. All maintenance shall be the responsibility of the permit holder. The maintenance of dikes must include periodic removal of woody vegetation (for example, trees and shrubs) which may become established on the embankment. Design of the project shall include provisions of maintenance access.

J. EXCEPTION TO THE CRITERIA

Under special circumstances, exceptions to the dike criteria may be authorized on an individual basis but they must have the concurrent approval of the N.D. State Engineer, local water management board in North Dakota, Minnesota Department of Natural Resources and local watershed district in Minnesota. Factors that will be considered shall be increased in flood stage, increase of stage at existing city dike, increase in stream velocity and environmental effects. Request for exceptions must be accompanied by a plan satisfactory to all agencies.

K. APPLICATION TO EXISTING DIKES

These criteria shall apply to all unauthorized dikes constructed in the past for the protection of those agricultural lands located within the floodplains of the Red River of the North and the Bois de Sioux, as defined in Section B of these criteria. Exceptions are farmstead dikes if they meet the provision of Section H of these criteria.

2. The first paragraph of Article V of the agreement is hereby amended by the deletion of the words "adopted pursuant to" and the insertion in lieu thereof the words

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"contained in". The first paragraph of Article V, as amended, therefore provides:

V. REMOVAL OF UNAUTHORIZED DIKES

Parties to this agreement hereby agree that they shall immediately take whatever steps are necessary and available to remove unauthorized dikes adjacent to the boundary rivers not meeting the criteria contained in part IV above.

STATE OF MINNESOTA

_____

Commissioner Department of Natural Resources

DATE: _____

STATE OF NORTH DAKOTA

_____

State Engineer
State Water Commission

DATE: _____

Pollution Control Agency

Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program

Notice of Hearing

Notice is hereby given that public hearings in the above-entitled matter will be held in the Board Room of the Minnesota Pollution Control Agency, 1935 West County Board B2, Roseville, Minnesota, on April 21, 1978, commencing at 9:00 a.m.; in the North Half, Multi-Purpose Building, Area Vocational Technical Institute, Highway 34 East, Detroit Lakes, Minnesota, on April 24, 1978, commencing at 7:00 p.m.; in the City Council Chambers, City Hall, 420 Pokegama Avenue North, Grand Rapids, Minnesota, on April 25, 1978, commencing at 7:00 p.m.; and in Room 101, Armstrong Hall, Mankato State University, Mankato, Minnesota, on April 26, 1978, commencing at 7:00 p.m. These hearings shall continue until all persons have had an opportunity to be heard. The Agency will present its witnesses and evidence establishing the need for and reasonableness of the amendment to the above-captioned rule at the hearing in Roseville, Minnesota.

All interested or affected persons will have an opportunity to participate. Statements may be made orally and written materials may be submitted at the hearing. In addition, written materials may be submitted by mail to Hearing Examiner Howard L. Kaibel, Jr., 1745 University Avenue, St. Paul, Minnesota 55104, phone — (612) 296-8107, either before the hearing or within five workings days after the close of the hearing, unless the Hearing Examiner orders the record to remain open for a longer period not to exceed 20 days, in which case written comments may be submitted within that period. To save time and to avoid duplication, it is suggested that those persons, organizations, or associations having a common viewpoint or interest in these proceedings join together where possible and present a single statement in behalf of such interests.

The existing regulation, Minn. Reg. WPC 34, establishes procedures relating to the administration of the state and federal grants program and the state loans program for the construction of municipal sewage treatment works and disposal systems. The proposed amendments would, if adopted:

(1) reflect changes in federal law pursuant to 1977 amendments to the Federal Water Pollution Control Act;

(2) amend the criteria for determining the priority of municipalities and projects on the Municipal Needs List and the Municipal Project List;

(3) provide for greater public participation prior to the adoption of the Municipal Needs List and the Municipal Project List;

(4) provide for Agency recourse in regard to projects which are improperly designed, constructed, operated or maintained;

(5) amend other provisions of the regulation for purposes of clarification and more efficient administration of the programs.

Copies of the proposed rule are now available and one free copy may be obtained by writing to Mr. Perry Beaton, Minnesota Pollution Control Agency, Division of Water Quality, 1935 West County Road B2, Roseville, Minnesota, 55113. Additional copies will be available at the door on the dates of the hearings. The Agency's authority to promulgate the proposed rule is contained in Minn. Stat. §§ ch. 115 and 116 and, more specifically, Minn. Stat. § 116.16, et seq. (1976). A "statement of need" explaining

Department of Natural Resources

Rules Providing Criteria For Regulating Agricultural Dike Construction Along The Red River Of The North And Bois De Sioux Rivers.

6 MCAR § 1.5400.

A. General purpose.

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activities which could contribute to an increased flood potential of these rivers. The two states further recognize the need to exercise this joint control in that water management decisions which appear logical in a local or statewide context may have negative interstate and international impacts.

These rules are being established at this time because there is a current need to provide a basis for the review of existing, unauthorized agricultural dikes and permit applications for the construction of additional agricultural dikes along the boundary waters. Local land owners view such dikes as interim solutions to local flood problems.

B. Jurisdiction.

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of Commissioner approved floodplain ordinances which include agricultural diking provisions as conditional uses.

C. Definitions.

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"Dike" means an embankment constructed of earth and/or other suitable materials to protect agricultural lands.

"Farmstead" means a farm dwelling and/or associated farm buildings.

"Flood Frequency" means the average frequency, statistically determined, for which it is expected that a specific flood stage or discharge may be equalled or exceeded. This frequency is usually expressed as having a probability of occurring, on the average, once within a specified number of years.

"Flood Waters" means those waters which temporarily inundate normally dry areas adjoining a watercourse. This inundation results from an overflow of the watercourse caused by excessive amounts of rainfall and/or snowmelt which exceed its capacity.

"Public waters" means all natural and altered natural watercourses with a total drainage area greater than two square miles, except that trout streams officially designated by the Commissioner shall be public regardless of the size of their drainage area.

"Watercourse" means a channel in which a flow of water occurs either continuously or intermittently in a definite direction. The term applies to either natural or artificially constructed channels.

D. Severability.

The provisions of these rules shall be severable, and the invalidity of any paragraph, subparagraph, or subdivision thereof shall not make void any other paragraph, subparagraph, subdivision, or any other part.

E. Design criteria.

1. Dike setbacks and elevation. Dikes are to be constructed at a location and elevation so as not to cause an increase in elevation of the 100-year frequency flood of more than one-half foot at any point along the river. Calculation of the effects of the dikes shall be based on an assumed equal degree of encroachment along the opposite side of the river. If mutual agreement has been reached between persons on both sides of the river, dikes on one side may utilize up to the entire increase in flood elevation allowable. In all instances the applicants maintain the liability for damages resulting from any and all activities.

2. Dike dimensions. Dike top width shall not be less than six (6) feet. Side slopes shall not be steeper than 3:1, except where slope stability analysis and slope erosion control can justify steeper slopes. No organic soil or material shall be allowed in the foundation of the fill of dikes.

3. Vegetative cover and riprap. A protective cover of grasses shall be established on all exposed surfaces of the dike. Riprap shall be used where required for control of erosion.

4. Interior drainage. Dikes shall have provisions for interior drainage. The design shall include plans to handle the discharge from the drainage area based on drainage design requirements for the local area.

F. Hydrologic data for design.

The North Dakota State Water Commission and the Minnesota Department of Natural Resources shall provide the discharges and corresponding elevations of the various frequency floods (and other available flood data), in relation to known historic floods, for use in dike design.

G. Dikes across natural waterways and legal drains.

Dikes shall not be constructed across public waters or watercourses without permit from the Commissioner of Natural Resources, under Minn. Stat. § 105.42.

Dikes constructed across legal drains or public ditch systems shall require the approval of the appropriate local authority (watershed district, county, city, etc.).

H. Farmstead diking.

Within an existing dike system, ring dikes around

individual farmsteads shall not require dike permits if they are not provided with tie-backs to existing roadways or dikes. Ring dikes provided with tie-backs shall be considered part of the overall dike system and will be required to secure diking permits. Outside the dike system there shall be no limitations on tie-backs of dikes around farmsteads. However, appropriate authorization must be obtained from the local land use authority consistent with adopted codes or ordinances.

I. Administration.

1. Application for permit. All applications submitted by the owner to construct, to relocate, rebuild or alter dikes shall be made on forms provided by the Commissioner and shall be accompanied by two (2) complete sets of plans and specifications. Such plans and specifications shall include the following:

a. A general location map with a minimum scale of 1"=800' showing the following:

(1) Location of the dike with respect to the watercourse;

(2) Location of field inlets to provide for internal drainage; and

(3) Location of legal drains and natural channels tributary to the main river channel.

b. Detailed cross-sections of the dike showing elevations, in relation to mean sea level, and side slopes.

c. Other data as deemed appropriate by the Commissioner to properly evaluate the application for permit.

After review of the information required above and other available data, the state agency to which the application is made shall determine the location and number of required cross-sections of the river channel and overland areas. These locations shall be provided to the applicant who shall then provide the required cross-section data. The applicant shall undertake and agree to pay the expenses incurred in securing these cross-sections.

2. Joint permit applications. Joint permit applications involving two or more landowners or a permit application on behalf of two or more landowners will be accepted by the State agencies. These permit applications, taken together, must meet the above rules.

3. Joint administration. A copy of each application for a permit shall be forwarded by the state agency receiving the initial application to the other state for comment and recommendation before final approval is granted.

If no response is received within 30 days, the Commissioner shall process the permit without such comments or recommendations.

4. Permit revocation. The applicant shall provide for certification by a registered land surveyor, engineer, or other qualified person or agency that the finished dike elevations are not higher than those approved by the Commissioner. The permit will be revoked for failure to provide this certification.

The permit may be revoked for failure to construct the dike in accordance with the plans and specifications submitted. Structural alteration of the dike without permission of the appropriate state agency will also result in having the permit revoked.

5. Reconstruction/maintenance. Reconstruction of any authorized dike may be performed after notification to the Commissioner of the repair needed. Permittee shall again certify the repair concurrent with this section. The maintenance of dikes must include periodic removal of woody vegetation (for example, trees and shrubs) which may become established on the embankment.

6. General administration. All applicants for permit to construct dikes shall be subject to the provisions of 6 MCAR 1.5026.

J. Exception to the criteria.

Under special circumstances, exceptions to the dike rules may be authorized on an individual basis but they must have the concurrent approval of the N.D. State Engineer, local water management board in North Dakota, Minnesota Department of Natural Resources and local watershed district in Minnesota. Factors that will be considered include but shall not be limited to dike setback line, location of farmsteads, property lines, existing roads, stream velocity, environmental effects, and acquisition of flowage rights. Request for exceptions must be accompanied by a plan satisfactory to all agencies.

K. Application to existing dikes.

1. These rules shall apply to all unauthorized dikes constructed in the past for the protection of those agricultural lands located within the floodplains of the Red River of the North and the Bois de Sioux, as defined in Section B of these rules. Exceptions are farmstead dikes if they meet the provisions of Section H of these rules.

2. The Commissioner shall have the authority to order removal, modification, or reconstruction of dikes not conforming to these rules.

APPROVED AS TO FORM AND LEGALITY

OCT. 2 1979 19___

WARREN SPANNAUS, ATTORNEY GENERAL

BY Lee E. Sherman

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
F I L E D
OCT - 2 1979
Joan Anderson Growe
Secretary of State
11:10 AM

Roy

STATE OF MINNESOTA)
(ss.
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

Eileen A. Gaiovnik , being first duly sworn, deposes and says that on the 26th day of July , 1978, at the City of St. Paul, County of Ramsey, State of Minnesota, he served the attached Report of Hearing Examiner upon, Joseph Alexander Commissioner of the Department of Natural Resources by handing to and leaving the same with James Zicopula, Graphic Arts Specialist with the Department .

Eileen A. Gaiovnik

Subscribed and sworn to before me
this 26 day of July , 1978.

John M. Westberg

JOHN M. WESTBERG
Notary Public, Hennepin County, Minn.
My Commission Expires Mar. 9, 1979.

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of Proposed Rules for Regulating Agricultural Dike Construction along the Red River of the North and Bois de Sioux River.

REPORT OF HEARING EXAMINER

The above-entitled matter was heard by Allan W. Klein on April 25, 1978, at Moorhead State University in Moorhead, Minnesota, and on April 26, 1978 at the Grand Forks Armory, Grand Forks, North Dakota.

This rulemaking proceeding was somewhat out of the ordinary in that the rules proposed for adoption take the form of an amendment to a joint agreement between the states of North Dakota and Minnesota.*

In order to comply with Article IV. B of the agreement (as well as the rulemaking procedures of Minn. Stat. Ch. 15, and Minn. Rule HE 101-108), the hearings were actually joint hearings, with one being conducted by Allan W. Klein of the Minnesota Office of Hearing Examiners, and the other being conducted by Gary Helgeson of the North Dakota Attorney General's office. This Report, however, is solely for the purpose of complying with Minnesota statutes and rules; the North Dakota State Water Commission will be conducting further public hearings and will take whatever steps are necessary to comply with North Dakota statutes and rules.

A. W. Clapp, III, Special Assistant Attorney General, and James F. Cooper, Director of the Division of Waters, appeared on behalf of the Minnesota Department of Natural Resources (hereinafter the "Department"). Approximately 400 persons attended the hearings. Both sessions continued until all persons desiring to speak had an opportunity to be heard.

Pursuant to Minn. Stat. § 15.0412, subd. 4, this Report shall be available for review to all affected individuals upon request for at least five days.

The Department shall, if it proposes to adopt the rules as originally proposed or amended, submit the complete hearing record, including its Findings and Order, to the Chief Hearing Examiner no earlier than five days subsequent to the receipt of this Report. This submission shall clearly indicate any changes made to the rules as originally proposed, preferably in the format that will be submitted to the State Register for publication. The Chief Hearing Examiner shall complete his review and submit his report to the Department on the issues of substantial changes in the rule and compliance with Minn. Stat. § 15.0412 within ten calendar days. Thereafter, the Department shall be responsible for filing the rules with the Attorney General and for notifying persons who have indicated that they wish to be notified of such filing.

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* The original agreement is entitled "Joint and Cooperative Agreement for the Establishment of Criteria for Authorizing Dikes and Other Flood Control Structures and Measures on the Red River of the North and the Bois de Sioux River." It was executed for Minnesota by Robert E. Herbst, then Commissioner of Natural Resources, on November 15, 1976, and executed for North Dakota by Vernon Fahy, State Engineer, on November 11, 1976. The rules under consideration in this proceeding are entitled "First Amendment" and amend Articles IV and V of the original agreement.

Based upon all the records and proceedings herein, the Examiner makes the following:

FINDINGS OF FACT

1. On March 20, 1978, a Notice of Hearing and a copy of the proposed rules were published at 2 State Register 1732.

2. On March 23, 1978, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Secretary of State for the purpose of receiving such notice.

3. On April 3, 1978, the Department filed the following documents with the Hearing Examiner:

(a) The Order for Hearing;
(b) The Notice of Hearing as mailed;
(c) The Affidavit of Receipt of the Secretary of State's list;
(d) The Affidavit of Mailing;
(e) The Certificate of the Secretary of State;
(f) The Notice and Rules as published in the State Register;
(g) The names of persons testifying for the rule.
(h) The estimate of the number of people attending each hearing.
(i) The citation to a scientific manual to be used at the hearing;
(j) A Statement of Need and Evidence; and
(k) A copy of the rules as proposed.

4. The above documents were available for inspection at the Office of Hearing Examiners from the date of filing to the date of the hearing. Only one person came to the Office to inspect the documents, which inspection occurred on either April 3rd or 4th, 1978.

5. On April 24, 1978, an Addendum to the Statement of Need and Evidence was filed with the Office. The Hearing Examiner was informed by the Department that they mailed a copy of this Addendum to Duane Ekman, Chairman of the Minn-Dak Farmers Flood Control Association, on the same date.

6. The record remained open through May 17, 1978 for the receipt of written comments and statements.

7. The transcript of the proceedings was received by the Hearing Examiner on June 13, 1978.

8. These rules are designed to regulate and control the construction of dikes along the banks of the Red River of the North. Both the Joint and Cooperative Agreement and these rules are the result of substantial dikes having been built by farmers since 1975 on both sides of the river. In order to understand these rules, and the motivation of the farmers, a brief history of flooding in the Red River (and the governmental response to it) will be presented below.

PAST FLOODING, CONTRIBUTING FACTORS, AND GOVERNMENTAL REACTION

9. There are at least two ways to measure the severity of a river flood. One is in water height above "normal", and the other is in flow velocity. The first is measured in feet, the second in cubic feet per second (c.f.s.).

10. The first recognized river gauge in the United States' portion of the Red River Valley was installed in 1873 at Grand Forks. However, earlier records from Winnipeg indicate that major floods occurred in 1826, 1852 and 1861; all of these were more severe than any flood in this century at Winnipeg. Since 1873, major floods have occurred in the U. S. portion in 1882, '83, '93, '97, 1916, '43. '47. '48, '50, '52, '65, '66, '69, '70, '72, '74,

'75 and '78. The greatest recorded floods in the U. S. basin were those of 1897, 1950, 1966 and 1978 (Agency Ex. 12, p. 9).

11. To put these into some perspective, the following data is presented:

Location	Year	Date	Elevation (msl)	Peak Discharge
Grand Forks				
	1897	4-10-87	826.8	80,0000
	1950	5-12-50	823.8	54,000
	1966	4-4-66	823.9	55,000
	1978	4-11-78	824.1	54,200
Oslo				
	1897	N/A	809.3	N/A
	1950	5-10-50	809.5	63,000
	1966	4-4-66	809.7	59,000
	1978	4-12-78	810.6*	56,200
Drayton				
	1897	4-?-97	797.4	N/A
	1950	5-12-50	798.0	86,500
	1966	4-8-66	797.2	67,500
	1978	4-16-78	796.2	56,200
Emerson				
	1897	N/A	790.0	N/A
	1950	5-13-50	790.9	95,500
	1966	4-11-66	789.2	66,800
	1978	N/A	N/A	N/A

These figures were taken from page 12 of Agency Ex. 12 for years before 1978. The data for 1978 comes from the testimony of Orrin Holmen, U. S. Geological Survey, at page 37 of Volume 1 of the transcript (hereinafter referred to by volume and page, such as T. 1-37) and T. 2-42.

12. Although the data above indicates the worst floods, the record is replete with references to the fact that, when measured in terms of interference with normal human activities, many other years have represented "flood years."

13. The problem with flood waters on the Red is exacerbated by the existence of three facts peculiar to this particular area:

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*Since Agency Ex. 12, p. 12, fn. 3, indicates that gauge on the Oslo highway bridge was discontinued after 1969, the location of the gauge used for the 1978 data is unknown.

a. The river flows from south to north. Spring snow melt proceeds from south to north as well. When spring waters overtake the "melt line", their flow is blocked by ice on the river. In addition to this blockage, the flooding problem is exacerbated when the runoff from tributaries is synchronized with peak flows arriving from the south.

b. The tributaries of the Red generally flow from high ground in the watershed to a large flat area on either side of the river. The size of this flat area has been attributed to a uniform deposit of sediment in glacial Lake Agassiz. Regardless of its origins, the flatness of the area abutting the river makes it easy for floodwaters to spread over a very large area.

c. In the reach of the river on either side of Oslo, the capacity of the river's channel is constricted in comparison with other parts of the river. For example, at Oslo, itself, the channel can contain only 20,000 c.f.s. When the flow reaches 42,500 c.f.s (July, 1975 flash flood), or 56,200 c.f.s. (1978 spring flood), vast amounts of water are forced out of the channel banks onto the adjoining land.

14. The natural factors listed above are not the only cause of the severe flooding problems on the Red. An equally significant non-natural factor is the drainage of lands by farmers at the suggestion, and with the financial help, of governmental bodies; national, state, and local. The installation of drainage facilities has not only been used to render previously unproductive land agriculturally productive, but drainage has also been used to speed the runoff of waters from already productive land. The combination of these two practices has resulted in a drastic reduction of acreage available for holding water in the uplands, with the concomitant drastic increase in the amount of water that is put into the main stream of the Red, often at a time when it cannot be accepted without flooding over its banks.

15. Unfortunately, the problem of flooding on the Red, due to both increased drainage and unusual natural factors, has long been recognized. Perhaps the most dramatic testimony in the hearings on these rules came from Donald Ogaard, chairman of both the Lower Red River Water Management Board and the Wild Rice Watershed District, and a past president of the Association of Watershed Boards of Managers, who presented the following:

> I note with interest a book that was picked up just a few minutes ago here. Statement: "Temporary storage of the floodwaters in reservoirs far upstream until the flat valley lands are drained in the early spring will prevent the overloading of valley streams."
>
> Another statement: "It would therefore be the height of folly to permit the hazards of recurring floods running an annual loss equal to the cost of expenditures necessary to prevent them from all time. Sooner or later this work must be done and will be done."
>
> Another statement: "Floods can be mitigated only by constructing reservoirs to detain the floodwaters, by constructing levees to prevent their overflow, or by increasing the capacity of channels to expedite their discharge."
>
> This is a report to the Governor of North Dakota.* I'm sure you all remember him, Honorable Lindvig Frazer, 1919 to 1920. (T. 2-74)

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*This was later identified as being authored by Herbert A. Hard, Chief Engineer, entitled Report to the Governor of North Dakota on Flood Control, 1919-1920.

16. The record of these hearings reflects that since that Report was delivered, far more time and money has been spent on drainage than on flood control. In a recent book authored by Thomas F. Waters entitled Streams and Rivers in Minnesota, it was stated that "No area on earth" has been so intensively drained for agriculture as the Red River Valley.

17. Governmental response to the flooding of the Red has been primarily the making of studies, although some local units of government have acquired land for upland reservoirs and have constructed such water retention facilities in the uplands. For example, a series of dams on the Turtle River (N.D.) have proved effective in reducing the inflow from the Turtle watershed during peak floods on the Red.

18. The Corps of Engineers has built "urban dikes" to protect Grand Forks, Oslo, and Pembina. The Corps has also embarked upon a thorough long-term study of the main stem flood plain from Wahpeton-Breckenridge to the Canadian border. The study will focus on flooding and damage reduction alternatives. This study is now estimated to be completed in three years, assuming continued Congressiona funding (T. 1-97).

AGRICULTURAL DIKES AND GOVERNMENTAL RESPONSE

19. Following the 1975 spring flood, a number of farmers in the southern portion of the Red River Valley cooperated in the construction of dikes along the river bank in order to protect their land. When a flash flood occurred in the summer of 1975, these dikes successfully protected their land and gave to others the idea that dikes could be used for protection of agricultural land. In the fall of 1975, both Minn-Dak Farmers Flood Control Association and Grand-Walsh Water Control Cooperative were formed, the former in Minnesota, and the latter in North Dakota.

20. The avowed purpose of those two organizations was to coordinate the construction of dikes and other water-control structures. A second purpose appears in a letter dated January 26, 1977 from John W. Bushaw, (a farmer who did not participate in the diking), to Ross S. Reagan of the Upper Mississippi Basin Commission, which letter was part of Public Ex. 7:

> I attended a series of meetings held in Oslo, Minnesota, in the summer of 1975. Although there obviously had been prior discussions about diking, it was obvious that little technical or legal research into the problem had been done. Largely as a result of my persistent questioning, an attorney, Mr. Depuy of Grafton, was retained. At a subsequent meeting, Mr. Depuy outlined the proper procedure to be followed for legal dike construction. The group, by majority vote, agreed to proceed with the dike construction, and to ignore the law.
>
> An organization was formed for the diking project. One of the principal reasons for this organization was to protect the individuals participating in the diking from civil suit. The theory was that, since the dike was built by an organization, and not by individuals, no individual could be sued. If a civil suit was filed against the organization, no damage would be done to the members, since the organization would have few, if any, assets from which damages could be recovered in the event of an adverse court decision. (Pub. Ex. 7)

21. The construction of agricultural dikes proceeded speedily in 1975 and 1976 so that by September of 1976, there were 26 miles of diking in place on 53 miles of river reach.

22. At the present time, there are 46 linear miles of dikes on the Minnesota side of the river, and 21 linear miles of dikes on the North Dakota side. None of these dikes have been built with a permit from the Minnesota Department of Natural Resources or the North Dakota State Water Commission. There has been one permit application made in Minnesota, which was denied (Tr. 1-60). There has been at least one application made in North Dakota, which has not been approved (Pub. Ex. 3-5).

23. These dikes have been built almost entirely by the voluntary contributions of farmers. They were generally designed to be three feet higher than the 1975 summer flood, having a 3:1 side slope, a vegetative cover to prevent erosion, and culverts with trap doors to provide interior drainage (Tr. 2-89a). There is little question in that these dikes were successful in achieving their primary purpose, even in the unusually severe flood of 1978. Very rough data generated by the Corps of Engineers compared the 1978 flood with the 1969 flood to assess the impact of the dikes. That data is divided into three segments or "reaches", referred to as the Grand Forks reach, the Oslo reach, and the Drayton reach. On the Grand Forks reach, there was "very little" difference in area flooded. However, on the Oslo reach, 13,000 acres on the Minnesota side which were flooded in 1969 were not flooded in 1978 (even though the river was at least one foot higher in 1978). In addition, 1400 acres which were not flooded in 1969 were flooded in 1978. Thus, on the Oslo reach, there was a net savings of 11,600 acres in Minnesota alone. On the North Dakota side of the Oslo reach, 3300 acres were flooded in 1978 which were not flooded in 1969, while 1,000 acres which flooded in 1969 were not flooded in 1978. Thus, on the North Dakota side of the Oslo reach, there was a net "loss" of 2300 acres. For both sides, the Oslo reach showed a net savings of 9300 acres.

The Drayton reach showed 17,500 acres as being flooded in 1969 but not in 1978, while 4500 acres were flooded in 1978 but not 1969. This gives a net "savings" of 13,000 acres for the Drayton reach (which was not broken down by states). The total net savings for all three reaches was approximately 22,300 acres.

24. One of the most difficult problems raised in this hearing was the fact that the dikes have caused some persons damage (over and above what damages they suffered due to the flooding which cannot be blamed on diking) because the dikes forced additional water onto their land. There was scant testimony from those people, and what testimony there was indicated a divergence of attitudes regarding the desirability of the dikes. For example, Melvin Juhl (a North Dakotan) testified, in part, as follows:

> I want to congratulate those people who have built dikes and especially those who built the dike across from me. I don't exactly believe that it's hurting me, but they're brave people to build a dike out there. I was out there and saw that machinery working this spring under tremendous odds: the wind and the waves, and they were putting up dikes.
>
> However, the putting up of that dike is what made the water worse on my side, and I go along with the Corps of Engineers in their plan of controlled diking. (T. 2-5a and 6a)

On the other hand, Maurice Bushaw (a North Dakotan) testified, in part, as follows:

The only thing you get any place in this flood control is to give everybody hell. We've been just through one of the worst floods in history, that's the flood of 1978, and I think it was caused by weather modification, huge drainage ditches, high roads and farm dikes.

I, Maurice E. Bushaw, was born and raised a mile and half north of Oslo, Minnesota, on the North Dakota side, one-eighth mile north on the Red River on a high knoll. In the past 30 years, I wanted to pull out more than once but my friends told me, "you can't quit now. Wherever you go, you'll have something else." I guess no matter where you live, you have to pay your dividend to society.

I'm not a member of any dike organization. I believe the water should flow the width of the floodplain at flood time. I talked against my entire community on farm diking but I failed. All I heard is "how good a job the Minnesota farmers did in 1975 and how much money they made," but I did not hear how much damage they caused, for they caused the water to raise ten inches higher in North Dakota and they've been diking since 1950 so they're pretty good.

We in Washville Township and Walsh County had no other choice: we met with the North Dakota water people requesting help and no help ever came. So we had to do what we knew how to do, we built dikes and our dikes, in the year 1978, they leaked. They were overtopped and they broke, but the water was two feet higher on the other side of the dike. If it hadn't been for the dikes, everything would have been gone, but if there had been no dikes or no high roads, the water would have been four feet or more lower.

Now, some of the acts of aggression that have been caused by the Minnesota farmers are: the water has destroyed farmsteads, overtopped ring dikes, has washed out roads and destroyed property such as grain and livestock, and the threat of human life, itself. I'm sure the ones that have committed the acts of aggression have a very guilty conscience for a man without a conscience has no soul.

I hold no grudge against our Minnesota neighbors, and I hope no one else does for a community that does not pull together does not survive. I would like to ask the help of every individual, every organization to construct ring dikes on every farmstead and I guarantee that they would not be overtopped by any flood water. (T. 2-61a and 62a)

In a more theoretical vein, but no less to the point, was the written statement of John McMerty, Executive Vice President of the North Dakota Water Users Association:

Individuals in our society are bestowed certain rights and responsibilities but these rights and responsibilities must be tempered by reasonableness and prudence. The individual right to private ownership of property is one of the basic tenets of our culture. So, too, is the right to take prudent and reasonable action to protect that property from natural disasters. But at that point, where the actions taken are detrimental to the safety of the lives and property of others, that action is no longer prudent and reasonable and the greater rights of society take precedence.

A state has the responsibility to protect all of its citizens from the intemperate actions of others. In order to accomplish this, the state must occasionally adopt rules and regulations which modify or limit an individuals's rights where the unbridled exercise of those rights would endanger others. A state limits a person's right to drive an automobile in whichever manner he wishes by imposing

maximum speeds and road regulations to protect other drivers on the highways. Zoning regulations may infringe upon a builder's right to construct a building wherever or however he desires, but such regulations are necessary to provide for the protection and safety of the inhabitants of the building and their neighbors. So, too, these proposed criteria may infringe upon a landowner's right to protect his property, but the limitations are necessitated by the greater rights of society to be protected from the individual actions of others.

There is no question that the agricultural dikes now in existence were built at large private cost. There is also no doubt that in many cases those same dikes performed their function well and provided protection for the local interests which constructed them. But there is also no question that that protection was achieved at the expense of increased hardship to the residents upstream and downstream without dikes and to increased threat of breaching of the municipal dikes. And the maintenance of their present unregulated status can only serve to compound the chances of tragedy in the future.

25. The record is replete with references to two factors which were significant motivations behind the decision to dike: frustration and desperation.

The desperation was vividly described by Duane Paschke, a North Dakotan who is Vice President of the Grand-Walsh group:

Well, as far as diking, like everybody says, it isn't an answer to their problem. But, like, in '75, we had a flood in the spring which everybody knows, we put the grain in and all the fertilizer and whatever. In the summertime, a flood comes along and wipes out the whole complete crop so you lost a whole year. After losing a whole year's income for most of the farmers and everybody in that area, everybody was desperate and what else was there to turn to but look for some protection, so we thought of diking.

Lots of farmers, like everybody else, some didn't have the money, some borrowed the money, some took it out of their savings accounts or whatever to pay for this dike. After losing a year's income and still to take money they had put away for future use to protect them and live for another year, people have to be desperate and need help bad to do that. (T. 2-54a and 55a)

The frustration was described by Duane Ekman, Chairman of the Minn-Dak group:

But I think it got to the point where it was just pure frustration in watching all the appropriation of money for studies. The studies would go forth but there was one thing wrong, there was nothing that said anything would be implemented after the studies were complete, and I think if I may, I just might qualify this a little bit.

We have a group in our area that was particularly concerned with implementation of the Hewitt Reservoir as was proposed at one time on the Red Lake River. The local interests got involved all the way up and down the Red River and the Red Lake River. They formed a group called the Red Lake Basin Planning Commission -- Lower Red Lake, I guess it was -- to work on the Hewitt project. It was found that local opposition was the first thing that they ran into as far as the landowners it would have affected.

So, I think our individual efforts, we came to an agreement between the people that lived in the high lands and those of us that had the flood problem whereby they would agree to a

three-dam series instead of the one huge monstrous dam, but they were fearful that their compensation for their farm that would be flooded would not be great enough and we agreed 100 per cent.

It is not fair to pay a person not even equal to market value when we have other laws in effect that he has to relocate some place. You're putting him out of business. He can't open up a new store if he can't buy new farm land. And in the process of your tax laws, your capital gains, your reinvestment procedure, and I think we all know what they are, so they were unwilling for that reason and yet the law said they could not be compensated for more than that amount.

Q. What year was that about?

A. I believe the concerted effort for Hewitt started in, oh, somewhere around 19--, late '60s.

Along that line, the frustration and the meetings that were involved, it finally came to a point where a transmittal of the Corps of Engineers' letter dated 12, August, '76 state that, "A preliminary economic analysis based on updating costs and benefits to the 1975 price level and updating for project features to meet the current design criteria and concerns indicates that the proposed Hewitt project is no longer economically feasible. A similar update of the other nonstructural or structural alternatives, including the series of large dams, indicate that an economically feasible solution does not exist." That's just one small example of the frustrations that the local people have been running into after diligently working for many years.

I think the thing that I'd like to point out here, too, Minn-Dak Farmers Flood Control, the word "farmers" is in there for a purpose. We have a group of farmers that are concerned about protecting agricultural land, and we don't feel that that has been addressed at all. Since our organization in 1975, we've been driving this point home as many of you know, but I'll give you another example about that.

I have in my possession a letter written 9, February, 1978; it's signed by James E. Braatz, B-r-a-a-t-z, Chief of Public Affairs Office for the Corps of Engineers. In there, he says, "Agricultural or rural flood protection is an area where the Corps Congressional authority limits its activities. Flood protection here is difficult to achieve because the size of the location to be protected and the associated high cost, and because low population densities usually mean that benefits wouldn't equal costs.

"The Red River Valley is a natural well-defined flood plain and complete protection for it would be a gigantic undertaking. Currently, we have engaged in a number of studies which are aimed at protecting several communities along the Red River of the North, but for the reasons already stated, we are not now attempting to study ways of protecting the entire valley, including agricultural lands, from flood." (T. 2-85a-88a)

26. The governmental response to the diking is these rules. The rules grew out of a series of meetings convened by the Upper Mississippi River Basin Commission beginning in October of 1975. The meetings included representatives of the two states, the U. S. Soil Conservation Service, the Corps of Engineers, and (after the first meeting) representatives of the diking farmers. A review of the minutes of these meetings (Pub. Ex. 7) indicates that while there was an exchange of ideas and some compromise, essentially the

positions of the opposing groups has not changed over the past two and one-half years. The states and the Corps want the existing dikes removed, while the farmers want to retain them. With regard to new dikes, the states and the Corps want them built according to criteria which the farmers argue render them virtually useless.

THE PROPOSED RULES.

27. The proposed rules amend Articles IV and V of the original Joint Agreement. Essentially, the amendments to Article IV contain specific criteria for dikes (such as height, placement, and procedures for permit approval), while the amendment to Article V deals with removal of existing dikes which do not meet the criteria of Article IV.

28. Proposed Article IV.A contains an explanation of the general purpose of the rules and the statutory basis for their adoption. While more attention will be devoted to the issue of statutory authority at a later point, it is found that this introductory rule is both needed and reasonable, as it "sets the stage" for the remainder of the rules.

29. Article IV.B, entitled "Jurisdiction", states that the criteria shall apply to dikes located within the flood plain of the Red (Red River of the North) and the Bois (Bois de Sioux River) as well as dikes constructed on tributaries within the flood plains of the two rivers.

The flood plains of the two rivers are defined differently. For the Red, the flood plain is defined by a map contained in a previous study,* while the flood plain of the Bois was defined by reference to USGS flood quadrangles.**

While it is clear from the rule that the flood plain for the Bois is the one percent chance of flood recurrence (100-year flood), it is unknown what area is encompassed by the Red flood plain.

Maps showing both flood plains were available at the hearings. The jurisdictional section is found to be both needed and reasonable.

30. Article IV C contains definitions of key words used in later rules. The only problem with the definitions arises from the vagueness of the definitions of Class I Watercourses and Class II Watercourses. This was apparently recognized by the Department because, in its "Addendum to Statement of Need and Evidence" filed on April 24th, the Department specifically named the Class I and Class II watercourses in Minnesota. The North Dakota Watercourses were named in the Rule. The import of designation as a watercourse will be discussed in connection with Article IV.G, below, but it is noted that that Article would prohibit diking across all watercourses.

As noted above, the North Dakota watercourses are specifically named in the Rule. The Minnesota watercourses are not. The first notice any person

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*Neither the map nor the study were introduced into the record. However, Duane Ekman, Chairman of the Minn-Dak Association referred to the same study in his testimony, implying that either he, or another member of his group, had read it (Tr. 2-89a).

** The USGS quadrangles were not introduced into the record, and the extent of their availability is unknown.

had as to which Minnesota tributaries would be included came when they were listed in the Addendum which was filed April 24th. They were set forth in the oral testimony of James Cooper on April 25th, and Dave Sprynczynatyk on April 26th.

While there is no question that it is both needed and reasonable that certain major tributaries be treated differently than very minor tributaries, was it unreasonable to withhold notice of which would be selected for special treatment until, essentially, the day of the hearing? It is found that it was not. There was only one person who indicated that his original testimony would have been different had he understood the impact of the rules on a given tributary, and he was able to supplement his original testimony based upon the newfound knowledge of the effect of the rules on the named tributaries (testimony of Don Ogaard, T. 2-96-97). There were no written comments filed subsequent to the hearings which indicated prejudice due to the failure to name.

Is the designation a de facto "substantial change"? It is not. First of all, there is no suggestion that the wording of the rule be changed. Secondly, the rules, as proposed, did contain definitions of the characteristics of those tributaries which would be affected, but did not specifically name them. What is sought to be accomplished is to leave flexibility in the rules to accommodate future changes in the hydraulic regime so that if a change in upland drainage, for example, occurs which changes a previously insignificant stream into a major tributary, those charged with administering these rules can react appropriately without having to seek a rule change in both Minnesota and (potentially) North Dakota. The definitional rule is found to be both needed and reasonable.

31. Section D of the rules is a standard severability clause. While the Department failed to present any testimony regarding need or reasonableness as to this Section, it is found that it is unnecessary to do so. There was no comment raised by any person regarding this section.

32. Section E of the rules, entitled "Design Criteria" is one of the most vital parts of the rule. It is divided into five subsections, and each will be treated separately below.

33. E.1. deals with setbacks. It states, as a basic requirement, that no dike shall be located in such a way as to cause either: (a) an increase in the elevation of flood waters of the ten-year frequency flood of more than one foot at any point along the river, or (b) an increase in the elevation of flood water of the ten-year frequency flood of more than one-half foot within the corporate limits of any city.

In calculating whether a dike is located so as to satisfy the above criteria, it is assumed that there are dikes on both sides of the river which are equally set back from the center line of the river. If two landowners can agree on some different spacing which results in the above flood elevation criteria being met, then the "equal distance from the center" requirement may be waived. For example, if, at a given point, there is an existing dike on one side of the river and no dike on the other side, the "equal distance from the center line" requirement could be waived if the landowner on the un-diked side agreed not to erect a dike, or to erect a dike set back

does the agreement bind successor in purchase of land? easement? filing? esp. since in Eff states!

farther than the equidistant line would otherwise require (all of this assuming that the flood elevation limitations are complied with).

The Department illustrated its argument in support of the setback criteria through a series of slides (Agency Ex. 11). The slides showed that for a "typical" reach of the river, with no dikes on either side, the ten-year flood would have an elevation of 815.0 and a velocity of 1.5 feet/second.

The illustrations then pointed out that:

"uncontrolled diking" (diking very near the river's banks) on both sides would result in an elevation of 818.5 and a velocity of 2.1 feet per second.

"uncontrolled diking" on one side only would result in an elevation of 815.8 and a velocity of 1.8 feet per second, as well as inundate more land on the non-diked side than would have been inundated by the no-dike situation.

"controlled diking" on both sides (diking according to these rules) would result in an elevation of 816.0 and a velocity of 1.6 feet per second.

The Department argued that basing its criteria on the ten-year flood (rather than some other frequency flood) was due to the availability of data on the ten-year flood and Federal Flood Insurance Administration flood plain management criteria. It pointed out that, by definition, the dikes would protect land nine out of ten years.

The Department argued that the 1/2 foot "effect limit" for cities was based upon the fact that when cities are flooded, there is a higher risk of damage to both property and lives. The Department argued that existing city dikes could not be raised to accommodate higher waters without endangering their stability.

Arguments against the ten-year standard for setbacks were based upon the amount of land which would be unprotected were the dikes required to be set back from the banks. Duane Paschke estimated that the "better part" of his farm would be unprotected (T. 2-48a), and Iner Quern testified that "a lot" of the land which he and his brother farm would be unprotected (T. 2-33a). While there was no precise data concerning the number of existing dikes which meet the proposed criteria for setback, David Sprynczynatyk of the North Dakota Water Commission estimated that only 20 or 30% of the existing dikes now meet this setback criterion (T. 1-58).

While there was no direct testimony regarding alternatives to the ten-year flood being used as the "measuring stick," it should be noted that the farmers' participation in the Upper Mississippi Basin Commission's Red River Diking Task Force included the submission of their ideas as to what the setback criteria should contain. On February 16, 1977, a workshop on the criteris was held in Grand Forks. At that workshop, Duane Ekman commented on the states' proposed criteria. One of his comments was that the criteria should be based on the effect of dikes on the 100-year flood, and that no restrictions on increase in stage should be placed on floods of lesser magnitude (such as the ten-year flood).

The North Dakota State Water Commission responded to this suggestion in a letter of April 18, 1977, stating that the Ekman 100-year flood proposal was unreasonable in that it failed to give consideration to floods of lesser magnitude and the resulting additional flooding which would result in

those more frequent floods if the dikes were designed for the 100-year flood. The letter estimated that 100-year flood dikes could cause stage increases of four to five feet, resulting in many additional acres being flooded, both upstream and downstream of the dikes.

There is no question that if dikes were permitted to be built on the banks of the river on both sides (particularly if there were no limitations on height, a factor to be discussed below), the drastic reduction in area through which the flood waters must pass would result in:

(a) water "backing up" upstream of the constriction, flooding a larger than otherwise area; and,

(b) an increase in velocity as the water passed through the constriction, increasing erosion not only at the point of constriction, but also downstream. Thus, it is found that setback criteria are needed.

The question presented vividly by the Ekman 100-year proposal is whether the ten-year setback criteria selected by the states is reasonable. It is found that the selection of any particular setback criteria is, in part, arbitrary, as is the selection of any particular speed limit, limit on the number of ducks in possession, or most other numerical limitations contained in our laws. Such choices require a balancing of competing interests, and will almost always work to some persons' detriment. To permit the erection of dikes in such a manner as to cause the flood elevation to rise one foot once every ten years is a reasonable balancing of the competing interests, even though such a setback does result in some land being unprotected. Dikes built to meet the ten-year criteria will protect land nine out of ten years, with a minimal impact on those who choose to not dike. The setback criteria are reasonable.

Whether these criteria will result in the "taking" of unprotected land in such a manner as to require payment, as was suggested by at least one witness, is a question which cannot be answered by this Examiner in an administrative proceeding, but rather must be answered by a judge in a court proceeding.

34. Section E.2. is closely linked with E.1. in that while one dealt with setbacks, the other deals with height. E.2. provides that the dikes shall be no higher than one foot above the ten-year flood elevation.

The Department's argument in support of this elevation restriction was essentially the same as its argument in support of setbacks: that uncontrolled diking would deny to the floodwaters the natural flood plain, and unless there is some restriction on height, there will be backup upstream and increased velocities downstream of the dikes. The proposed limit (one foot above the ten-year flood) would protect land at least nine out of every ten years. In the event of greater floods (such as the 50 or 100-year flood), the dikes would be overtopped, and their effect would be minimal. In the Addendum to the Statement of Need, the Department estimated that for the ten-year flood, the dikes would cause a .75 foot increase in stage; for the 50-year flood, the increase would be 1/2 foot, and for the 100-year flood, the increase would be .3 feet. Those figures would be greater, however, were the dikes built high enough to withstand the 25, 50 or 100-year floods. On the other hand, of course, were they so built, the landowners would be protected

24 out of 25 years, 49 out of 50, or 99 out of 100, a far more desirable ratio from their point of view.

David Sprynczynatyk estimated that few, if any, of the dikes currently in place satisfied this criterion (T. 1-58).

Opposition to this part of the rule came from farmers who felt they were entitled to greater protection than nine out of ten; however, there was division on the question of whether low dikes were better than none. For example, Ken McIntyre, who is involved with the Cass County-Rush Water Management District stated:

> And then, getting back to your dikes. We were commenting as it was discussed this morning that they should be constructed so they can be overtopped. In our experience with water over the last years, every dike that has ever been constructed, and I think a lot of them shouldn't have been, although if I was one of the farmers along the Red River, I think I'd be diking, too, because either you're going to fish or you're going to farm, and I think a lot of you want to farm, but where you overtop a dike, you do tremendous destruction. A dike, in our opinion, should be either high enough to solve the problem or not be there at all because once a dike is built and water overtops it, the destruction at that time is terrible: it doesn't only erode and gully and do things it shouldn't, but it just makes destruction much worse. So we would make this comment on dikes at this time: either they've got to be good ones or not at all. (T. 2-15a and 16a).

On the other hand, Peter Gerszewski testified in response that:

> As far as topping a dike and having the water go over the dike is no different than every road that goes east and west that gets topped over every year, I mean, there is a flood. So far as washouts and all that from the dike being topped as was mentioned here a while ago, I can't see that, because we have that every flood, of roads being topped and washed out. (T. 2-23a-24a)

Just as competing interests must be balanced in the case of setbacks, so must they be in the case of dike elevations. The logic needs no repetition. It is found that a limitation on dike elevations is needed, and the Department did justify the reasonableness of its proposal.

35. Section E.3. of the criteria deals with dimensions of dikes other than height. It would require that the dikes be not less than six feet wide at their top, that they have a slope no steeper than 3:1, and that the foundation or fill not contain any organic material.

The Department's justification for these design criteria was brief. In the Statement of Need, the Department stated that these dimensions "are generally acceptable standards for agricultural dikes not protecting urban areas." In the Addendum, the Department stated that the prohibition against organic material was needed because such material "will weaken the structure and may cause failure before overtopping occurs." No further justification was given at the hearing.

There was no opposition expressed to these criteria. Perhaps the reason for this is that the 3:1 slope was a design criterion already utilized by the farmers who did dike (T. 2-89a).

While the Department's justification was minimal, the proposals are found to be both needed and reasonable.

36. Section E.4. would rrequire that a grassy vegetative cover be established on dikes and that riprap be utilized where required to control erosion.

Again, both the Department's justification and the public comment were minimal. Both requirements were explained in the Addendum as necessary to prevent erosion. Again, perhaps the lack of public comment can be explained by the fact that the farmers' organizations had already recommended to their members that a vegetative cover be employed to prevent erosion (T. 2-89a).

The Department's proposals are both found to be needed and reasonable to protect dikes from erosion.

37. Section E.5. requires that dikes have provisions for interior drainage capable of handling discharge from the drainage area. The purpose of this is to insure that water trapped behind the dikes can be discharged satisfactorily. This procedure was also recommended by farmers' organizations which suggested that trapdoor culverts be employed for this purpose (T. 2-89a).

It is found to be both needed and reasonable.

38. Section F places a responsibility on the states to provide data for use in dike design. What the proposed rule mandates is the provision of ". . . discharges and corresponding elevations of the ten-year flood (and other available flood data . . . for use in dike design."

It is unclear from this rule just what data the states will provide. For example, will the states provide setback data? There is no indication that they would. Rather, it would appear to be their intent that the landowner compute the required setback distance or (more likely) go out and hire a water engineer to do it.

While it is certainly needed and reasonable for the "people's experts" (the state agencies) to supply the historical data on elevations of the ten-year flood, is it unreasonable for them to require that the landowners hire an engineer to determine the setback distances? In connection with the rule on Administration, the agencies propose that the landowners be required to supply "cross-sections of the river channel and overland areas" at the landowners' expense. This was justified in the Addendum to the Statement of Need as being "consistent with the application requirements for other types of comprehensive projects requiring a permit under the provisions of M.S. [Minn. Stat.] 105.42." A review of that section (as well as 105.44) indicates that is, in fact, the case. While it would be desirable for the agencies to assist landowners by providing the required setback distance, the rule cannot be found unreasonable should they elect not to do so. The rule, as proposed, is found to be both needed and reasonable.

It is hoped that the Department would use as current data as possible in computing the ten-year flood. The flood of 1978 may have altered previously available data.

39. Section G of the criteria deals with tributaries, water courses, drains and ditches. It would prohibit the construction of dikes across Class I or Class II watercourses in Minnesota. It would limit and control the construction of dikes across "other natural waterways, streams or rivers." It also provides that the setback criteria contained in Section E.1. shall apply to any dikes constructed along "tributary waterways" (which term is not defined) if those dikes are located within the jurisdictional area defined by Section B.* Finally, this section would require the approval of the appropri-

(See footnote on page 16)

ate watershed district, drainage board, water management district or other local authority, for the construction of dikes across legal drains or public ditch systems.

The Statement of Need argues that obstruction of Class I or II watercourses would:

> . . . interfere with drainage and otherwise be in conflict with the identified 'Beneficial Public Purpose' contained in M.S. 105.37.

The Addendum to the Statement of Need identifies by name the Class I and Class II watercourses. The only other information which it contains is a statement which appears to be more in the nature of a rule than a justification:

> Dikes constructed across legal drains or public ditch systems shall meet all other requirements of law as well as the proposed criteria.

This must be an allusion to the requirement that such dikes be approved by local authorities which would presumably assure that the dikes did meet "other requirements of law."

At the hearings, the Department focussed its justification on the limitations proposed for dikes across "other natural waterways, streams or rivers." Those limitations include a requirement that dikes have an opening capable of passing the 25-year summer flood. The Department argued that the 25-year summer storm was chosen because it would cause a minimum amount of backwater effects on the more frequent events such as a ten-year summer flood (T. 1-31). The other limitation proposed for such dikes would be that they have an emergency spillway to prevent overtopping in the 100-year summer storm. The Department stated that such a spillway was needed "to prevent loss of the principal control structure" during these unusual events (T.1-31).

During the hearings, the Department also defended its proposed prohibition of diking across the Class I and II watercourses by arguing that because of their high flow potential, it would be unfeasible, if not impossible, to construct spillways or outlet works which would minimize backwater effects on upstream tributary landowners (T. 1-31).

This last assertion was disputed by Iner Quern, who testified that he

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*This statement could be misleading unless read in conjunction with another section of the criteria, Section B. Whereas this statement implies that only the setback criteria apply to dikes along tributaries, Section B contains a statement that implies that all of the criteria (not only setback, but height, width, etc.) apply to tributary dikes.

A question from Don Ogaard tangentially raised this problem, and in replying, Dave Sprynczynatyk quoted to Ogaard from Section B, not Section G (T. 2-96 and 97).

Common sense would dictate the same resolution. It makes little sense to regulate setback without regulating height, since the whole purpose of setback regulation would be defeated by very high dikes.

It is recommended, to avoid confusion, that either the sentence in Section G be deleted, or it should be reworded to conform with the sentence in Section B.

had seen in other areas of the country the use of pumps to transport tributary water over dikes into the main river. He believed that pumps would prove feasible on tributaries such as the Snake, Turtle, Forest and Middle Rivers (T. 2-36a).

There is no question that the tributaries are not only sources of waters which contribute to flooding on the Red, but that they, themselves, are flood problems. Many witnesses testified to having been flooded by water overtopping the banks of the tributaries before it even got to the Red.

For example, Don Ogaard testified to two different tributary dikes. The first set of dikes was built in 1956 by various governmental bodies to protect the city of Ada. He predicted that if these dikes were altered to meet the proposed criteria, ". . . the city would be in severe danger of annual flooding." (T. 2-99) It should be pointed out, however, that these criteria apply only to "agricultural dikes" which, by virtue of the definition contained in Section C, are dikes to protect agricultural lands. In addition, Section J contains open-ended authority to make exceptions on an individual basis.

The second set of dikes discussed by Ogaard may be an extension of the Ada dikes, or they may be separate -- it is not clear from the record. What is clear is Ogaard's attitude toward removal and his reasons (it should be remembered that Ogaard is a past president of the Association of Watershed Boards of Managers):

> Q. You think the dike around your farm is how high?
>
> A. Up to eleven feet.
>
> Q. Do you have any intention to remove those dikes in the event they adopt this criteria?
>
> A. I wouldn't remove those ditches for the adoption of any criteria.
>
> Q. Why?
>
> A. Because the water would change course and go through the village of Halstad and inundate about 60 square miles of land and cause tremendous erosion.
>
> That dike broke in 1969, caused damage to the adjoining township for $30,000 in the form of just gravel replacement, left trees in two adjacent farms that took about a year and a half to remove, actually caused erosion spots in the field five to eight feet deep covering 50 to 40 acres; and the volume of water at that point naturally heads northwest, the channel goes to the south and southeast -- south and southwest, pardon me. (T. 2-101, 102)

Assuming that Ogaard's prediction is correct, it demonstrates a need for a case-by-case balancing of interests with regard to these upland tributary dikes, rather than the blanket approach envisioned by these rules. Such an individualistic approach takes a commitment of knowledge and time which the Department, at least at this time, seems unable to make.*

40. It is found that the prohibition against diking across Class I or II watercourses is both needed and reasonable. While the Quern testimony related above raises doubts about the lack of alternatives to such a prohibition, it is not necessary, as a matter of law, that the Department demonstrate

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*For a description of the staff and data shortages of the Division of Waters, see T.1-68 to 70, 1-80 to 83, and 2-135 to 139.

its chosen method is the best (or the most reasonable alternative) -- it is only necessary that it demonstrate that it is an alternative which is within the boundaries of reasonableness.

It is further found that the limitations on diking across other rivers requiring openings for the 25-year storm and spillways for the 100-year storm are both needed and reasonable.

It is found that requiring the approval of local bodies prior to diking across drains and ditches is both needed and reasonable.

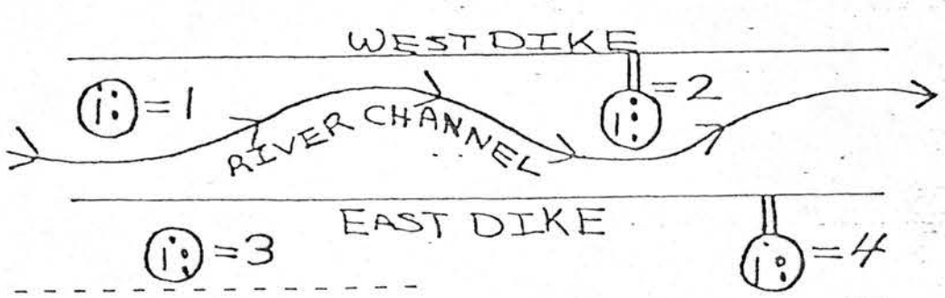
It is found that regulation of tributary dikes is needed. However, the blanket method of regulating tributary dikes proposed by the Department has not been shown to be reasonable. The size and diversity of the area subject to these criteria is huge.* To require that all of the tributary dikes in a 431,700-acre area either meet the criteria or else be removed without attempting to assess the impact of their removal on a more individual basis, is unreasonable particularly when many of the tributary dikes were erected by governmental units at taxpayer expense. While it ultimately may be determined that, on balance, many of the tributary dikes cause more problems than they solve, the Department has not demonstrated any basis for such a conclusion at this point. What has been demonstrated is the need for time to allow for individual evaluation of applications for exceptions under Section J for these tributary dikes. This will be discussed below.

41. Section H deals with farmstead diking. A farmstead dike, by definition in Section C, surrounds (either in whole or in part) farm dwellings, buildings, and adjacent non-tillable acreage.

The proposed rule would differentiate between farmstead dikes within an existing dike system and those outside of an existing dike system. For farmsteads within an existing system, the rule would allow them to be built (and remain, if already built) without a permit and without complying with any criteria, so long as they are not linked to dikes or roadways with "tie-back" dikes. If they do have tie-backs, then they would be considered a part of the overall dike system, and would be required to secure permits and (although it was unstated), the criteria would be applied to them (or at least to the tie-back).

Farmstead dikes outside an existing dike system would not be subject to any limitations and would not require permits.

An illustration was used at the hearing to clarify these different situations (plus one situation not shown in the illustration, but added by the Examiner). It was essentially as below:



* According to the Corps Report, in the Oslo reach alone, the 100-year flood (whose boundaries outline the area of jurisdiction for these criteria) would cover approximately 230,000 acres (Agency Ex. 12, Plates 22 and 30). The total acreage included in the three reaches of interest is 431,700 acres (Corps Report, p. 20).

Ring dikes numbered 1 and 2 would be deemed to be "within" the diking system. Dike No. 1, having no tie-back, would be allowed with no permit or restrictions. Dike No. 2, with a tie-back, would require a permit and be subject to restrictions. Dikes Nos. 3 and 4 are "outside" the system, and No. 3, at least, would not require either a permit or compliance with criteria. Dike No. 4 was not illustrated by the Department, but the rule states that there would be no permit or criteria required for it even though it does have a tie-back.

Essentially, the rule only would require permits and compliance with criteria in the case of Dike No. 2. The rationale for this is that the tie-back serves to obstruct the flow of water with the potential for resultant increased stages. Obviously, the seriousness of this situation varies with the length and height of the tie-back.

Peter Fisher of the Corps testified that farmstead ring dikes generally have very little effect on flood stages because they only remove a small portion of the flood plain. Even large urban ring dikes, such as those at Oslo and Pembina, were estimated to have little effect on flood stages. However, if a tie-back is added, it could act as a dam across the flood plain, confining flood waters to the river channel, resulting in increased flood stages and velocities. Fisher stated the same effect could occur if a ring dike were so large as to substantially obstruct the flood plain (T. 2-49 to 51). Perhaps the most telling of Fisher's remarks was the following:

> Therefore, we feel that although the ring dikes in general do not have a major impact on raising stages, it's a relative sort of thing: each ring dike situation, if it is, in fact, a very extensive thing, should be evaluated for its impact (T. 2-50 to 51).

The Department has justified the need for and reasonableness of its proposal on farmstead diking. While it may have been preferable to adopt some different method of treating ring dikes with tie-backs (e.g., that before requiring a permit, the Department must determine that the dike and tie-back are of such a size as to constitute a significant hazard potential), again it cannot be said that the proposed rule is per se unreasonable.

42. Section I deals with Administration, primarily the permit granting procedure.

The first thing that must be noted is a change in the last complete sentence of the first paragraph. The term "plans or specifications" should have been "plans and specifications." This is an insubstantial change.

The first subsection of the proposal states what must be contained in the application for a permit. It is generally straightforward and consistent with the Department's newly adopted rules on public water permits, 6 MCAR § 1.5020 to 5026. Aside from comments about the fact that all information must be furnished at the landowner's expense, there were no comments directed to the subsection.

exempt.?

The second subsection allows for joint applications by two or more landowners. Again, there was no adverse comment. It could be anticipated that a number of landowners might join together to share the costs of making an application; it is appropriate that this be permitted.

The third subsection discusses issuance of permits, and indicates that permits will issue only upon the agreement of both state and local governmen-

tal units in the state where the dike is located. The comments regarding this subsection related to the time it might take in order to secure the approval of the appropriate governmental units. In response to those comments, James Cooper estimated that if no governmental unit raised any questions with an application, it could be processed in 60 to 90 days (T. 1-77).

Section I.3. also contains a sentence which reads:

> Approval of the permit will in no way relieve the owner from damages which may be caused or created by construction of the dikes.

While the Examiner believes this to be merely a restatement of existing law, the Department offered absolutely no evidence to support the need for, or reasonableness of, this sentence. If this is merely a restatement, then it is unnecessary. If it goes beyond existing law, then it must be justified. It is recommended that the sentence be deleted.

I think they moved + + E1

Section I.4. states that the state receiving the application shall forward it to the other state for comment and recommendation. Cooper testified that, at least in the case of Minnesota applications, the ultimate authority to grant or deny would remain with the Department, but that an effort would be made to reach an agreement with the Water Commission prior to final action (T. 1-75).

Section I.5. deals with permit revocation, citing specific acts which would give rise to revocation of an existing permit. There was no comment on this subsection. It should be noted that Minn. Stat. § 105.44, subd. 9, confers upon the Commissioner of Natural Resources the right to cancel permits ". . . if deemed necessary by him for any cause for the protection of the public interest." By setting forth more specific grounds in this rule, the Department has given advance notice to permit holders of their duties and responsibilities, and the penalty for failing to abide by them.

Section I.6. discusses maintenance of the dikes. It drew no public comment, and the provisions are straightforward.

In summary, Section I of the proposed criteria is found to be both needed and reasonable with one exception: the last sentence of I.3. was not shown to be either needed or reasonable, and it is recommended for deletion.

43. Section J. of the Rules is a rather open-ended provision for exceptions to the criteria. It has been mentioned above as a "safety valve", permitting deviations from the criteria in order to meet individual circumstances. The conditions for such exceptions are:

a. The existence of a "special circumstance"

b. Concurrent approval of state agencies in both states and local water management authorities in both states.

c. Submission of "a plan" satisfactory to all agencies.

There was no public comment on this section.

It is found that some provision for exceptions to the criteria is necessary. These provisions provide an open framework for processing the many different types of requests for exceptions that can be anticipated. They also balance power between the state agencies and local authorities. While the Examiner finds that they are barely reasonable in their present form, there is a lack of specificity in the rule. What is a "special circumstance"?

What kind of a plan would be "satisfactory"? It would be proper for these to be defined in greater detail. The statute provides some guidance. Section 105.45 contains the following tests to guide the Commissioner in granting permits:

a. The plan is reasonable;

b. The plan is practical;

c. The plan adequately protects public safety; and,

d. The plan promotes the public welfare.

It is recommended that the Department add these four tests to the proposed criteria to protect the public from abuses of discretion (and protect the Department from allegations of abuse).

44. Section K was by far the most controversial section of the criteria and the one to which the greatest amount of public comment was directed. It deals with the application of these criteria to existing dikes.

Section K contains two separate provisions. The first is (like all of the previous criteria) is an amendment to Article IV of the Joint Agreement. The second is an amendment to Article V.

The first paragraph of the section states:

> These criteria shall apply to all unauthorized dikes constructed in the past for the protection of those agricultural lands located . . . [within the area defined by Section B]. Exceptions are farmstead dikes if they meet the provisions of Section H of these criteria.

The second section amends Article V so that it would read:

> Parties to this agreement hereby agree that they shall immediately take whatever steps are necessary and available to remove unauthorized dikes adjacent to the boundary rivers not meeting the criteria contained in part IV above.

In contrast to the above, the Department explained in its Statement of Need and Addendum that existing dikes would be compared with the criteria to determine what would have to be done to bring the dikes into compliance with the criteria, and that in lieu of outright removal, the Department would issue permits for those dikes brought into compliance with the criteria. The Department also agreed that in lieu of removal or modification, the acquisition of negative construction easements or flooding easements could be justification for the granting of an exception pursuant to Section J. In all cases, permits would have to be obtained pursuant to Minn. Stat. § 105.42. Finally, if none of the above solutions were achieved, no permit would issue, and removal of the offending dike would be sought.

During the hearings, additional buttressing of the above came from the Department. James Cooper stated that at least at the present time, the Department had no monies to offer to landowners to assist them in modifying, relocating, or removing their dikes (T. 1-71). However, he stressed that removal was only one alternative, and that modifications such as degrading (downgrading the height) or relocation were also acceptable (T. 1-73).

Duane Ekman of the Minn-Dak group noted the difference between the relatively firm tone of Article V (". . . immediately take whatever steps are . . . available to remove unauthorized dikes. . . .") compared with the more cooperative tone of the Statement of Need, its Addendum, and Cooper's testimony summarized above.

The following are excerpts from the transcript, T. 2-95a to 101a. Mr. Sobolik is examining Mr. Ekman. The minutes of the meetings of the Upper Mississippi Basin Commission Task Force referred to in Finding No. 26 above had just been marked and introduced into the record as Public Ex. 7:

Q. (By Mr. Sobolik) Duane, is there any specific minutes in there that you would like to point out to the Examiner as being beneficial to him?

A. I would like to first comment on something that I'm not sure, I don't believe is in the minutes and this is the very first meeting we had. I think the minutes will show that we came with an official request that we be part of what is designated the Red River [Diking] Task Force. In that very first meeting, I was spokesman for the group and I made some specific requests to the task force and I believe that the record today here should show that we asked that the state agencies involved, Corps of Engineers and the two state agencies and whoever else was there, that we pool our expertise and that we asked them to come and recognize local input and come to our area and help us finish construction of those dikes instead of asking first: "How can we stop the farmers?"

Q. Well, describe, if you will, the attitude or the pulse or the feeling of the DNR and the Water Commission as it related to the farm dikes in place.

A. Well, I think that to me it was a feeling that right from the beginning the real, the only real thing they were addressing was removal of the farm dikes.

Q. Did they offer you any alternative solution at all?

A. No.

* * *

Q. Have you reviewed the criteria as is proposed at this hearing?

A. Yes, I have, except I haven't looked too closely at the Addendum that was just received the day before the hearing.

MR. KLEIN: I might state for the record so there isn't any confusion, the Addendum is not an Addendum on the criteria themselves, but rather an Addendum [to the] explanation of the . . . criteria in the Statement of Need, as far as I know.

* * *

MR. KLEIN: Perhaps I could ask Mr. Clapp.

Mr. Clapp, was it your intent that some statement made in the Addendum to the Statement of Evidence which is marked Agency Exhibit 8 was intended to amend the Rules as published?

MR. CLAPP: No; no such intention.

MR. KLEIN: I don't think there was any intention to change the condition of the Rules. To the extent that the Addendum tries to, I don't think it can successfully do it.

MR. CLAPP. I agree; it can't.

* * *

MR. KLEIN: I would like to allow Mr. Clapp to clarify this matter. I think there are some people out there wondering what in the devil is going on.

MR. CLAPP: You listen to me, Mr. Cooper, in case I get this wrong.

What that Addendum to the Statement of Need was intended to do was fill out some of the thinness in the original Statement of Need and Evidence, and what that part of it

that you're referring to is doing is talking about how you could, some examples of ways that the existing, that could be worked out to get the existing dikes to satisfy the criteria.

For instance, by getting - - - say the area on the other side of the river is undiked - - - by one way or the other getting a statement from the landowners on the opposite side of the river that they don't object to the location of your dikes. In other words, they are saying they're not being damaged and they say they yield any right to build up as close as you have.

As the rules say in the body of them, themselves, you don't have to have equal encroachment, you can backslide it around with both parties agreeing.

MR. SOBOLIK: Are we saying then that the dikes can be situated by consent of those affected on both sides of the river?

MR. CLAPP: It's my understanding.

Is that your understanding, Dave?

MR. SPRYNCZYNATYK: As long as parties on both sides agree to the placement of dikes so as not more than one foot increase in the elevation, then the dikes can be shifted, and that's a waiver of equal distance from the river or equal encroachment that's included in the criteria.

MR. SOBOLIK: Is that section by section or township by township or county by county as you progress north to the border?

MR. SPRYNCZYNATYK: It will be dike by dike. In other words, it could shift as it moves along, it doesn't have to follow a specific legal boundary or township or county line or whatever.

Essentially what has occurred is that the Department has offered to accept applications for permits for bringing the dikes into conformance by modification or relocation. However, this more cooperative approach is not explicitly recognized in the "immediately take whatever steps" language of Article V. While this Examiner has no doubts about the sincerity of the Department personnel who made these statements, individuals in state government do come and go. The fact of the matter is that if Article V is adopted in its present form, the Department could move immediately to issue Orders for removal pursuant to Minn. Stat. § 105.462 (1977 Supp.). Therefore, if the Article is to stand, there must be some protection against such action. Before discussing such protection, however, there is more public testimony which must be examined.

Not all farmers are opposed to removal. For example, 36 residents of Pulaski Township, North Dakota, submitted a petition urging the States to:

> work toward removal of dikes in Minnesota along various rivers, tributaries and watercourses which also border on North Dakota land. Further, we ask that all natural watercourses be left open for reception of water. In the alternative, our view is that said dikes should be moved back, so as to be 1,150 or 1,200 feet from the channels of the rivers and lowered so as to be no higher than to withstand a Grand Forks, North Dakota flood crest of 42 feet.

In addition, many of the people noted in Finding No. 24 above favor removal, as do a number of cities along the river (See Pub. Ex. 7).

The vast numerical majority of the comments in record are opposed to removal. For example, Derrill Liffrig, Acting Superintendent of the Oslo Public Schools, stated:

I am vehemently opposed to Article V . . . . These dikes did protect approximately seventy (70) square miles of land in the Oslo I.S.D. # 442 from being flooded in April, 1978. Consequently, they did protect the bus routes in the district of approximately 180 miles daily. I could live with the recommendations and criteria for future diking.

* * *

Further, I do not see the agricultural dike as a permanent solution to the problem. Water retention in the watersheds is the answer, we need more work and less talk on this particular issue. But again, for all practical purposes, removing the existing dikes at this time, or in the near future, won't help anything.

The Board of Managers of the Middle River-Snake River Watershed Dis stated:

We do not believe that the states have the authority to adopt criteria that apply to levees already in place. Nor do we feel it is a reasonable requirement to require the removal and replacement of levees to meet requirements that were not in effect at the time they were constructed.

The record is replete with other testimony and submissions which es tially make the following argument:

1. The problem of flooding and its solution have long been recognized by all, yet the states have done little or nothing about either.

2. In the absence of any state action, the farmers went to substantial personal expense to protect not only their businesses, but also their homes.

3. The great flood of 1978 demonstrated not only that the dikes were successful, but also that they did not have dire consequences for others.

4. The dikes are not the ultimate solution to the problem, but until the states demonstrate a willingness to do something toward achieving a long-term solution to the problem, it is grossly unreasonable to remove the only protection available to the farmers.

It should be noted that the Department has not been closed to sugge tions for compromise, particularly with regard to the existing dikes. At close of the hearings, the following statements were made:

MR. SOBOLIK: The posture of Minn-Dak Farmers Flood Control Association is that cooperation is apparent from their standpoint. They have tried to cooperate for a good many years; they have [garbled] the states to implement action; no action was implemented; they acted themselves. I can relate to you with utter firmness that the position of Minn-Dak Farmers Flood Control Association regarding the removal of the existing dikes is firm. Cooperate they will, but to ask the dikes to be removed as proposed herein by the States of North Dakota and Minnesota, with no other affirmative action whatsoever, cannot be tolerated and will not be tolerated. Cooperate they wanted, but there's no way they're going to allow themselves to be destroyed. They're firm and they think they're fair.

* * *

MR. CLAPP: I'd just like to tie on to the word "cooperate" that you used, Mr. Sobolik. I want to make a suggestion.

Although, Mr. Sobolik, during your statement you did say you didn't feel any criteria were needed for dike construction on the Red River, you did feel on the other hand criteria were needed for drainage in the uplands, and

that doesn't sound, I can't tie that together. How come you can do things willy-nilly down here but we better get organized up there?

I would suggest that before the record closes that the Minn-Dak Association propose a set of criteria that would make sense to it. I mean, it's clear that you want the existing dikes grandfathered in, and it's clear that if there has to be relocation you want the government to pay for it, maybe you think it should be a 25-year flood and it gets to be raised two feet, whatever. If you could propose some alternative to what we have here, I think it would be useful, within the time the record is open.

MR. SOBOLIK: May I comment the fact that we tried, and here's a letter of last April where we suggested in proposals and the answers were: "This would not be acceptable to the State Water Commission," was one answer, and would maybe like to submit this as an effort in the past to cooperate. And if the Examiner would --

MR. KLEIN: Does this - - -

MR. SOBOLIK: We'd be happy to submit a criteria that we can live with.

(Whereupon, Public Exhibit No. 8 was marked for identification.)

MR. KLEIN: What I'm marking as Public Exhibit No. 8, is a letter to Mr. Lloyd Fisher dated April 18, 1977, from Vern Fahy, State Engineer, relating to proposed diking criteria developed by the Minn-Dak Cooperative presented at the February 16, 1977 meeting. (T. 2-160 to 162).

No such criteria were received, although the February '77 criteria are contained in Pub. Ex. 7.

In a brief filed on behalf of Minn-Dak, Sobolik urged that the criteria not be adopted and, in the event that they be adopted, existing dikes be excepted from compliance "until such time as positive alternative measures are employed to alleviate flooding. . . ."

The Department's brief urged the adoption of the rules, but pointed out that Section J is "an open-ended . . . invitation to the Minnesota-Dakota group to come in with proposals for the existing dikes that all can live with." The brief concluded by stating "When the rules are adopted, work can begin on finding a fair and equitable solution to the problem of the existing dikes."

It is found that the dikes were constructed in violation of Minn. Stat. § 105.42, subd. 1. It is also found that while the dikes have protected some, they have damaged others. Proceeding on the basis that the only proper way to dike is to take into account all interests on both sides of the river, criteria for future diking are needed. For existing dikes, however, immediate removal, without time for compromise, is found to be not reasonable.

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

CONCLUSIONS OF LAW

1. Any of the foregoing Findings which should more properly be denominated as Conclusions of Law are hereby adopted as such.

2. Due, timely and adequate legal notice of the hearing was served and published by the Department.

3. The Department did not comply with the 25-day filing requirement of Minn. Rule HE 103. However, there was no prejudice to any person because the

materials were available for inspection (and were inspected and copied) when the lone person who requested to see them did so.

4. The Statement of Need and Evidence which was originally filed was inadequate. However, an Addendum was prepared and filed. The two documents, taken together, were adequate. However, the person who did ask to inspect the prefiled documents did not see the Addendum. Was he prejudiced?

The purpose of the rule is to give all persons advance notice of the facts and reasoning which a state agency intends to rely upon at the hearing so as to enable persons to better prepare a "rebuttal" of those facts and reasoning.

In this particular case, the farmers' organizations were represented at the Upper Mississippi Basin's Task Force meetings from December, 1975 onward, and had in their possession for months the primary document which formed the factual basis for these rules, the Corps of Engineers Report of October, 1977. Numerous meetings, letters, and other communications between the farmers and the state agencies over the last two and one-half years have provided far more "discovery" to the farmers than even the best Statement of Need and Evidence would have given them. It is concluded that there was no prejudice arising from the inadequate original statement of Need and Evidence.

5. Minn. Rule HE 103(h) requires the filing of the names of witnesses appearing on behalf of an agency, and HE 103(i) requires a brief summary of any expert opinion proposed to be presented by the Agency. The testimony of Orrin Holmen and Peter Fischer falls within this latter category. Neither were named nor was their testimony summarized. However, Agency Ex. 6 (filed by the Department on April 3rd) does state that the Corps Report would be submitted. Having been put on notice of the fact that the Corp Report would be submitted, can it be said that any of Holmen's or Fischer's testimony contained any expert opinion which was "new" opinion? If so, was it prejudicial to the preparation of the farmers' case?

Holmen testified to two things. First, the methodology used to estimate the peak flow discharge at Grand Forks for the 1897 flood. He stated that while a 1922 publication gave the discharge as 40,000 c.f.s., that figure was revised, in 1955, to 80,000 c.f.s.

The second thing he testified to was the peak discharge and stage elevations of the 1978 flood. As shown in Finding No. 11 above, those peaks occurred between April 11 and April 16, 1978, a period of time well after the 25-day filing deadline.

The usual remedy for failure to prefile such evidence is to exclude it from the record. However, in neither case is that remedy either warranted or reasonable under these particular facts. The 1955 recalculation of the 1897 flood was well known to Ron Adrian, the only person who appeared to have any interest in it (T. 2-8a to 13a). In addition, it was included in the historical flood data in the Corps Report at page 12, and thus known to all well in advance of the hearing. There is no reason to exclude the 1978 data presented by Holmen because the peaks did not occur until April 11-16, and because it is an "almanac-type" fact which is subject to judicial notice. Finally, aside from enabling everyone to put the 1978 flood into historic perspective, it is immaterial to the issue of the need for or reasonableness of these rules.

Fischer's expert testimony related principally to material in the Corps Report. However, he did ask a series of rhetorical questions and did provide answers based upon 1978 flood data. In addition, he testified to the acreage protected by diking in the 1978 flood as opposed to the acreage flooded in 1969. Both were unavailable 25 days before the hearing, and indeed, the acreage data was based upon aerial photos received by him on April 21 and analyzed over the weekend preceding the hearing on April 25 (T. 1-50). In such a case, exclusion is unreasonable.

No action needs to be taken with regard to either the Holmen or Fischer testimony.

The brief for Minn-Dak also alleges that the Department failed to disclose the name of the Agency representative who would appear at the hearing, a requirement of HE 103(h). Such is not the case: Agency Ex. 6 does indicate that James Cooper would be testifying for the rule.

6. The Department does have statutory authority to adopt the rules as proposed. See Minn. Stat. §§ 105.49, 471.59, subd. 1 (1976), and 105.415 (1977 Supp.).

A substantial question of the Department's authority to adopt the rules arises from the apparent conflict between the requirement that permits be obtained prior to constructing structures such as these dikes contained in Minn. Stat s 105.42, subd. 1, and the expressions of legislative policy contained in ss 104.01, subds. 3 and 4, and 105.42, subd. 1a, expressing a preference for non-structural means of flood control. The reasoning in the Minn-Dak brief is essentially two-fold: First, that the rules are inherently unreasonable because they hold out the hope that permits would issue for conforming dikes, yet the legislative preference contains provisions which would prevent the Commissioner from issuing any permits whatsoever; and second, that the Department may not adopt these rules because they conflict with the nonstructural policy.

With respect to the power of the Commissioner to issue permits, the statute at issue is § 105.42, subds. 1 and 1a, which states:

> Subdivision 1. It shall be unlawful for the state, any person, partnership, association, private or public corporation, . . . to construct, reconstruct, remove, abandon, transfer ownership, or make any change in any reservoir, dam or waterway obstruction on any public water; or in any manner, to change or diminish the course, current or cross-section of any public waters, wholly or partly within the state, by any means, including but not limited to, filling, excavating, or placing of any materials in or on the beds of public waters, without a written permit from the commissioner previously obtained. Application for such permit shall be in writing to the commissioner on forms prescribed by him.
>
> * * *
>
> The commissioner, subject to the approval of the county board, shall have power to grant permits under such terms and conditions as he shall prescribe, to establish, construct, maintain and control wharfs, docks, piers, levees, breakwaters, basins, canals and hangars in or adjacent to public waters of the state except within the corporate limits of cities.
>
> Subd. 1a. . . . After November 15, 1975, a permit shall be granted under this section only when the project conforms to state, regional, and local water and related land resources management plans, and only when it will involve a minimum of encroachment, change, or damage to the environment,

particularly the ecology of the waterway. In those instances where a major change in the resource is justified, permits shall include provisions to compensate for the detrimental aspects of the change.

In unincorporated areas and, after January 1, 1976, in incorporated areas, permits that will involve excavation in the beds of public waters shall be granted only where the area in which the excavation will take place is covered by a shoreland conservation ordinance approved by the commissioner and only where the work to be orized is consistent with the shoreland conservation ordinance. Each permit that will involve excavation in the public waters shall include provisions governing the deposition of spoil materials.

No permit affecting flood waters shall be granted except where the area covered by the permit is governed by a flood plain management ordinance approved by the commissioner and the conduct authorized by the permit is consistent with the flood plain management ordinance, provided that the commissioner has determined that sufficient information is available for the adoption of a flood plain ordinance. No permit involving the control of flood waters by structural means, such as dams, dikes, levees, and channel improvements, shall be granted until after the commissioner has given due consideration to all other flood damage reduction alternatives. In developing his policy with regard to placing emergency levees along the banks of public waters under flood emergency conditions, the commissioner shall consult and cooperate with the office of emergency services.

* * *

If these provisions were to be interpreted as the Minn-Dak suggests, barring the issuance of any permits because in at least some affected counties, no flood plain management ordinances exist, the Commissioner would have little choice but to do nothing, or order the removal of existing dikes in toto. Clearly, the compromise position of permitting flooding easements, modifications, or relocation is better for the landowners than outright removal.

In addition, the Minn-Dak interpretation would bar the Commissioner from permitting any new dikes, even those meeting all of the proposed criteria. This would work an inequity upon those who have not yet diked, but may be waiting until these long-pending criteria are adopted and the "ground rules" are known.

The second conflict raised by Minn-Dak relates to the Flood Plain Management Act, Minn. Stat. Ch. 104. The relevant section of the Chapter (§ 104.01) provides:

Subd. 2. The legislature finds and declares that: (a) A large portion of the state's land resources is subject to recurrent flooding by overflow of streams and other watercourses causing loss of life and property, disruption of commerce and governmental services, unsanitary conditions, and interuption of transportation and communications, all of which are detrimental to the health, safety, welfare, and property of the occupants of flooded lands and the people of this state; and (b) The public interest necessitates sound land use development as land is a limited and irreplaceable resource, and the flood plains of this state are a land resource to be developed in a manner which will result in minimum loss of life and threat to health, and reduction of private and public economic loss caused by flooding.

Subd. 3. It is the policy of this state and the purpose of sections 104.01 to 104.07 to reduce flood damages through flood plain management, stressing nonstructural measures

such as flood plain zoning and flood proofing, and flood warning practices. It is the policy of this state and the purpose of sections 104.01 to 104.07 not to prohibit but to guide development of the flood plains of this state consistent with the enumerated legislative findings to provide state coordination and assistance to local governmental units in flood plain management, to encourage local governmental units to adopt, enforce and administer sound flood plain management ordinances, and to provide the commissioner of natural resources with authority necessary to carry out a flood plain management program for the state and to coordinate federal,1 state, and local flood plain management activities in this state.

Subd. 4. In furtherance of the policy stated in subdivision 3, the legislature further declares that flood plain management ordinances are to be given primary consideration in the reduction of flood damage in Minnesota and that alternative methods for reducing flood damage may not be carried out before adoption of flood plain management ordinances by local governmental units. Structural projects which have the purpose of controlling floods are to be considered only as elements of a flood plain management program.

Again, the Minn-Dak position would result in removing the opportunity for compromise on existing dikes and prohibit the construction of new dikes.

The Department's response to this is that the Flood Plain Management Act and the "no permit" paragraph of § 105.42 are designed to cause local government to consider non-structural flood control methods before the same local government undertakes structural construction. It is not intended, DNR argues, to forbid DNR from allowing private dikes before the local government has its non-structural ordinance in place.

Cooper testified that in his opinion, the last paragraph of subd. 1a of § 105.42 would not prohibit the issuance of permits because, by adopting these criteria, the DNR was stating that it had given "due consideration" to non-structural alternatives and found them wanting (T. 1-62).

In weighing both of the conflict situations, the involvement of another state, with different laws, cannot be forgotten. At the very first Upper Mississippi Basin Task Force meeting, the North Dakota State Engineer is reported to have stated that the North Dakota dikes were "an action-reaction occurrence". Later at the meeting, the minutes state that North Dakota farmers were diking to protect themselves from Minnesota diking. Rather than taking their differences into a courtroom, the two states sat down and hammered out an agreement that is satisfactory to both.

While there is nothing in the record to indicate how well the agreement "meshes" with the overall statutory scheme in North Dakota, it is clear that it does not fit perfectly into Minnesota's. Minnesota's water management scheme does not contemplate an eventuality such as was presented by such large-scale diking.

While there is some doubt in the mind of the Examiner regarding both of these statutory conflicts, both are resolved in favor of the Department, in part because the Examiner believes that, on balance, the Commissioner is legally correct, and in part because of a "safety valve: contained in Minn. Stat. § 3.965. That section provides a procedure for legislative review of agency rules. Essentially, a commission of ten legislators is empowered to temporarily suspend the operation of any rule or set of rules and place the issue before the whole Legislature at its next session. If, in fact, these rules are contrary to the intent of the Legislature, this provides a procedure for the Legislature to act. Due to the recommendation to be made below

regarding existing dikes, there will be ample opportunity for such action before any irreversible destruction occurs.

7. Except where specifically noted above, the proposed criteria are found to be both needed and reasonable.

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

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

That the criteria, as proposed, with the correction and deletions and addition noted above, be adopted except that the effective date of Section K be stayed for a period of 18 months from the effective date of the remainder of the criteria to permit the parties to deal with existing dikes, both on the main stems and on tributaries.

Dated this 26th day of July, 1978.

Allan W. Klein

ALLAN W. KLEIN
Hearing Examiner

M E M O R A N D U M

In a letter to the Examiner, the Acting Superintendent of the Oslo Public Schools stated:

> I feel it is remarkable that such a friendly and peaceful atmosphere has remained (overall) in this community despite the fact that there are those agencies, that I feel, place unjustifiable blame on the Minnesota agricultural dikes. The community is grateful for people like Duane Eckman and Raymond Hutton who have faced this situation in such a diplomatic and pragmatic way.

"Diplomacy" and "pragmatism" are the standards by which both sides are expected to act during the 18-month stay recommended above. The Department, during the hearings, held out the olive branch and asked the farmers to come forward with proposals for existing dikes that all could live with. It is clear that the case by case approach recommended for the tributaries (which will probably also end up being used on the main stem as well) will put a strain on the resources of the Department's Division of Waters, which must fairly allocate its resources throughout the state. There are other resources, however, which the Department can and should draw upon -- the local people who know from experience what the effects of various alternatives will be. If both sides realize that they must make concessions and work together if they are ever to achieve a satisfactory solution, it can be accomplished.

Beyond what can be accomplished in those 18 months, cooperation can also foster a relationship which can work toward resolution of the long-term problem which far overshadows the dikes. The Governors of the two States have put in motion a drive to organize the victims of the floods with the various units of government which have responsibility for preventing future floods, and, as one farmer put it:

> . . . and if it goes beyond their smiles, I think they mean business and are ready to take action. They want us farmers to get together, Minnesota and North Dakota, with the State Water Commission, DNR, and the Corps of Engineers to see justice done to all farmers all the way to the Canadian border. May God help us succeed.

A.W.K.

ADMIN [illegible] Our File No: #536

STATE OF MINNESOTA

DEPARTMENT: Attorney General

Office Memorandum

JOSEPH H. ALEXANDER
Commissioner
TO : Department of Natural Resources

DATE: 10-2-79

Attention: A. WILLIAM CLAPP
Special Assistant Attorney General

FROM : Lee E. Sheehy
Special Assistant
Attorney General

PHONE: 296-1238

SUBJECT: Rules as Approved In the Matter of Proposed Rules for Regulating Agricultural Dike Construction Along the Red River of the North and Bois De Sioux River.

Enclosed herewith are the rules you have submitted for approval. These rules have been approved by this office and filed with the Secretary of State. Note that they have NOT been filed with the State Register; this must be done promptly by your agency.

Upon receipt and before transmittal to your agency, however, it is important that you recheck these rules as to:

1. Affixation of the stamps of the Attorney General and Secretary of State to the last page of the rules;

2. Coverage by these stamps of all rules submitted; and

3. Inclusion of all pages of the rules in the approved set.

Directly following the approved rules is a complete set of required documents and transcript which must be retained with the rules by you or your agency.

If you have any questions in this regard, please contact me.

LES/dw
Enclosure
cc: Duane Harves
Marshall Whitlock
Melvin Goldberg

ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

Office Memorandum

DEPARTMENT Attorney General
Natural Resources

TO : LEE SHEEHY
Special Assistant Attorney General

DATE: 9-17-79

FROM : BILL CLAPP
Special Assistant Attorney General

PHONE:

SUBJECT: Red River Dike Rules

Regarding your letter to Commissioner Alexander of September 12, the Commissioner is submitting Supplemental Findings regarding items 3, 5, and 6. Item 1 (incorporation by reference) is taken care of by the attached (3 copies) Order of the Chief Hearing Examiner. This memorandum addresses the other 2 items, which are questions of law.

Retroactivity. The "unauthorized dikes constructed in the past" referred to in Section K of the rule were built without the permit required by Minn. Stat. § 105.42 for any activity which makes a change in the course, current, or cross-section of public waters. At the time they were built, the DNR had no specific rules regarding the height and placement of dikes, but it did have the criteria of § 105.45 that the activity be reasonable, practical and adequately protect public safety and promote the public welfare. The record shows the dikes caused flooding of the property of others, so they cannot be said to satisfy the criteria. There was also a standard then in effect under the Floodplain Management Act and rules adopted thereunder, that no construction in the floodplain be allowed that would increase the elevation of the 100 year flood more than one-half foot - no different than the standard the Commissioner now asks you to approve.

To be protected from retroactive effect, a right must be vested. Peterson v. City of Minneapolis, 285 Minn. 282, 173 NW 2d, 353 (1969). Since the dikes were unlawfully built and flood other land, justice and equity cannot allow a claim that their builders have a vested right in them.

Joint Agreements Binding Subsequent Successors in Interest of Real Property. You are right, the subject was not addressed in the record. It will be dealt with as the need arises. The agreements will probably be drawn to run with the land, and be recorded so as to give notice to future purchasers. Such an agreement would be a condition of a permit, and the permit could be recorded. This is a fairly common practice, with § 105.42 permits now, where the permit places an obligation or restriction on both present and future owners of the property (as, for example, the duty to maintain a dam).

enc.

ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

Office Memorandum

TO : Duane Harves
Hearing Examiner's Office

DATE: August 15, 1979

FROM : Steve Thorne
Deputy Commissioner

PHONE: 8/16

SUBJECT: CHANGES IN RED RIVER DIKE RULES

As discussed with your office previously, a few changes have been made in the rules which went through the hearing process a year and a half ago. This memo is intended to outline those changes, the process that lead to the changes, the basis for the changes and your concurrence that these changes are insignificant.

The changes are as follows:

C. Definitions

Dike - the revision is more concise and reflects later changes.

Farmstead - nontillable allows for too much flexibility, therefore, was dropped. Reasonable expansion areas around existing farm buildings would be included.

Ring dike - was omitted as it is covered by the general dike definition above.

Public Waters was substituted for Class I & II watercourses consistent with recent legislative changes in M.S. 105.

E. Design Criteria 1 & 2

During the hearing, testimony was received stating that the 10 year plus 1 foot criteria did not provide sufficient protection to agricultural lands and did not provide adequate flexibility to deal with existing unauthorized dikes. Subsequent to the hearing, numerous meetings have been held with the Governors of Minnesota and North Dakota, Minn-Dak Inc., Lower Red River Water Management Board, individual farmers, North Dakota Water Commission, MN DNR, USCE, state legislators, and congressmen to discuss the agricultural dike concerns. A main thrust of the local interests was to treat urban and rural concerns in a consistent and uniform manner and provides a reasonable degree of agricultural protection.

Therefore, the Eckman and Ogaard group suggested using the 10 year frequency to define dike location and the 30 year frequency elevation plus one foot to define elevation of dikes. Evaluation of this alternative revealed that the 100 year flood would be increased in excess of .5 foot and in excess of one foot in some reaches.

Since this increased stages above the allowable flood plain regulations, this alternative was dropped. As a compromise between the proposed criteria and the aforementioned alternative,the allowable .5 foot increase for the 100 year flood as applied to many existing flood plains appeared reasonable. The flood plain regulations had gone through hearings in 1970 and stood the test of time, therefore, why not apply the same standard for dikes. Additionally, many cities and counties have adopted ordinances regulating flood plain activities consistent with this standards. In fact, all local governments along the Red River will have been required to adopt state approved ordinances by the end of 1980. These ordinances allow for equal and opposite encroachments which do not exceed .5 foot increase in the 100 year frequency flood. This standard provides for greater protection of agricultural lands consistent with that of other flood plain uses and provides greater flexibility in the disposition of unauthorized dikes.

For comparison purposes, the dikes built at the location under the original criteria could be 2-2.5 feet higher in elevation using the new standard.

After much discussion with all interests including Minn-Dak, Lower Red River Water Management Board, Eckmand, Ogaard, watershed districts, North Dakota State Water Commission, USCE and MN DNR, this standard was agreed to as being the most reasonable approach for dikes. The rewording reflects the modification.

F. Hydrologic Data for Design

The changes reflect the above modification in Section E.

G. The public waters definition is reflected in this change as well as that of Section E.

I. 1.c. Addition of a provision to provide for acquisition of additional information needed to adequate act on an application.

I. 5. Reconstruction/Maintenance

Once authorized, there is generally no need to reapply for rebuilding as long as accomplished consistent with the original authorization. This reduces paper work and "red tape."

I. 6. General Administration

References appropriately to the provisions of which these rules become a part.

J. Exception to Criteria

Additional considerations were included at the insistance of local interests. They don't change the intent of the rule.

K. Application to Existing Dikes

This section includes the intent of Article V of the hearing draft.

This concludes the summary of the changes. Your review and response of concurrence that these are insignificant at the earliest possible date, is greatly appreciated.

Attached for your information is the redraft with the changes; the hearing draft; and the recent North Dakota rule hearing draft. If you have any questions, do not hesitate to contact myself or Ron Harnack (4803) Division of Waters.

Attachments

cc: Larry Seymour
Bill Clapp

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

Rules Providing Criteria for Regulating Agricultural Dike Construction Along The Red River of the North and Bois de Sioux River

Findings & Conclusions of the Commissioner

Public hearings on the above-entitled rules were held in April 1978. The Report of hearing examiner Allan Klein was issued July 26 of that year. It is attached as Exhibit A. Except as indicated below, I adopt the examiner's findings as mine.

The examiner correctly identified two primary issues: (1) the location and elevation of new dikes (findings 33 and 34); (2) what to do about existing dikes not meeting the location and elevation standards for new dikes (finding 44). The examiner particularly recommended that 18 months be taken to further consider what to do about existing dikes - that during that period no relocations, removals, or alterations, be required. In the year following the examiner's report, this agency has consulted with the North Dakota State Water Commission. Governors Quie and Link have met and committed themselves to prompt adoption of rules so that lawful repair of existing dikes damaged in the Spring 1979 flood could begin. On Saturday, July 28, 1979, in Roseau, the governors, the two state agencies, and the agricultural interests concerned about the dikes (represented by Don Ogaard and Duane Ekman of Minnesota and Robert Thompson of North Dakota) met and agreed to a set of rules which differs from the rules proposed in 1978 in certain respects.

Sections E.1 and E.2 as originally proposed, require dikes to be set back from the river a sufficient distance so as not to increase the 10-year flood elevation by more than 1 foot, and be built to overtop when that 1 foot increase has been reached. The examiner finds, and I agree, that these are reasonable standards. However, the record is clear that the farmers believe the standards provide neither sufficient protection to agricultural land, nor adequate flexibility for dealing with existing dikes.

There is in existence another standard, namely the provision of Minnesota's floodplain rules that allows encroachments on the floodplain that will not cause an increase in the 100 year flood stage of more than one-half foot. 6 MCAR, §§ 1.0087 D.1. and 1.0089 E.2.b. (NR 87(d) (1) and 89(e) (2) (bb)). This floodplain regulation, in effect since 1970, has stood the test of time. Many cities and counties have adopted ordinances regulating floodplain activities consistent with this standard, and by the end of 1980 all local governments along the Red River will have been required to do so.

The floodplain standard was probably conceived with an urban setting in mind, but the hearing record shows no reason it can't be applied to rural agricultural diking as well. This standard provides greater protection of farmland than the rule as proposed (dikes built at the setback established by the original criteria can be 2 to 2.5 feet higher under the new criteria), establishes equity of treatment between city land and crop land, and enables greater flexibility in the disposition of existing dikes. I find that although E.1 and E.2 as proposed are reasonable, it is more reasonable - under the record before me - to allow dikes to be so located and of such a height as not to cause an increase in the stage of the 100 year flood of more

than one-half of one foot, assuming an equal degree of encroachment on each side of the river.

Other changes to the rule as proposed should be made as follows.

1. The term "agricultural dike" is unnecessary. "Dike" is sufficient. By dropping the language after "lands" in the definition of dike, the definition becomes general enough so that the definition of "ring dike" becomes superfluous.

2. The reference to nontillable acres in the definition of farmstead should be dropped in order to avoid potential disputes.

3. The 1979 legislature eliminated the watercourse classification scheme, so the definitions of Class I and Class II watercourses may be dropped.

4. In Section F, the reference to the 10 year flood needs to be changed to conform to the changes in E.

5. The record indicates that the absolute prohibition in G. against diking across larger watercourses, is unnecessary. Any proposed dike across public water receives a review under Minn. Stat. § 105.42, and that is all that need be said in this rule.

6. The second sentence of the first paragraph of Section G. creates some confusion, as noted by the hearing examiner, and in any case is superfluous and should be deleted.

7. The "or" in paragraph I.1. should be changed to "and".

8. Section I.1. needs a provision allowing the agency to require additional information when necessary.

9. As noted by the hearing examiner, the second sentence of I.3 is superfluous. So is the first sentence.

10. In proposed paragraph I.6, the first, second, and last sentences are not needed. Although a permit for reconstruction or maintenance would be "red tape", the rule should require notice to the agency that such work is being done, and should require certification that the work has not put the dike out of conformance with the permit.

11. It should be indicated that, administratively, dike permits are handled as § 105.42 permits.

12. The examiner notes that Section J. needs some standards. The following should be added: "Factors that will be considered include but shall not be limited to dike setback line, location of farmsteads, property lines, existing roads, stream velocity, environmental effects, and acquisition of flowage rights".

Finally, for purposes of adopting it as a rule, the format of the entire document must be changed from that of an amendment to the joint and cooperative agreement, to that of a Minnesota rule.

Dated 28, 1979.

Joseph N. Alexander

JOSEPH N. ALEXANDER
Commissioner of Natural Resources

ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

Office Memorandum

DEPARTMENT Attorney General
Natural Resources

TO : LEE SHEEHY
Administration Division

DATE: 8-30-79

FROM : BILL CLAPP
Special Assistant Attorney General

PHONE:

SUBJECT: Rules for Red River Agricultural Dikes

Governors Quie and Link want these rules to be in effect ASAP. If they knew your role in this, they would be pleased to know you had completed it in 11 days rather than 20. On the other hand, I don't think the President, the Ayotullah Khomeini, or God care one way or the other.

If you are troubled by Harves's determination on substantial change, give me a call and I can give you some background on the issue.

STATEMENT OF COMPLIANCE WITH

MANUAL OF RULE MAKING PROCEDURES

I, Special Assistant Attorney General A. W. Clapp, III, do hereby declare that I have examined the proposed rules and all related documents and that, based on them and my personal familiarity with the applicable procedures, the requirements of statute and rule have been followed.

A. W. CLAPP, III
Special Assistant
Attorney General

Dated: August 30, 1979

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of Proposed Rules Providing Criteria for Regulating Agricultural Dike Construction Along the Red River of the North and Bois de Sioux River

ORDER FOR HEARING

Privately-initiated diking activity on the Red River of the North has demonstrated that this method of flood control has impacts on lands upstream, downstream, and across the river. Minnesota and North Dakota have therefore agreed that they must regulate such diking activity under a common set of criteria, which have been drafted.

NOW THEREFORE, pursuant to the authority vested in me by Minnesota Statutes sections 105.415 and 105.42 I order that public hearings on the proposed rules be held jointly with the State of North Dakota, at the following places, dates, and times.

April 25, 1978, 9:30 a.m., Ballroom, Comstock Memorial Union Building, Moorhead State University 6th Avenue and 14th Street South, Moorhead, Minnesota.

April 26, 1978, 9:30 a.m., Grand Forks Armory, Room 36, 615 1st Avenue North, Grand Forks, North Dakota.

For Minnesota, the criteria are rules and the hearings will be conducted accordingly.

Dated March 1, 1978.

WILLIAM B. NYE
Commissioner

by James F. Cooper
JAMES F. COOPER
Acting Director
Division of Waters

EXHIBIT
Agency Ex. L
RECEIVED
APR 3 1978
OFFICE OF HEARING EXAMINERS

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of Proposed Rules Providing Criteria for Regulating Agricultural Dike Construction Along the Red River of the North and Bois de Sioux River

NOTICE

OF

HEARING

Public hearings on the above entitled rules at the following dates and places.

April 25, 1978, 9:30 a.m., Ballroom, Comstock Memorial Union Building, Moorhead State University 6th Avenue and 14th Street South, Moorhead, Minnesota

April 26, 1978, 9:30 a.m., Grand Forks Armory, Room 36, 615 1st Avenue North, Grand Forks, North Dakota

The hearings will be conducted jointly with the North Dakota State Water Commission, for the purpose of the two states adopting identical rules for granting and denying permits to construct agricultural dikes along the subject rivers. Minnesota's statutory authority may be found in Minnesota Statutes, sections 105.415, 105.42, 105.49 and 471.59. The rules govern building, rebuilding, relocating or altering agricultural dikes within the floodplains of the Bois de Sioux and Red River of the North Rivers in North Dakota and Minnesota. The rules contain criteria for deciding how close to the river a dike may be built, how high it may be and how it must be constructed. They regulate diking across tributaries, and around farmsteads. The rules establish procedures for applying for permits, for application review, and for revoking issued permits. The rules can require the relocation or removal of existing unauthorized dikes.

All interested persons will have an opportunity to participate in the hearings. Statements may be made orally and written materials may be submitted at the hearings. In addition, written materials may be submitted to hearing examiner Allan Klein at the Office of Hearing Examiners, 1745 University Avenue, Saint Paul, Minnesota 55104, either before the hearing or within five (5) days after the hearing. The hearing will be conducted as described in Minn. Stat., § 15.0412 and in Minnesota Rules HE 101-109.

A free copy of the proposed rules may be obtained by writing to the Department of Natural Resources, Division of Waters, Space Center, 444 Lafayette Road, Saint Paul, Minnesota 55101. Additional copies will be available at the hearings. A "statement of need and evidence" explaining why the agency feels the proposed rules are necessary and outlining the testimony they will be introducing will be filed with the Office of Hearing Examiners twenty-five (25) days before the hearing and will be available there for public inspection.

Please be advised that Minn. Stat., ch. 10A, requires each lobbyist to register with the Ethical Practices Board within five (5) days after he commences lobbying. Lobbying includes attempting to influence rule-making by communicating or urging others to communicate with public officials. A lobbyist is generally any individual who spends more than $250 per year for lobbying or any individual who is engaged for pay or authorized to spend money by another individual or association and who spends more than $250 per year or five hours per month at lobbying. The statute provides certain exceptions. Questions should be directed to the Ethical

Practices Board, 41 State Office Building, Saint Paul, Minnesota 55155, phone: (612)-296-5615.

Dated March 6, 1978.

WILLIAM B. NYE
Commissioner

by James F. Cooper
JAMES F. COOPER
Acting Director
Division of Waters

EXHIBIT
Agency #3

RECEIVED
APR 5 1973
OFFICE OF HEARING EXAMINERS

STATE OF MINNESOTA
COUNTY OF RAMSEY

CERTIFICATE

In the matter of the Proposed Adoption of Rules of _____ Division Governing _____

In the Matter of Proposed Rules providing Criteria for Regulating Agricultural Dike Construction along the Red River of the North and Bois de Sioux River.

I hereby certify that the attached 484 labels, 3 sheets constitute the complete list of persons, associations, and other interested groups who as of 10:15 o'clock A .M, this 14th day of March, 19 78, have requested pursuant to M.S. 1976 [illegible], 15.0421 _____, that their names be placed on file with the Secretary of State for the purpose of receiving notice of public hearing on proposed rules on the subject captioned above.

Secretary of State

_____

By Cheri L. Mattson

_____



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APR 3 1978
OFFICE OF HEARING
EXAMINERS

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES

In the Matter of Proposed Rules
providing Criteria for Regulating
Agricultural Dike Construction
along the Red River of the North
and Boise de Sioux River.

AFFIDAVIT
OF
MAILING

- - - - - - - - - - - - - - - - -

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Pamela A. Shren being first duly sworn, deposes and says:

That on the 23rd day of March, 1978, at the City of Saint Paul, County of Ramsey, State of Minnesota, she served the attached Proposed Rules by depositing in the United States mail at said City of Saint Paul, a true and correct copy thereof, properly enveloped, and with postage prepaid, to all persons and associations at the addresses on the attached list.

That she transmitted on the 23rd day of March, 1978, the attached Proposed Rules by inter-office mail to all persons and associations at the addresses on the attached list.

Pamela A. Shren

Subscribed and sworn to before
me this 3 day of April, 1978

Annette Selbitschka
Notary Public
ANNETTE SELBITSCHKA
Notary Public, Ramsey County, Minn.
My Commission Expires July 17, 1980

MMC 20

area: If any provision of the orderly annexation joint resolution resolves to annex an area designated for orderly annexation, the board shall, after accepting the joint resolution, treat this provision as a separate resolution initiating annexation.

C. Evidentiary requirements for annexation within the designated area: The party proposing an annexation within the designated area shall demonstrate that the proposed annexation is consistent with the joint agreement.

D. Reporting requirements: One year after the joint agreement has been accepted by the board, and every year thereafter, for as long as the joint resolution is in effect, the parties shall inform the board of any changed conditions within the area designated for orderly annexation. If there have been no changed conditions, the parties shall so inform the board.

E. Amending the joint agreement: The joint agreement can only be amended by joint resolution submitted to the board by the parties to the joint agreement. The board may accept the amendment if it is consistent with the applicable state law and the remainder of the joint agreement.

F. Effective of noncompliance: If a party to the joint agreement continually does not comply with its provisions, the board or an aggrieved party by resolution may initiate a hearing, conducted pursuant to Minn. Stat. § 414.09. If the evidence demonstrates that there has been continuing noncompliance, and, further, that, as a result of this noncompliance, the basis of the agreement has been substantially undermined, the board may rescind the agreement and any pending annexations being considered within the designated area.

Department of Natural Resources

Proposed Rules Providing Criteria for Regulating Agricultural Dike Construction Along the Red River of the North and Bois de Sioux River

Notice of Hearing

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Practices Board, 41 State Office Building, Saint Paul, Minnesota 55155, phone: (612) 296-5615.

William B. Nye
Commissioner

Rules as Proposed

NOTE: The proposed rule is published in the form of an amendment to an existing agreement between Minnesota and North Dakota. Upon final adoption, each state will put the amendment into its rules format.

FIRST AMENDMENT TO

JOINT AND COOPERATIVE AGREEMENT FOR THE ESTABLISHMENT OF CRITERIA FOR AUTHORIZING DIKES AND OTHER FLOOD CONTROL STRUCTURES AND MEASURES ON THE RED RIVER OF THE NORTH AND THE BOIS DE SIOUX RIVER

1. Article IV of the agreement is hereby amended by the deletion of the existing article and the insertion of the following new article:

IV. JOINT DIKE CRITERIA FOR AGRICULTURAL DIKE CONSTRUCTION

A. GENERAL PURPOSE

The purpose of these criteria is to provide for the orderly and consistent review of permit applications to construct, relocate, rebuild or alter agricultural dikes along the Red River of the North and Bois de Sioux in order to assure that the granting of such permits would be in the best interests of the people of Minnesota and North Dakota. These criteria would be mutually applicable in both states. The authority to establish these joint criteria is granted to the Commissioner of Natural Resources in Minnesota Statutes, Sections 105.42, 105.49 and 471.59 and to the North Dakota State Water Commission by Sections 61-02-24 and 61-16-15 of the North Dakota Century Code. The two states recognize that establishment of these criteria governing the issuance, review and denial of permits to construct, relocate, rebuild or alter agricultural dikes along the boundary rivers is but the first step in the exercise of joint control over those activities which could contribute to an increased flood potential of these rivers. The two states further recognize the need to exercise this joint control in that water management decisions which appear logical in a local or statewide context may have negative interstate and international impacts.

NR

The criteria herein are being established at this time because there is a current need to provide a basis for the review of existing, unauthorized agricultural dikes and permit applications for the construction of additional agricultural dikes along the boundary waters. Local land owners view such dikes as interim solutions to local flood problems.

B. JURISDICTION

These criteria governing the review, issuance and denial of permits to construct, relocate, rebuild or alter agricultural dikes along the boundary rivers pertain to all such dikes located within the flood plains of the Red River of the North and the Bois de Sioux Rivers. Floodplain areas of the Red River of the North are defined by Appendix O, Volume 8 of the Souris-Red-Rainy Basins Comprehensive Study as "Red River of the North Main Stem Regional Floodplain Area" and the floodplain of the Bois de Sioux River is defined by the U.S. Geological Survey one percent chance of recurrence area flood quadrangles. These criteria apply to dikes constructed on tributaries within the floodplains of these boundary rivers.

C. DEFINITIONS

For the purposes of these regulations certain terms or words used herein shall be interpreted as follows:

"Agricultural Dike" or "Dike" means an embankment constructed of earth and/or other suitable materials to protect agricultural lands from frequently recurring floods (10-year frequency or more often) which result from overflow of watercourses or from diffused surface waters.

"Boundary Rivers" means the Red River of the North and the Bois de Sioux River as they form a natural boundary between the States of Minnesota and North Dakota.

"Farmstead" means a farm dwelling, adjacent farm buildings and those nontillable acres adjacent to the buildings.

"Flood Frequency" means the average frequency, statistically determined, for which it is expected that a specific flood stage or discharge may be equalled or

KEY: PROPOSED RULES SECTION: Underlining indicates additions to pre-existing rule language. ~~Strike outs~~ indicate deletions from pre-existing rule language. If all proposed rules in a set are totally new (i.e. non-amendatory) the entire set is printed in standard type face. RULES SECTION: Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

exceeded. This frequency is usually expressed as having a probability of occurring, on the average, once within a specified number of years.

"Flood Waters" means those waters which temporarily inundate normally dry areas adjoining a watercourse. This inundation results from an overflow of the watercourse caused by excessive amounts of rainfall and/or snowmelt which exceed its capacity.

"Ring Dike" means an embankment constructed of earth and/or other suitable materials which completely encloses a parcel of land.

"Watercourse" means a channel in which a flow of water occurs either continuously or intermittently in a definite direction. The term applies to either natural or artificially constructed channels.

"Watercourse, Class I" means, in Minnesota, those natural watercourses serving as major drainage outlets, or major tributaries to those outlets, which are capable of serving a number of beneficial public purposes; smaller natural watercourses serving specific values such as trout streams and scenic waterways.

"Watercourse, Class II" means, in Minnesota, those natural watercourses serving as tributaries of Class I watercourses which are often perennial streams serving more than one beneficial public purpose.

D. SEVERABILITY

The provisions of these regulations shall be severable, and the invalidity of any paragraph, subparagraph, or subdivision thereof shall not make void any other paragraph, subparagraph, subdivision, or any other part.

E. DESIGN CRITERIA

1. Dike Setbacks. Dikes are to be constructed a sufficient distance from the river so as not to cause an increase in the elevation of flood water of the 10-year frequency flood of more than one (1) foot at any point along the river. However, when the effect of the dike extends within the corporate limits of any city the permitted increase in flood water elevation shall not exceed 0.5 feet within the corporate limits of the city. Calculation of the effects of proposed dikes shall be based on the dikes being located on both sides of the boundary water an equal distance from the center of the channel. If mutual agreement has been reached between applicants on both sides of the river as to location of the dike, the "equal distance from the center" requirements may be waived providing the limit for increase in flood stage is met.

2. Dike Elevations. Dikes are to be designed and constructed so that they will be overtopped upon the occurrence of a flood that is one foot higher than the 10-year frequency flood at that point.

3. Dike Dimensions. Dike top width shall not be less than six (6) feet. Side slopes shall not be steeper than 3:1, except where slope stability analysis and slope erosion control can justify steeper slopes. No organic soil or material shall be allowed in the foundation of the fill of dikes.

4. Vegetative Cover and Riprap. A protective cover of grasses shall be established on all exposed surfaces of the dike. Riprap shall be used where required for control of erosion.

5. Interior Drainage. Dikes shall have provisions for interior drainage. The design shall include plans to handle the discharge from the drainage area based on drainage design requirements for the local area.

F. HYDROLOGIC DATA FOR DESIGN

The North Dakota State Water Commission and the Minnesota Department of Natural Resources shall provide the discharges and corresponding elevations of the 10-year flood (and other available flood data), in relation to known historic floods, for use in dike design.

G. DIKES ACROSS NATURAL WATERWAYS AND LEGAL DRAINS

Dikes shall not be constructed across Class I or Class II watercourses in Minnesota. Dikes shall not be constructed across the following rivers in North Dakota: Wild Rice, Sheyenne, Elm, Goose, Turtle, Forest, Park and Pembina. Dikes constructed across other natural waterways, streams or rivers in Minnesota and North Dakota shall have an opening capable of passing the summer storm having a four percent chance of recurrence and have an emergency spillway to prevent overtopping of the structure when the one percent (1%) summer storm occurs. Dike setbacks along tributary waterways, within the area defined in Section B of these criteria, to the boundary water shall meet the criteria as stated in Section E.

Dikes constructed across legal drains or public ditch systems shall require the approval of the appropriate watershed district, drain board, water management district or other local authority.

H. FARMSTEAD DIKING

Within an existing dike system, ring dikes around individual farmsteads shall not require dike permits if they are not provided with tie-backs to existing roadways or dikes. Ring dikes provided with tie-backs shall be considered part

of the overall dike system and will be required to secure diking permits. Outside the dike system there shall be no limitations on tie-backs of dikes around farmsteads.

I. Administration

1. Application for Permit. All applications submitted by the owner to construct, to relocate, rebuild or alter dikes shall be made on forms provided by the Minnesota DNR or ND State Water Commission and shall be accompanied by two (2) complete sets of plans or specifications. Such plans and specifications shall include the following:

A) A general location map with a minimum scale of 1"=800' showing the following:

1) Location of the dike with respect to the watercourse

2) Location of field inlets to provide for internal drainage

3) Location of legal drains, and natural channels tributary to the main river channel.

B) Detailed cross-sections of the dike showing elevations, in relation to mean sea level, and side slopes.

After review of the information required above and other available data, the state agency to which the application is made shall determine the location and number of required cross-sections of the river channel and overland areas. These locations shall be provided to the applicant who shall then provide the required cross-section data. The applicant shall undertake and agree to pay the expenses incurred in securing these cross-sections.

2. Joint Permit Applications. Joint permit applications involving two or more landowners or a permit application on behalf of two or more landowners will be accepted by the State agencies. These permit applications, taken together, must meet the above criteria.

3. Issuance of Permits. Dike permits will be issued only upon concurrent approval by the state and local government in which state the dikes are located. Approval of the permit will in no way relieve the owner from damages which may be caused or created by construction of the dikes.

4. Joint Administration. A copy of each application for a permit shall be forwarded by the state agency receiving

NR

the initial application to the other state for comment and recommendation before final approval is granted.

5. Permit Revocation. The applicant shall provide for certification by a registered land surveyor, engineer, or other qualified person or agency that the finished dike elevations are not higher than those approved by the state agency to which the application was submitted. The permit will be revoked for failure to provide this certification.

The permit may be revoked for failure to construct the dike in accordance with the plans and specifications submitted. Structural alteration of the dike without permission of the appropriate state agency will also result in having the permit revoked.

6. Dike Maintenance. All dikes must be adequately maintained to the required shape, height, and protective covering. All maintenance shall be the responsibility of the permit holder. The maintenance of dikes must include periodic removal of woody vegetation (for example, trees and shrubs) which may become established on the embankment. Design of the project shall include provisions of maintenance access.

J. EXCEPTION TO THE CRITERIA

Under special circumstances, exceptions to the dike criteria may be authorized on an individual basis but they must have the concurrent approval of the N.D. State Engineer, local water management board in North Dakota, Minnesota Department of Natural Resources and local watershed district in Minnesota. Factors that will be considered shall be increased in flood stage, increase of stage at existing city dike, increase in stream velocity and environmental effects. Request for exceptions must be accompanied by a plan satisfactory to all agencies.

K. APPLICATION TO EXISTING DIKES

These criteria shall apply to all unauthorized dikes constructed in the past for the protection of those agricultural lands located within the floodplains of the Red River of the North and the Bois de Sioux, as defined in Section B of these criteria. Exceptions are farmstead dikes if they meet the provision of Section H of these criteria.

2. The first paragraph of Article V of the agreement is hereby amended by the deletion of the words "adopted pursuant to" and the insertion in lieu thereof the words

KEY: PROPOSED RULES SECTION: Underlining indicates additions to pre-existing rule language. ~~Strike outs~~ indicate deletions from pre-existing rule language. If all proposed rules in a set are totally new (i.e. non-amendatory) the entire set is printed in standard type face. RULES SECTION: Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

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"contained in". The first paragraph of Article V, as amended, therefore provides:

V. REMOVAL OF UNAUTHORIZED DIKES

Parties to this agreement hereby agree that they shall immediately take whatever steps are necessary and available to remove unauthorized dikes adjacent to the boundary rivers not meeting the criteria contained in part IV above.

STATE OF MINNESOTA

_____

Commissioner Department of Natural Resources

DATE: _____

STATE OF NORTH DAKOTA

_____

State Engineer
State Water Commission

DATE: _____

Pollution Control Agency

Proposed Amendment to Minn. Reg. WPC 34 Regarding the Administration of the Construction Grants and Loans Program

Notice of Hearing

Notice is hereby given that public hearings in the above-entitled matter will be held in the Board Room of the Minnesota Pollution Control Agency, 1935 West County Board B2, Roseville, Minnesota, on April 21, 1978, commencing at 9:00 a.m.; in the North Half, Multi-Purpose Building, Area Vocational Technical Institute, Highway 34 East, Detroit Lakes, Minnesota, on April 24, 1978, commencing at 7:00 p.m.; in the City Council Chambers, City Hall, 420 Pokegama Avenue North, Grand Rapids, Minnesota, on April 25, 1978, commencing at 7:00 p.m.; and in Room 101, Armstrong Hall, Mankato State University, Mankato, Minnesota, on April 26, 1978, commencing at 7:00 p.m. These hearings shall continue until all persons have had an opportunity to be heard. The Agency will present its witnesses and evidence establishing the need for and reasonableness of the amendment to the above-captioned rule at the hearing in Roseville, Minnesota.

All interested or affected persons will have an opportunity to participate. Statements may be made orally and written materials may be submitted at the hearing. In addition, written materials may be submitted by mail to Hearing Examiner Howard L. Kaibel, Jr., 1745 University Avenue, St. Paul, Minnesota 55104, phone — (612) 296-8107, either before the hearing or within five workings days after the close of the hearing, unless the Hearing Examiner orders the record to remain open for a longer period not to exceed 20 days, in which case written comments may be submitted within that period. To save time and to avoid duplication, it is suggested that those persons, organizations, or associations having a common viewpoint or interest in these proceedings join together where possible and present a single statement in behalf of such interests.

The existing regulation, Minn. Reg. WPC 34, establishes procedures relating to the administration of the state and federal grants program and the state loans program for the construction of municipal sewage treatment works and disposal systems. The proposed amendments would, if adopted:

(1) reflect changes in federal law pursuant to 1977 amendments to the Federal Water Pollution Control Act;

(2) amend the criteria for determining the priority of municipalities and projects on the Municipal Needs List and the Municipal Project List;

(3) provide for greater public participation prior to the adoption of the Municipal Needs List and the Municipal Project List;

(4) provide for Agency recourse in regard to projects which are improperly designed, constructed, operated or maintained;

(5) amend other provisions of the regulation for purposes of clarification and more efficient administration of the programs.

Copies of the proposed rule are now available and one free copy may be obtained by writing to Mr. Perry Beaton, Minnesota Pollution Control Agency, Division of Water Quality, 1935 West County Road B2, Roseville, Minnesota, 55113. Additional copies will be available at the door on the dates of the hearings. The Agency's authority to promulgate the proposed rule is contained in Minn. Stat. §§ ch. 115 and 116 and, more specifically, Minn. Stat. § 116.16, et seq. (1976). A "statement of need" explaining



FIRST AMENDMENT TO

JOINT AND COOPERATIVE AGREEMENT
FOR THE ESTABLISHMENT OF CRITERIA
FOR AUTHORIZING DIKES AND OTHER
FLOOD CONTROL STRUCTURES AND MEASURES
ON THE RED RIVER OF THE NORTH
AND THE BOIS DE SIOUX RIVER

RE
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OFFICE OF HEARING
EXAMINERS

1. Article IV of the agreement is hereby amended by the deletion of the existing article and the insertion of the following new article:

IV. JOINT DIKE CRITERIA FOR AGRICULTURAL DIKE CONSTRUCTION

A. GENERAL PURPOSE

The purpose of these criteria is to provide for the orderly and consistent review of permit applications to construct, relocate, rebuild or alter agricultural dikes along the Red River of the North and Bois de Sioux Rivers in order to assure that the granting of such permits would be in the best interests of the people of Minnesota and North Dakota. These criteria would be mutually applicable in both states. The authority to establish these joint criteria is granted to the Commissioner of Natural Resources in Minnesota Statutes, Sections 105.42, 105.49 and 471.59 and to the North Dakota State Water Commission by Sections 61-02-24 and 61-16-15 of the North Dakota Century Code. The two states recognize that establishment of these criteria governing the issuance, review and denial of permits to construct, relocate, rebuild or alter agricultural dikes along the boundary rivers is but the first step in the exercise of joint control over those activities which could contribute to an increased flood potential of these rivers. The two states further recognize the need to exercise this joint control in that water management decisions which appear logical in a local or statewide context may have negative interstate and international impacts.

The criteria herein are being established at this time because there is a current need to provide a basis for the review of existing, unauthorized agricultural dikes and permit applications for the construction of additional agricultural dikes along the boundary waters. Local land owners view such dikes as interim solutions to local flood problems.

B. JURISDICTION

These criteria governing the review, issuance and denial of permits to construct, relocate, rebuild or alter agricultural dikes along the boundary rivers pertain to all such dikes located within the flood plains of the Red River of the North and the Bois de Sioux Rivers. Floodplain areas of the Red River of the North are defined by Appendix 0, Volume 8 of the Souris-Red-Rainy Basins Comprehensive Study as "Red River of the North Main Stem Regional Floodplain Area" and the floodplain of the Bois de Sioux River is defined by the U.S. Geological Survey one percent chance of recurrence area flood quadrangles. These criteria apply to dikes constructed on tributaries within the floodplains of these boundary rivers.

C. DEFINITIONS

For the purposes of these regulations certain terms or words used herein shall be interpreted as follows:

"Agricultural Dike" or "Dike" means an embankment constructed of earth and/or other suitable materials to protect agricultural lands from frequently recurring floods (10-year frequency or more often) which result from overflow of watercourses or from diffused surface waters.

"Boundary Rivers" means the Red River of the North and the Bois de Sioux River as they form a natural boundary between the States of Minnesota and North Dakota.

"Farmstead" means a farm dwelling, adjacent farm buildings and those non-tillable acres adjacent to the buildings.

"Flood Frequency" means the average frequency, statistically determined, for which it is expected that a specific flood stage or discharge may be equalled or exceeded. This frequency is usually expressed as having a probability of occurring, on the average, once within a specified number of years.

"Flood Waters" means those waters which temporarily inundate normally dry areas adjoining a watercouse. This inundation results from an overflow of the watercourse caused by excessive amounts of rainfall and/or snowmelt which exceed its capacity.

"Ring Dike" means an embankment constructed of earth and/or other suitable materials which completely encloses a parcel of land.

"Watercourse" means a channel in which a flow of water occurs either continuously or intermittently in a definite direction. The term applies to either natural or artificially constructed channels.

"Watercourse, Class I" means, in Minnesota, those natural watercourses serving as major drainage outlets, or major tributaries to those outlets, which are capable of serving a number of beneficial public purposes; smaller natural watercourses serving specific values such as trout streams and scenic waterways.

"Watercourse, Class II" means, in Minnesota, those natural watercourses serving as tributaries of Class I watercourses which are often perennial streams serving more than one beneficial public purpose.

D. SEVERABILITY

The provisions of these regulations shall be severable, and the invalidity of any paragraph, subparagraph, or subdivision thereof shall not make void any other paragraph, subparagraph, subdivision, or any other part.

E. DESIGN CRITERIA

1. Dike Setbacks. Dikes are to be constructed a sufficient distance from the river so as not to cause an increase in the elevation of flood water of the 10-year frequency flood of more than one (1) foot at any point along the river. However, when the effect of the dike extends within the corporate limits of any city the permitted increase in flood water elevation shall not exceed 0.5 feet within the corporate limits of the city. Calculation of the effects of proposed dikes shall be based on the dikes being located on both sides of the boundary water an equal distance from the center of the channel. If mutual agreement has been reached between applicants on both sides of the river as to location of the dike, the "equal distance from the center" requirements may be waived providing the limit for increase in flood stage is met.

2. Dike Elevations. Dikes are to be designed and constructed so that they will be overtopped upon the occurrence of a flood that is one foot higher than the 10-year frequency flood at that point.

3. Dike Dimensions. Dike top width shall not be less than six (6) feet. Side slopes shall not be steeper than 3:1, except where slope stability analysis and slope erosion control can justify steeper slopes. No organic soil or material shall be allowed in the foundation of the fill of dikes.

4. Vegetative Cover and Riprap. A protective cover of grasses shall be established on all exposed surfaces of the dike. Riprap shall be used where required for control of erosion.

5. Interior Drainage. Dikes shall have provisions for interior drainage. The design shall include plans to handle the discharge from the drainage area based on drainage design requirements for the local area.

F. HYDROLOGIC DATA FOR DESIGN

The North Dakota State Water Commission and the Minnesota Department of Natural Resources shall provide the discharges and corresponding elevations of the 10-year flood (and other available flood data), in relation to known historic floods, for use in dike design.

G. DIKES ACROSS NATURAL WATERWAYS AND LEGAL DRAINS

Dikes shall not be constructed across Class I or Class II watercourses in Minnesota. Dikes shall not be constructed across the following rivers in North Dakota: Wild Rice, Sheyenne, Elm, Goose, Turtle, Forest, Park and Pembina. Dikes constructed across other natural waterways, streams or rivers in Minnesota and North Dakota shall have an opening capable of passing the summer storm having a four percent chance of recurrence and have an emergency spillway to prevent overtopping of the structure when the one percent (1%) summer storm occurs. Dike setbacks along tributary waterways, within the area defined in Section B of these criteria, to the boundary water shall meet the criteria as stated in Section E.

Dikes constructed across legal drains or public ditch systems shall require the approval of the appropriate watershed district, drain board, water management district or other local authority.

H. FARMSTEAD DIKING

Within an existing dike system, ring dikes around individual farmsteads shall not require dike permits if they are not provided with tie-backs to existing roadways

or dikes. Ring dikes pr[redacted]ded with tie-backs shall be c[redacted]idered part of the overall dike system and will be required to secure diking permits. Outside the dike system there shall be no limitations on tie-backs of dikes around farmsteads.

I. ADMINISTRATION

1. Application for Permit . All applications submitted by the owner to construct, to relocate, rebuild or alter dikes shall be made on forms provided by the Minnesota DNR or ND State Water Commission and shall be accompanied by two (2) complete sets of plans or specifications. Such plans and specifications shall include the following:

A) A general location map with a minimum scale of 1"=800' showing the following:

1) Location of the dike with respect to the watercourse

2) Location of field inlets to provide for internal drainage

3) Location of legal drains and natural channels tributary to the main river channel.

B) Detailed cross-sections of the dike showing elevations, in relation to mean sea level, and side slopes.

After review of the information required above and other available data, the state agency to which the application is made shall determine the location and number of required cross-sections of the river channel and overland areas. These locations shall be provided to the applicant who shall then provide the required cross-section data. The applicant shall undertake and agree to pay the expenses incurred in securing these cross-sections.

2. Joint Permit Applications. Joint permit applications involving two or more landowners or a permit application on behalf of two or more landowners will be accepted by the State agencies. These permit applications, taken together, must meet the above criteria.

3. Issuance of Permits. Dike permits will be issued only upon concurrent approval by the state and local government in which state the dikes are located. Approval of the permit will in no way relieve the owner from damages which may be caused or created by construction of the dikes.

4. Joint Administration. A copy of each application for a permit shall be forwarded by the state agency receiving the initial application to the other state for comment and recommendation before final approval is granted.

5. Permit Revocation. The applicant shall provide for certification by a registered land surveyor, engineer, or other qualified person or agency that the finished dike elevations are not higher than those approved by the state agency to which the application was submitted. The permit will be revoked for failure to provide this certification.

The permit may be revoked for failure to construct the dike in accordance with the plans and specifications submitted. Structural alteration of the dike without permission of the appropriate state agency will also result in having the permit revoked.

6. Dike Maintenance. All dikes must be adequately maintained to the required shape, height, and protective covering. All maintenance shall be the responsibility of the permit holder. The maintenance of dikes must include periodic removal of woody vegetation (for example, trees and shrubs) which may become established on the embankment. Design of the project shall include provisions of maintenance access.

J. EXCEPTION TO THE CRITERIA

Under special circumstances, exceptions to the dike criteria may be authorized on an individual basis but they must have the concurrent approval of the N.D. State Engineer, local water management board in North Dakota, Minnesota Department of Natural Resources and local watershed district in Minnesota. Factors that will be considered shall be increase in flood stage, increase of stage at existing city dike, increase in stream velocity and environmental effects. Request for exceptions must

be accompanied by a pla[redacted]atisfactory to all agencies. [redacted]

K. APPLICATION TO EXISTING DIKES

These criteria shall apply to all unauthorized dikes constructed in the past for the protection of those agricultural lands located within the floodplains of the Red River of the North and the Bois de Sioux, as defined in Section B of these criteria. Exceptions are farmstead dikes if they meet the provision of Section H of these criteria.

2. The first paragraph of Article V of the agreement is hereby amended by the deletion of the words "adopted pursuant to" and the insertion in lieu thereof the words "contained in". The first paragraph of Article V, as amended, therefore provides:

V. REMOVAL OF UNAUTHORIZED DIKES

Parties to this agreement hereby agree that they shall immediately take whatever steps are necessary and available to remove unauthorized dikes adjacent to the boundary rivers not meeting the criteria contained in part IV above.

STATE OF MINNESOTA

_____
Commissioner
Department of Natural Resources

DATE: _____

STATE OF NORTH DAKOTA

_____
State Engineer
State Water Commission

DATE: _____

DNR-78-018-AK

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF NATURAL RESOURCES

IN THE MATTER OF PROPOSED RULES)
FOR REGULATING AGRICULTURAL DIKE)
CONSTRUCTION ALONG THE RED RIVER)
OF THE NORTH AND BOIS DE SIOUX)
RIVER.)

REPORT OF THE
CHIEF HEARING EXAMINER

WHEREAS, hearings were held on April 25 and April 26, 1978, before Allan W. Klein, a Hearing Examiner of the State Office of Hearing Examiners, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. § 15.052, Subd. 3, was issued to the Department of Natural Resources on July 26, 1978; and

WHEREAS, the Department of Natural Resources has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Department of Natural Resources has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, Subd. 4, and 9 MCAR § 2.110; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearing and that the Department of Natural Resources has met all requirements of Minn. Stat. § 15.0412, Subd. 4.

NOW, THEREFORE, upon receipt of this Report, the Department of Natural Resources has the responsibility of submitting the complete hearing record and the rules as adopted by the Department to the Attorney General, notifying all persons who requested to be informed that the hearing record has been submitted to the Attorney General, and publishing in the State Register, all pursuant to Minn. Stat. § 15.0412, Subd. 4.

Dated this 15th day
of August, 1979.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

Rules Providing Criteria for Regulating Agricultural Dike Construction Along the Red River of the North and Bois de Sioux River

ORDER ADOPTING RULE

Based on the Findings and Conclusions of the Commissioner in this matter, and having received a determination from the Chief Hearing Examiner that the rules being adopted do not contain changes from the rule proposed at the hearing sufficiently substantial to require a new hearing,

NOW, THEREFORE, IT IS ORDERED That the rules providing criteria for regulating agricultural dike construction along the Red River of the North and the Bois de Sioux River, identified as 6 MCAR § 1.5400, are adopted.

Dated August 27, 1979.

JOSEPH N. ALEXANDER, Commissioner
Department of Natural Resources

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES



IN THE MATTER OF PROPOSED RULES FOR REGULATING AGRICULTURAL DIKE CONSTRUCTION ALONG THE RED RIVER OF THE NORTH AND BOIS DE SIOUX RIVER

STATEMENT OF NEED AND EVIDENCE

RECEIVED
APR 3 1978
OFFICE OF HEARING EXAMINERS

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Criteria is needed for the orderly and consistent review of permit applications to construct, relocate, rebuild or alter agricultural dikes along the Red River of the North and Bois de Sioux Rivers in order to assure that the granting of such permits would be in the best interests of the people of Minnesota and North Dakota. These criteria would be mutually applicable in both states. The authority to establish these joint criteria is granted to the Commissioner of Natural Resources in Minnesota Statutes, Sections 105.42, 105.49 and 471.59 and to the North Dakota State Water Commission by Sections 61-02-24 and 61-16-15 of the North Dakota Century Code. The two states recognize that establishment of these criteria governing the issuance, review and denial of permits to construct, relocate, rebuild or alter agricultural dikes along the boundary rivers is but the first step in the exercise of joint control over those activities which could contribute to an increased flood potential of these rivers. The two states further recognize the need to exercise this joint control in that water management decisions which appear logical in a local or statewide context may have negative interstate and international impacts.

The criteria herein are being proposed at this time because there is a current need to provide a basis for the review of existing, unauthorized agricultural dikes and permit applications for the construction of additional agricultural dikes along the boundary waters. Local land owners view such dikes as interim solutions to local flood problems.

Evidence at the April 25 and April 26, 1978, public hearings to be held in Moorhead, Minnesota and Grand Forks, North Dakota respectively is

outlined as follows:

I. Historical Background

A. Uniqueness of Red River

B. Diking along Red River

1. Prior to January 1, 1975

2. Prior to summer storm of 1975

C. Diking since summer storm of 1975

Slides will be used in presenting I.

II. Actions Taken By The States

A. Meetings between the States

B. Contact with Corps of Engineers in 1975

C. Dike surveys in the fall of 1975 and spring of 1976

D. Cooperative agreement between the States

E. Formulation of Preliminary Criteria

F. States encourage Corps report-blue report dated October 1977

G. Continuation of Corps Study of the Red River

III. Review Of Corps Of Engineers Involvement

IV. Explain First Amendment To Cooperative Agreement (Referred To In II D) Relating To Criteria

A. General purpose of first amendment

B. Jurisdictional area slides and displays will be used in presenting B.

C. Definitions

D. Severability

E. Design Criteria

1. Dike setback

2. Equal encroachment theory

3. Dike elevations

4. Dike dimensions

Slides will be used in presentation of E.

F. Hydrologic Data for Design

1. Data used by States

2. Derivation of data

G. Dikes across natural waterways, etc.

H. Farmstead Diking

Slides will be used in presenting G. and H.

I. Administration

J. Exception to criteria

K. Application to existing dikes

L. Removal of dikes

V. Report On Agricultural Levee Criteria In Other States

Items I and II are to be presented by North Dakota Officials at the Moorhead hearing and by the Minnesota Officials at the Grand Forks hearing.

Item III will be presented by the St. Paul District of the Corps of Engineers at both hearings.

Item IV is scheduled to be presented by Minnesota Officials at the Moorhead hearing and North Dakota Officials at the Grand Forks hearing.

Item IV - F will be presented by the North Dakota District of the U.S. Geological Survey.

SUMMARY OF ARGUMENTS FOR REASONABLENESS AND NECESSITY FOR KEY ELEMENTS OF THE RULE

1. Dike Setbacks - The one foot criteria attempts to reflect the permissible stage increase that would not cause appreciable additional damage during the 10-year flood to adjacent agricultural lands into areas upstream, but recognizing that the effects of the dikes will have some impact on flood flows and flood stages. Minnesota DNR requirements only mention a half a foot increase in the 100-year frequency flood and if this criteria is met, the 10-year frequency flood and one foot increase, the 100-year flood would overtop the agricultural dikes and should have no measurable increase in flood stages for floods, probably up to 25 year frequency or greater. Also, the Federal Insurance Administration has a one foot permissible increase in flood stages in their flood plain management criteria. There is concern about the effect of stage increases on urban areas upstream, such as at Grand Forks and East Grand Forks. The cities along the River of the North have adopted floodways and flood plain regulations that permit increases in 100-year flood stage of up to a half

of a foot. Again, with the adoption of these criteria, we feel that there would be no further adverse impacts on these cities from the construction of agricultural dikes. For the larger floods, if kept low enough, the water will overtop the dikes and essentially minimize the increase in flood stages.

In urban areas existing Minnesota Flood Plain Management Criteria restricts the increase in stage of the 100-year flood resulting from flood plain encroachment including dike construction to 0.5 foot.

2. Dike Elevations - The elevation of the dike is to provide protection from the 10-year flood. No freeboard is permitted. Higher dikes would tend to increase flood stages and reduce valley flood water storage, thus resulting in increased flood discharges in downstream reaches.

3. Dike Dimensions - The dike dimensions specified in the criteria are generally acceptable standards for agricultural dikes not protecting urban areas.

4. Dikes Across Natural Waterways and Legal Drains - Class I public watercourses serve as major drainage outlets, or are major tributaries to those outlets. Class II public watercourses are natural watercourses serving as tributaries of Class I courses and are often perennial streams. Obstruction of these classes of streams would interfere with drainage and otherwise be in conflict with the identified "Beneficial Public Purpose" contained in M.S. 105.37.

5. Farmstead Diking - Farmstead ring dikes are dikes which completely surround farmsteads, but are not of a scope which will tend to obstruct flood flows. Flood water is permitted to flow completely around the dikes. Should farmstead ring dikes be connected with another diking system or a tie bank, flow would be obstructed, increased flood stages would result and the ring dike would have to be evaluated as part of a comprehensive diking system.

6. Application to Existing Dikes - The criteria shall apply to all existing unauthorized dikes. The unauthorized dikes will be compared with the criteria to determine compliance. If compliance is achieved, then no modification of the dike itself would be required, although the permit requirements of M.S. 105.42 would have to be met. If the existing dikes do not meet the criteria, then modification of the dikes would be required, unless compelling reasons exist to cause application of the criteria exception clause.

Still the permit requirements of M.S. 105.42 would have to be met.

WILLIAM B. NYE
COMMISSIONER

By James F. Cooper
James F. Cooper
Acting Director
Division of Waters

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

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EXAMINERS



IN THE MATTER OF PROPOSED RULES FOR REGULATING AGRICULTURAL DIKE CONSTRUCTION ALONG THE RED RIVER OF THE NORTH AND BOISE DE SIOUX RIVER

ADDENDUM TO STATEMENT OF NEED AND EVIDENCE

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

THE following statements relating to the subject criteria are to supplement the information contained in the original Statement of Need and Evidence.

1 and 2. Dike Setbacks and Elevation - The proposed criteria allows dikes to be located in a manner which will allow no more than a one (1) foot increase in stage of the 10-year flood when that flood is confined to the area between the dikes located on opposite sides of the river channel. Any increase in flood stage will result in additional flood plain area being flooded, additional back up of water along tributary streams and a reduction in the level of protection of existing upstream dike systems which protect urban areas.

In accordance with the Corps of Engineers report entitled, Red River of the North, Main Stem - Hydrologic Data, for example near Oslo a one (1) foot increase in stage of the 10-year flood will result in excess of 40,000 additional acres being flooded.

The height of the dikes are limited such that overtopping will result upon occurrence of floods greater than the 10-year flood. This will on the average provide protection from flooding nine out of every 10 years. If higher dikes would be permitted closer to the river channel flood stage increases would reach several feet and flood water storage area of the flood plain located landward of the dikes would be lost and result in flood discharges being increased in downstream reaches. The flood plain area landward of the dikes constitutes ponding area which if not available for flood water storage would result in greater velocities, increased stages and higher rates of flow along the river between the dikes. Such increases are necessary to pass and discharge the volumes of flood water generated during the flooding event if these ponding areas are not available

for flood water storage. Dikes on opposite sides of the river are required to be located at equal distances from the river channel in an effort to treat similar situations in a similar manner.

Compliance with the dike criteria will result in the maximum increases in flood stage of one (1) foot to occur when the dikes just begin to overtop. As larger floods occur and overtop the dikes, the effect of the dikes on increasing flood stages will become less and less such that for a very large flood the dike system will "drown out". For example, the effect of dike system would be 1.0 ft. for the 10-year flood because of overtopping the dikes may cause 0.75 ft. increase in stage; for the 50-year flood only a 0.5 ft. increase in stage; for the 100-year flood only a 0.3 ft. increase in stage; and for a flood greater than a 100-year event, because of the depth of water over the dikes, the increase in stage may be little or nothing. In other words by limiting the height of dikes to the level of the 10-year flood, the stages of the very large flood would be no greater than what otherwise would have occurred had the dikes not been built.

3. Dike Dimmension - Organic material or soil in the foundation of the dike will weaken the structure and may cause failure before overtopping occurs.

4. Vegetative Cover and Riprap - A protective cover of grasses on the dikes will minimize erosion resulting from normal weathering. Riprap on the riverward side of the dikes will minimize erosion resulting from high velocities of flow and wave action.

5. Interior Drainage - Provision for interior drainage would include installing a means to discharge water trapped behind or landward of the dikes.

6. Dikes Across Natural Waterways and Legal Drains -

Class I tributaries to the Red River of the North in Minnesota are, Red Lake River, Otter Tail River and the Bois de Souix River.

Class II tributaries to the Red River of the North in Minnesota are Two River, Tamarac River, Snake River, Grand Marais River, Sandy Hill River, Marsh River, Wild Rice River, Buffalo River, Whiskey Creek and Rabbit Creek.

Dikes constructed across legal drains or public ditch systems shall meet all other requirements of law as well as the proposed criteria.

7. Application for Permit - The application requirements for a dike permit are consistent with the application requirements for other types of comprehensive projects requiring a permit under the provisions of M.S. 105.42.

8. Removal of Unauthorized Dikes - In leu of removal of unauthorized dikes, bringing such structures in compliance with the proposed criteria will be acceptable. The acquisition of negative construction easements or flooding easements may be justification for implementation of the exception provisions for these proposed criterias.

WILLIAM B. NYE
COMMISSIONER

BY James F. Cooper
James F. Cooper
Acting Director
Division of Waters

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

Rules Providing Criteria for Regulating Agricultural Dike Construction Along The Red River of the North and Bois de Sioux River

SUPPLEMENTARY FINDINGS OF THE COMMISSIONER

These additional findings are made in response to a request from the Office of the Attorney General.

1. Last sentence Section B. Finding 6 of the hearing examiner discusses at some length a potential conflict between the permitting system under Minn. Stat. § 105.42, and the floodplain management system under Chapter 104. Once a local government has a DNR-approved floodplain ordinance in effect, it has all the tools necessary to regulate dikes. There is no need for two public bodies to regulate the same thing in the same way, which is why the sentence added to Section B is reasonable.

2. Last sentence Section E.1. The provision was added as a way to heighten the awareness of dike builders of their common law responsibilities. A little "consciousness raising" is reasonable, if not strictly necessary.

3. Subdivision G: 25-year storm opening and emergency spillway provisions. Several people testified that upstream storage and throttled watershed flow must be a component of diking and of flood damage reduction in general. The case made for the 25-year parameter was related to minimal backwater, but "minimal" was not explained. In light of the last paragraph of hearing examiner finding 40 revealing the Red River watershed has variety within it, it is best to provide flexibility of treatment of dikes across waterways. The rule is therefore more reasonable without the subject provisions than with them, because without them the permitting authority can select the design standard best suited to the particular fact situation.

4. Last sentence Section H. It is to the benefit of ring-dike builders that they be made aware that even though no state permit is needed, a local one may be.

5. Last sentence Section I.3. The public is always concerned about the length of time involved in any permitting process. Taking administrative notice of this, both states have agreed that one should not hold up the other for more than 30 days in exercising its privilege of making comments. It is reasonable and needed that agencies put time restraints on themselves.

6. Section I.6. The reason for adding this section is given in my previous finding 11. 6 MCAR 1.5026 is the administrative section of the rules for § 105.42 permits.

7. The first paragraph of Section G needs to be clarified by adding "under Minn. Stat. § 105.42".

8. Change from 10-year to 100-year standard. My previous findings on the need for and reasonableness of the change is supplemented as follows.

(a) The federal Flood Insurance Administration allows a one foot increase in the 100-year flood, and has no standard for other flood events. This E.1 as adopted does not conflict with the FIA Program.

(b) The April 18, 1977 letter of the North Dakota State Water Commission responded to Mr. Ekman's proposal which contained no limit on the amount the 100-year flood stage might be increased. The rule as adopted has a one-half foot limit on that increase, which the Commission accepts and in fact has already completed its own public rule-making hearings on.

(c) The state's floodplain regulations allow activity in the floodplain which increases the 100-year flood stage up to one-half foot, but no more. The dike rule being adopted conforms with that. The urban dikes on the Red River are built to U.S. Corps

of Engineers standard, namely to the height of the standard project (approximately 500 year) flood, which is some 3 feet above the 100 year flood.

(d) Portions of the record supporting the 100-year standard are

- reference to the FIA criteria, which are based solely on the 100-year flood
- Testimony of Duane Paske, Iner Quern, and Duane Ekman supporting a standard with more flexibility than that proposed at the hearing. Ekman specifically referenced the 100 year event, but without any limitation on stage increase.
- The record discusses Minnesota's floodplain management legislation, which incorporates the 100 year flood as the basis for control of activities in floodplains.

9. Substantial change. The reason for having a rehearing when a rule being adopted is "substantially different" from a rule as it was proposed, is to provide opportunity for public comment that wasn't made at the first hearing because the public didn't know the agency might adopt such a rule. There is not such problem here. Virtually all of the public testimony was in the direction of urging the two states to make the change they have made. If there were a rehearing, it is unlikely anyone would appear to object to the change. There has in fact been hearings on the change - admittedly not pursuant to Chapter 15 - at which all those represented at the original hearings appeared and agreed to the change. See the second paragraph of my original findings. Another hearing would be form over substance. Whatever legal risk there may be in not holding it, I prefer to take, in the interests of supporting the agreement of Governors Quie and Link.

Dated September 28, 1979.

JOSEPH N. ALEXANDER, Commissioner
Department of Natural Resources

ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

Office Memorandum

DEPARTMENT Attorney General
Natural Resources

TO : LEE SHEEHY
Special Assistant Attorney General

DATE: 9-25-79

FROM : A. W. CLAPP, III
Special Assistant Attorney General

PHONE:

SUBJECT: Red River Dike Rules

We return the record to you, together with 3 documents which taken together constitute a response to the questions you raised in your letter to Commissioner Alexander.

- Chief hearing examiner's approval of incorporation by reference
- Supplementary findings of commissioner
- Memo by Clapp re legal issues.

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF NATURAL RESOURCES

IN THE MATTER OF PROPOSED RULES)
FOR REGULATING AGRICULTURAL DIKE)
CONSTRUCTION ALONG THE RED RIVER)
OF THE NORTH AND BOIS DE SIOUX)
RIVER.)

ORDER OF THE
CHIEF HEARING EXAMINER

WHEREAS, on September 7, 1979, the Minnesota Department of Natural Resources (hereinafter "Department") submitted a request to the Chief Hearing Examiner for approval of the incorporation by reference of certain documents in the above-reference rules; and

WHEREAS, pursuant to Minnesota Statutes 1978, § 15.0412, subd. 4, agencies may incorporate by reference provisions of federal law or rule or other materials from sources which the Chief Hearing Examiner determines are conveniently available for viewing, copying and acquisition by interested persons; and

WHEREAS, the Chief Hearing Examiner has reviewed Appendix O of Volume 8 of the Souris-Red-Rainy Basins Comprehensive Study, "Red River of the North Main Stem Regional Floodplain Area", and the U. S. Geological Survey and has found them to be in excess of 3,000 words and has determined that they would exceed five pages of publication in the State Register; and

WHEREAS, the Department has indicated that the documents are widely distributed and that they are available for review and copying at watershed district offices along the Red River Valley, at the United States Corps of Engineer offices, and at the Department; and the Chief Hearing Examiner thus finds that the documents are thereby conveniently available for viewing, copying and acquisition by interested persons.

NOW, THEREFORE, IT IS ORDERED that the Department shall have the approval of the Chief Hearing Examiner to incorporate by reference in the proposed rules the above-referenced materials.

Dated this 12th day
of September, 1979.

DUANE R. HARVES
Chief Hearing Examiner

DNR-78-018-AK

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF NATURAL RESOURCES

IN THE MATTER OF PROPOSED RULES)
FOR REGULATING AGRICULTURAL DIKE)
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Dated this 12th day
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Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

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Dated this 12th day
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Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

ADMIN 1000 (Rev. 1/78)
SF-00006-01

Our File #536

DEPARTMENT ATTORNEY GENERAL

STATE OF MINNESOTA

Office Memorandum

TO : JOSEPH N. ALEXANDER
Commissioner
Department of Natural Resources

DATE: September 12, 1979

FROM : LEE E. SHEEHY
Special Assistant
Attorney General

PHONE: 296-1288

SUBJECT: Rules Providing Criteria for Regulating Agricultural Dikes Construction Along the Red River of the North and Bois de Sioux River

The above-captioned rules have not been approved by this office. After agency consideration of the below-enumerated reasons and appropriate argument and action, if any, the rules may be resubmitted. At that time, please ensure that the originals of the Order Adopting and the Rules as Adopted are returned with the resubmitted documents.

The rules were disapproved for the following reasons:

1. Incorporation by reference: 6 MCAR § 1.5400 B incorporates by reference "(f)lood plain areas of the Red River of the North . . . defined by Appendix O, Volume 8 of the Sioux-Red-Rainy Basins Comprehensive Study as 'Red River of the North Main Stem Regional Floodplan Area' and the Floodplan of the Bois de Sioux River . . . defined by the U.S. Geological Survey one percent chance of recurrence area flood quadranges." The requirements of Minn. Stat. § 15.0412, Subd. 4, relating to incorporations by reference do not appear to have been satisfied in the record submitted to this office.

2. Retroactivity: The Minnesota Supreme Court recently in Mason v. Farmers Insurance Companies, _____Minn._____, 281 N.W. 2d 344 (1979) held that absent clear legislative intent agency rules should not have a retroactive effect. 281 N.W. 2d at 348. While it is not clear that the effects of 6 MCAR § 1.5400 K would be retroactive, this office would like an elaboration of the agency's position regarding that issue.

3. Absence of Specific Findings for Certain Amendments: The rules proposed for adoption differ in several places from the rules originally proposed. While the agency findings directly or through adoption of the Hearing Examiner's Report provides a basis for several

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of these changes, certain amendments appear to have been made without specific finding. For example, the last sentence of Subdivision E(1) appears to be an unsupported addition, which may run contrary to Hearing Examiner Finding No. 42 adopted by Commissioner Finding No. 9. See also addition of 30-day limit in Subdivision I(3), the final sentence of Subdivision B, addition of I(6) and deletion of the emergency spillway requirement from Subdivision G in light of Hearing Examiner Finding No. 40. Each amendment to the rules should be compared to the findings in the record to insure that the record supports every amendment.

4. Joint Agreements Binding Subsequent Successors in Interest of Real Property: The rules provide for at least two instances where individual property owners can agree to jointly undertake dike-related activities. Subdivision E(1) permits that diking on one side of the river may utilize a certain height and setback so as to prohibit diking on the other side of the river if there is mutual agreement of parties on both sides. Subdivision I(2) allows joint permit applications. While it may not be a matter directly related to our review, an issue which appears unaddressed in the record is the binding nature of those agreements on successors in interest in the real property. Does the agency intend by rule to address this problem or leave it to an ad hoc resolution as the practice of joint undertakings is implemented?

5. Commissioner Finding No. 5: Commissioner Finding No. 5 seems to require that a reference to Minn. Stat. § 105.42 be incorporated into Subdivision G.

6. Change from 10-Year to 100-Year Standard: The change in the design criteria from use of the 10-year frequency flood standard to the 100-year frequency flood standard is a significant, if not substantial, change. Agency findings on the change are incomplete. Hearing Examiner Finding No. 33 provides a lengthly discussion of the choice of the 10-year frequency flood standard as the basic design criteria. In order to fully review this change our office must ask that the agency address at least the following issues raised by the Hearing Examiner:

(a) Effect of change on Federal Flood Insurance Administration flood plan management criteria and program as discussed by the Hearing Examiner.

(b) Response to concerns raised by North Dakota State Water Commission letter dated April 18, 1977. (In the resubmittal of materials to this office, please include a copy of the Commission's letter.)

(c) Discussion of the statement in Hearing Examiner Finding No. 33 that use of the 100-year frequency flood as the design criteria could increase stage increases of four to five feet. The agency should also address the impact of such stage increases on cities and urban populations who, according to Hearing Examiner Finding No. 33, can not safely raise their dikes "to accomodate higher waters without endangering their stability."

(d) Portions of the record which support the change from the 10-year to the 100-year standard.

The agency should also provide argument as to why such a change is not "substantial."

If you have any questions, please contact me.

LES/bw
cc: A. William Clapp
Duane Harves
Marshall Whitlock
Melvin Goldberg