OAH 5-2200-40149

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE POLLUTION CONTROL AGENCY

In the Matter of Draft Animal Individual Permit Number MN0071943 for Toquam Hog Finishers	**ORDER DENYING MOTION FOR SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Jim Mortenson on Toquam Hog Finishers's (Toquam or Petitioner) Motion for Summary Disposition. Jack Y. Perry and Brayanna J. Smith, Taft, Stettinus & Hollister LLP, appeared on behalf of Toquam. Peter Wenker, Assistant Attorney General, appeared on behalf of the Pollution Control Agency (MPCA or Agency).

The Motion was filed on February 21, 2025. The MPCA filed a Response to the Motion on March 14, 2025. Toquam filed a Reply on March 21, 2025. The Judge held a motion hearing on March 28, 2025. The Judge encouraged the parties to stipulate to material facts not in dispute. The parties filed seperate lists of proposed stipulated material facts on April 11, 2025, and the motion record closed that date.

Based upon the administrative record and for the reasons explained in the accompanying memorandum,

IT IS HEREBY ORDERED:

1. The Motion for summary disposition is **DENIED**.

2. This matter will proceed to hearing on the issues set forth in the Notice and Prehearing Order dated August 14, 2024, as scheduled.

Dated: April 21, 2025

JIM MORTENSON
Administrative Law Judge

MEMORANDUM

I. Introduction

This case concerns whether the Agency can require Petitioner, a hog farm, to apply for an individual National Pollutant Discharge Elimination System (NPDES) permit related to the air pollution the hog farm emits. The Motion specifically raises the question: does the County's provision of an air quality easement to Toquam eliminate the need for an individual NPDES permit by Toquam? There are no material facts in dispute on this question, and so a legal ruling on it is appropriate.

Toquam's air quality easement over the County roadway (servient property) does not eliminate the Agency's responsibility to enforce air quality standards where the general public has access on the servient property. Thus, Toquam's Motion is denied. This legal determination will control as the matter proceeds to hearing on the remaining questions:[1]

1. What are the overall levels of hydrogen sulfide (H_2S) at Toquam's feedlot (facility)?

2. What are the levels of H_2S present at the borders of the property associated with the facility or where the general public has access on servient property?

3. What was the location of the MPCA's continuous air monitor (CAM) used to monitor H_2S levels at the facility?

4. What is the likelihood that the facility is emitting H_2S beyond the borders of the associated property, or where the general public has access, at levels that would make the facility ineligible for coverage under the NPDES General Permit?

5. Did Petitioner give permission for the MPCA to place a CAM on the property associated with the facility?

[1] These issues come from the Notice and Order for Hearing (at 3) and were modified during the prehearing conference on August 12, 2024 (See Prehearing Order at 2, Aug. 14, 2024). Based on the ruling here, the issued are further refined.

II. Summary Disposition Standard

Summary disposition is the administrative law equivalent of summary judgment.[2] Summary judgment is not specifically addressed in the contested case rules for administrative hearings. Pursuant to Minn. R. 1400.6600 (2023),

> [i]n ruling on motions where parts 1400.5100 to 1400.8400 are silent, the judge shall apply the Rules of Civil Procedure for the District Court of Minnesota to the extent that it is determined appropriate in order to promote a fair and expeditious proceeding.[3]

Minnesota Rule of Civil Procedure 56 governs summary judgment.[4] A motion for summary disposition must be granted "if the movant shows there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law."[5] The function of the judge on a motion for summary disposition is not to decide issues of fact, but to determine whether genuine factual issues exist.[6] In other words, the judge does not weigh the evidence; instead, "the judge *must* ignore all the evidence that points in favor of the moving party and focus solely on the evidence supporting the nonmoving party's position."[7]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[8] But, "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact, as required by Rule 56.03, the court may:

(a) give an opportunity to properly support or address the fact;

(b) consider the fact undisputed for purposes of the motion;

(c) grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it; or

(d) issue any other appropriate order.[9]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[10] A fact is material if its resolution will affect the outcome of the case.[11] When evidence, such as "affidavits are submitted in support of the motion, the

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[2] *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2023).
[3] Minn. R. 1400.6600 (2023).
[4] Minn. R. Civ. P. 56.01 - .08.
[5] Minn. R. Civ. P 56.01.
[6] *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[7] *Peterson v. Western Nat'l Mutual Ins. Co.*, 946 N.W.2d 903, 911 (Minn. 2020) (Emphasis in original).
[8] *Sauter*, 70 N.W.2d at 353.
[9] Minn. R. Civ. P. 56.05.
[10] Minn. R. Civ. P. 56.01*; Anderson v. Dep't of Natural Res.*, 693 N.W.2d 181, 191 (Minn. 2005).
[11] *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

nonmoving party cannot simply rely upon general allegations in his pleadings but must present specific facts showing that there is an issue for trial on the merits."[12]

A court may, under the proper circumstances, grant summary disposition for a nonmovant, grant the motion on grounds not raised by a party, or make a sua sponte summary disposition after identifying for the parties the material facts that may not be genuinely in dispute.[13]

III. Material Facts not in Dispute

Following the hearing on this motion, the parties each filed a set of what they viewed as material facts not in dispute.[14] While the lists of facts were not identical, the Judge relies on the material facts appearing simultaneously in both lists here.

In the fall of 2018, complaints were made to the MPCA about the odor from Petitioner's facility in Dodge County, Minnesota. The MPCA conducted monitoring for H_2S for five periods from October 9, 2018, through October 11, 2022. The measurements were taken near Petitioner's eastern property line, which is adjacent to County Road 3, during the following periods:

(1) October 9 – 30, 2018

(2) July 12 – October 28, 2019

(3) August 27 – October 12, 2020

(4) June 30 – August 11, 2021

(5) June 8 – October 11, 2022

Monitoring only occurred near Petitioner's eastern property line because air quality easements existed during the entire time period on the other neighboring properties. Only the monitoring period from June 8 through October 11, 2022, is at issue in this matter.

In October 2022, the County was evaluating the provision of an air quality easement to Toquam, which would cover the County roadway adjacent to Toquam's eastern property boundary. The County Attorney, Paul Kiltinen, examined the issue and inquired of the MPCA, specifically asking if the idea that the time-period in which individuals might reasonably be on the roadway would be a factor in granting any such easement. The MPCA advised the County Attorney that there may be an issue with

[12] *Eakman v. Brutger*, 285 N.W.2d 95, 97 (Minn. 1979); *see also DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997)..
[13] Minn. R. Civ. R. 56.06.
[14] The [Proposed] Parties' Stipulation of Facts (filed by Petitioner), April 11, 2025; The [Proposed] Parties' Stipulation of Facts (filed by Agency), April 11, 2025).

granting air quality easements for a roadway because it "is open to members of the public."[15]

Kiltinen subsequently advised the County Board that they had the authority to provide air quality easements over County roadways adjacent to feedlots. On November 22, 2022, the County Board passed a resolution to permit the granting of air quality easements for County roadways to owners of feedlots adjacent to the roadways.[16]

On January 24, 2023, the County granted an air quality easement to Toquam for where County Road 3 abuts Toquam's facility.[17] In support of the easement, the County Engineer, Guy Kohlnhofer, stated:

> The site requesting easement is in an open and clear area 1,900 feet from any intersection requiring vehicles and the public to stop and linger. The Dodge County Highway department does not expect the effluent air from this facility to cause an undue nuisance to the users of the county right of way and approves this application.[18]

Toquam's easement was not recorded until September 10, 2024.[19] Whan that occurred, air quality easements existed on all four sides of the Toquam property.

Back on March 5, 2023, however, Toquam applied to the MPCA for the reissuance of its NPDES General Permit. On March 16, 2023, the MPCA provided Toquam with its "Incomplete Application/Additional Information Request," which required Toquam to (1) withdraw its March 5, 2023 General Permit Reissuance Application, (2) submit a written request for a refund of the fees submitted, and (3) submit an application for an individual NPDES permit for the facility. This resulted in Toquam requesting a contested case hearing on April 14, 2023. On November 9, 2023, the MPCA denied Toquam's first contested case petition. Toquam appealed that decision to the Court of Appeals on December 4, 2023.

On December 18, 2023, the MPCA issued a public notice for and a copy of Toquam's unapplied-for Draft Individual NPDES Permit for the facility. This resulted in, on January 11, 2024, Toquam filing another petition for a contested case hearing. On May 9, 2024, the MPCA granted the Petition, initiating the present case. The case before the Court of Appeals is stayed pending the outcome of the present matter.

IV. Analysis

Toquam's primary argument is that because it has an air quality easement from the County, and there is no evidence of air quality standards violations on the far-side of

[15] Toquam Exhibit (Ex.) 10.
[16] Toquam Ex. 4.
[17] Toquam Ex. 5.
[18] Toquam Ex. 6.
[19] Toquam Ex. 9.

the servient property, Toquam should not, as a matter of law, be subject to an individual NPDES permit. Toquam's argument includes four parts, or alternative bases, for this desired outcome. First, Toquam argues the plain language of Minn. Stat. § 116.0713, the statute at issue, supports Toquam's argument about the easement and its practical impact. Second, Toquam argues that if the statute is ambiguous, the intent of the statutory scheme controls and Toquam's interpretation that the servient property (the County roadway) is not subject to state air quality standards should be applied. Third, Petitioner argues that deference should be given to the County's interpretation of the applicable statute, which, according to Toquam, includes the idea that the general public is not using the County road because the County controls it. Lastly, Toquam argues that any interpretation about the implication of the air quality easement by the Agency cannot be given deference, because any adjudication over the easement is within the jurisdiction of the district court. As a result, according to Petitioner, its motion for summary disposition should be granted.

The MPCA argues that it has the authority to monitor Toquam's air emissions from its property line because the general public has access to all of the land covered by the County's easement to Toquam. Moreover, according to the Agency, the County does not provide direct authorization to categories of people to enter the public roadway. The plain meaning of the words of Minn. Stat. § 116.0713 controls, according to the MPCA. Thus, according to the Agency, Petitioner's motion should be denied.

A. There is no dispute the Petitioner has an air quality easement from the County, and the legality of the easement itself is not at issue.

It is undisputed that Toquam has an air quality easement from the County. Therefore, according to Toquam, the Agency and the Administrative Law Judge lack any authority over the measurement of feedlot odor, specifically hydrogen sulfide (H_2S), along Toquam's property line adjacent to the County roadway. The legitimacy of the easement, according to Toquam, is not within the Agency's or the Judge's jurisdiction. Toquam's objections based on the mere existence of the easement are unconvincing.

Toquam is correct that there is no dispute that it has an air quality easement from the County. Toquam is also correct that neither the Agency nor this Judge have authority over the legitimacy of the recorded easement. The dispute is not, however, about the existence of the easement. Rather, the dispute is about the application of Minn. Stat. § 116.0713, governing livestock odor.

The statute protects feedlot owners from intrusion by the Agency. H_2S that remains on a feedlot – specifically, on the "farm or parcel of agricultural land on which a livestock production facility is located" - is not regulated (or monitored).[20] In addition, an adjoining neighbor may permit H_2S or their land through an air quality easement.[21] Generally, where there is an air quality easement, there is no regulation of H_2S.

[20] Minn. Stat. § 116.0713(e).
[21] *Id.*

There is an exception to the rule of unregulated H_2S on any private land, including servient property upon which there is an air quality easement. The exception applies to locations on any property where "the general public has access."[22] When the general public has access, state air quality standards apply, as does the reach of the Agency.

This case is about what the legislature means by "general public", not about the existence of the air quality easement. The Agency's regulatory authority generally extends to all places in question where the general public has access, unless another exception applies.[23] Only the reach of the easement is at issue. Because the reach of the easement does not extend to locations on the property where the general public has access, those locations are within the authority of the Agency for H_2S regulation. This dispute is properly before the Agency and the Judge.

B. The general public has access to the county roadway.

ii. Minn. Stat. § 116.0713 is not ambiguous.

This analysis rests on statutory interpretation. When interpreting a statute, the purpose "is to ascertain and effectuate the intention of the legislature."[24] When the language of a statute is unambiguous, the plain language of the statute controls and no further analysis is necessary.[25]

The portion of Minn. Stat. § 116.0713 at issue is as follows:

> State ambient air quality standards are applicable at the property boundary of a farm or a parcel of agricultural land on which a livestock production facility is located, except that if the owner or operator of the farm or parcel obtains an air quality easement from the owner of land adjoining the farm or parcel, the air quality standards must be applicable at the property boundary of the adjoining land to which the easement pertains. The air quality easement must be for no more than five years, must be in writing, and must be available upon request by the agency or the county feedlot officer. Notwithstanding the provisions of this paragraph, state ambient air quality standards are applicable at locations to which the general public has access. The "general public" does not include employees or other categories of people who have been directly authorized by the property owner to enter or remain on the property for a limited period of time and for a specific purpose, or trespassers.[26]

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[22] *Id.*
[23] This additional exception will be discussed in detail, below.
[24] Minn. Stat. § 645.16 (2024).
[25] *Id.*; *Matter of Surveillance and Integrity Review*, 999 N.W.2d 843, 855 (Minn. 2024), *citing Matter of Denial of Contested Case Hearing Requests*, 993 N.W.2d 627, 646 (Minn. 2023).
[26] Minn. Stat. § 116.0713(e).

The first sentence of this provision addresses what was discussed above, that "air quality standards are applicable at the property boundary" not within or on the property.[27] This sentence also provides for an air quality easement from an adjoining property owner. There is nothing ambiguous about the first sentence.

The second sentence addresses the details required for the air quality easement. The "easement must be for no more than five years, must be in writing, and must be available upon request by the [MPCA] or county feedlot officer."[28] Like the first sentence, this sentence is clear and unambiguous. There are few requirements for the easement, and none of those requirements appear at issue in this matter. If they were, they would likely be properly brought before the district court, not the Agency or this court.

The third sentence is also unambiguous. It clearly provides that it is an exception to the first two sentences pertaining the protection of feedlot landowner, including where that landowner has an air quality easement. This is obvious by the first clause of the sentence: "Notwithstanding the provisions of this paragraph."[29] The second clause, likewise, is unambiguous: "state ambient air quality standards are applicable at locations to which the general public has access."[30] Read as a whole, the meaning of the sentence is clear: the general public is always to be protected from hazardous levels of H_2S, even where the portions of the property where the general public lacks access are not required to comply with state standards for H_2S levels.

It is the fourth sentence of this paragraph that generates the most controversy here. The sentence qualifies the term "general public" in the preceding sentence. The sentence states: "[t]he 'general public' does not include employees or other categories of people who have been directly authorized by the property owner to enter or remain on the property for a limited period of time and for a specific purpose, or trespassers."[31] This creates an exception to the exception above. While the general public may not be exposed to hazardous levels of H_2S, "employees or other categories of people who have been directly authorized by the property owner to enter or remain on the property for a limited period of time and for a specific purpose, or trespassers" are excluded from the protection from hazardous levels of H_2S offered by Minn. Stat. § 116.0713.[32]

Is this (fourth) sentence, and its impact on the previous sentence, ambiguous? If it is, further analysis to determine the intention of the legislature is required. But if it is not, the analysis stops and "the letter of the law shall not be disregarded."[33] If there is only one reasonable way to read the text of the statute, it is unambiguous.[34]

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[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Minn. Stat. § 645.16; *Haefele v. Haefele*, 837 N.W.2d 703, 708 (Minn. 2013).
[34] *State v. Fugalli*, 967 N.W.2d 74, 77 (Minn. 2021).

Here, the legislature used the phrase "general public." The legislature did not define the phrase, but it did ensure it excluded certain classes of people from being included in the phrase. Those classes are: trespassers, feedlot or farm employees, and "other categories of people who have been directly authorized by the property owner to enter or remain on the property for a limited period of time and for a specific purpose."[35]

Toquam essentially argues "general public" does not include the general public when the general public is permitted to be on a property for a specific reason and for a limited time. This is an absurd result which swallows the rule (which is really the exception to the rule).[36] General words in a statute "are construed to be restricted in their meaning by preceding particular words."[37] Thus, where the legislature states "[t]he 'general public' does not include employees or other categories of people who have been directly authorized by the property owner," the general words "employees and other categories of people" must be construed in light of "employees." With this frame, the only reasonable interpretation of "categories of people" are those people the property owner permits onto a property to do work or engage in some type of necessary activity. Conversely, if the categories included everybody, or even those people typically considered the "general public", then the there is no longer a rule protecting the general public. Had that been the legislature's intent, it could have accomplished that much more simply.

Moreover, the statute refers to locations on a property in which the general public *has access*.[38] It does not limit the requirement to meet state air quality standards only to when or where the general public *are present.* The legislature's choice of words makes its intent here clear. If the general public has access to a location on a servient property, the air quality easement on that property does not permit H_2S above state standards in those locations. The length of time members of the general public are actually there is not a factor. To add such a requirement to the statute is impermissible.[39]

The statute is unambiguous because there is only one reasonable reading of the statute. Feedlot, farm, or even county employees are not included in "the general public." Nor are trespassers. The property owner may authorize certain people to be on the property who do work or perform other authorized duties and they do not benefit from the air quality standards. But a property owner who permits the general public in locations on the property must ensure H_2S levels exceeding state standards are not present. Here, to redefine the phrase "general public" as excluding everyone who uses the county roadway is not reasonable. Just as if Toquam allowed the general public on its property to, for example, shop. Shopping is not a required task or duty, such as an employee or contractors would be responsible for. Similarly, using a public roadway to traverse from one location to another, regardless of the type of, or absence of, vehicle, does not place a person in "other categories of people" as that phrase is used in the statute. To permit

[35] Minn. Stat. § 116.0713(e).
[36] Minn. Stat. § 645.17.
[37] Minn. Stat. § 645.08.
[38] *Id.* (Emphasis added.)
[39] *Matter of Surveillance and Integrity Review*, 996 N.W.2d 178, 185 (Minn. 2023), *citing Reider v. Anoka-Hennepin Sch. Dist. No. 11*, 728 N.W.2d 246, 250 (Minn. 2007).

the general public on the property and then declare the general public is not protected by the standards is contrary to the plain meaning of the statute.

Put another way, most people normally using the roadway are the general public. They have access to the entire roadway, unless it is closed off for a specific reason, commonly roadwork or other repair or construction. Those people doing the roadwork or construction may be excluded from the general public, for purposes of the air quality easement. But the general public does, generally, have with access to the entire width of the roadway right-of-way. Thus, legislature's rule that H_2S levels exceeding state air quality standards must be kept from locations on property where the general public has access is applicable to the normally functioning right-of-way of the county roadway. The same would be true for locations on the Toquam property if Toquam permitted the general public on its property.

Because the statute is unambiguous and its plain meaning is applied, additional examination of legislative intent is not warranted.[40] Moreover, the interpretations of the statute Toquam claims the County made, or that the Agency made, likewise are not entitled to deference.[41] It is noted that Toquam claims the County Engineer advised the County Board that drivers on the county road are only authorized there for a certain period of time. Not only is such analysis inapplicable because of the unambiguous plain meaning of the statute, but also because the statute refers to the general public having "access" to the locations on the property. It does not refer to their presence on the property.[42] The plain meaning controls and the Commissioner should apply it here.

iii. The Supreme Court's decision in In re Hubbard, 778 N.W.2d 313 (Minn. 2010), is inapposite.

During oral argument, Toquam stressed reliance on the Supreme Court's decision in *In re Hubbard* to support its position that the Agency and Judge were without authority in this matter. In *Hubbard*, the Court held that the Department of Natural Resources (DNR) lacked authority to certify a local government decision to grant a variance to a DNR regulation.[43]

In re Hubbard concerned the DNR's authority under Minn. Stat. §§ 103F.301-.345, .351 (2008). The commissioner of the DNR argued that the DNR had express and implied authority under the law to certify a city decision on a variance to applicable DNR regulations.[44] The authority came from the broad rule-making powers the legislature granted the DNR in both statutes, according to the commissioner.[45] The Court found that

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[40] Minn. Stat. § 645.16 "When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit."
[41] *Matter of Surveillance and Integrity Review*, 999 N.W.2d at 861; *Matter of Denial of Contested Case Hearing Requests*, 993 N.W.2d at 855.
[42] Minn. Stat. § 116.0713(e).
[43] *In re Hubbard*, 778 N.W.2d 313, 325.
[44] *Id.* at 318.
[45] *Id.* at 320-22.

broad rule-making authority does not expressly permit an agency to expand its own authority which was granted by the legislature.[46] Moreover, the Court declined to find implied authority from the statutes where the authority to enforce standards was specifically given to local units of government.[47] As a result, the Court found the DNR lacked the authority which it claimed: to approve or deny a variance to Department rule granted by a city.

The present case occurs under a regulatory scheme different from the one in *Hubbard*. Here the Agency is expressly charged with monitoring and identifying "potential livestock facility violations of the state ambient air quality standards for" H_2S.[48] The issue is the requirement that H_2S is not permitted above state air quality standards in locations on any property where the general public has access. Toquam's argument that *Hubbard* requires a determination that the Judge and Agency have no jurisdiction here is unconvincing.

V. Conclusion

Minn. R. 7009.0020 prohibits the emission of air which does not meet state air quality standards past the property line of the person emitting it. Based upon the undisputed material facts and the plain language of Minn. Stat. § 116.0713, the MPCA may monitor and identify livestock facility violations of state ambient air quality standards for H_2S and take appropriate measures to ensure compliance in locations on property where the general public has access. The County's air quality easement to Toquam does not override the state requirements. While there is an exception to the general rule when there is an air quality easement from a neighboring property owner, under no circumstances are livestock odors that exceed state standards permitted where the general public has access. The Judge finds, as a matter of law, that the general public has access to a county road and its right-of-way, unless appropriately restricted. Therefore, Petitioner's motion for summary disposition is **DENIED**.

Absent a voluntary resolution, this matter must proceed to an evidentiary hearing on the issues stated above.

J. R. M.

[46] *Id.* at 321.
[47] *Id.* at 322-24.
[48] Minn. Stat. § 166.0713(a).