

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Alteration of
A Cross-Section of Spring Creek
By Elden and Dorothy Brant Without
A Permit from the Commissioner
Of Natural Resources.

**SECOND PREHEARING
ORDER**

This matter is before Administrative Law Judge Steve M. Mihalchick on the Department's request for an Order requiring the Brants to allow Department representatives to enter upon the Brant's land to make certain observations and conduct certain tests related to the allegations made and defenses raised in this matter. A conference was held October 6, 1999 at the Office of Administrative Hearings. Peter L. Tester, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127 appeared on behalf of the Department of Natural Resources. Paul R. Haik, Krebsbach & Haik, LTD., 701 Fourth Avenue South, Suite 500, Minneapolis, MN 55415-1631 appeared on behalf of Elden and Dorothy Brant.

Based upon all the documents in the file and the arguments of counsel, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. The Brants shall allow or obtain permission from the current owners for Department representatives to enter upon the land in question to examine Spring Creek, the adjacent ponds constructed by the Brants, and adjacent lands to make observations, take measurements, and conduct tests related to matters at issue in this proceeding. Such observation shall include, without limitation:
 - A. Surveyor measurement and documentation of the size and depth and nature of the stream and ponds.
 - B. Various water readings in the stream and ponds of temperature, pH, oxygen content, etc.
 - C. An inventory of plants and animals in and around the stream and ponds.
 - D. Dye tests to determine flow and dilution rates.
 - E. General observation of the site to observe the condition and nature of the ponds and the stream above, adjacent to, and below the ponds.

2. Access shall be allowed on October 11, 1999, or any other date acceptable to the Department.

3. The Brants' Motion to require the Department's request for an Order to be treated as a formal motion subject to all the requirements of Minn. R. 1400.6600 is denied.

Dated this 8th day of October 1999.

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

BACKGROUND

This proceeding arises out of a Findings of Fact and Order issued by the Commissioner of Natural Resources on May 3, 1999. Very briefly, the Findings of Fact described Spring Creek as a designated trout stream in Pine County, Minnesota, part of which ran through property owned by the Brants. In September 1996, the Brants applied to the local DNR Waters office for an application to excavate two acres of wildlife pond adjacent to Spring Creek. DNR's area hydrologist informed them that no DNR permit was needed, provided the excavation was not connected to Spring Creek. A year later, an investigation of this site was conducted that revealed that soil and vegetation had been removed from both sides of Spring Creek to create two ponds and that caused the water in the stream to discharge directly into the excavated area. The Findings of Fact detail negotiations over a period of several months to resolve the matter by a voluntary partial restoration of the area. The Findings of Fact also detail several calculations made by Department scientists regarding the impact of the excavation on Spring Creek. One of the purposes of the calculations was to evaluate the effectiveness of a proposal for restoration prepared by Barr Engineering, a consultant hired by the Brants. The Findings indicate that the Barr proposal would not store the fisheries habitat that had been lost due to the excavation, would not prevent further seepage from the stream channel, and would not prevent thermal degradation of the trout stream. It found that the excavation had changed or diminished the course, current or cross-section of public waters without the permit required under Minn. Stat. § 103G.245, subd. 1, and that a permit could not be issued under the provisions of Minn. Stat. § 103G.245, subd. 7 and Minn. R. 6114.0200, subp. 3. The Order then required the Brants to restore the area to certain specifications. The Findings of Fact and Order state that they are issued pursuant to Minn. Stat. § 103G.251. The Brants have appealed from the Findings of Fact and Order.

Following a telephone prehearing conference on September 28, 1999, the Administrative Law Judge issued the first prehearing order in this matter, which was

entitled "Scheduling Order", on September 29, 1999. That Order rescheduled the hearing from its original start date of October 19 to November 18, 1999 and set a schedule for the exchange of witness and exhibit lists and filing of Motions.

During the September 28, 1999 telephone conference, it appeared to the Administrative Law Judge that discovery was proceeding relatively smoothly and no provision was placed in the Scheduling Order regarding discovery. Likewise, at the time of the September 28 conference, the parties had agreed that the Department would be allowed to enter the land on October 6 to make observations and conduct tests regarding the issues in this matter. No provision was put in the Scheduling Order regarding that site visit.

On October 4, 1999 Mr. Haik advised Mr. Tester that the Department would not be allowed to conduct the inspection unless it agreed to limit the tests to those that Mr. Haik believed were relevant. That day Mr. Tester faxed the Administrative Law Judge a letter requesting a conference to discuss the matter. The Administrative Law Judge was out of town until October 6, 1999 and the conference was held that day.

FORM OF THE MOTION

The Brants object to the form of the Department's request and argue that the request should be put in the form of a formal motion in compliance with Minn. R. 1400.6600. The Brants also argue that the Findings of Fact and Order were issued without appropriate investigation and that the legislature did not intend that the Department "provoke a hearing and redo an inadequate investigation."^[1] The Department responds that the burden of proof is upon the Brants in this proceeding to demonstrate that they meet the requirements for the issuance of a permit under Minn. Stat. § § 103G.251, 103G.311, and 103G.315 and related rules, that it is entitled to gather evidence to refute evidence the Brants are expected to present and to counter defenses that the Brants are expected to assert, 50 of those defenses were revealed to the Department in discovery answers served on the Department on September 13, 1999. Furthermore, the Department asserts that it has good faith basis and evidence supporting each of the findings made in the Findings of Fact and Order.

The Department has made a request of the Administrative Law Judge for an order compelling discovery in the form of a site visit and certain testing. That request is equivalent to a motion, but it was not filed in accordance with the provisions of the rule on motions, Minn. R. 1400.6600. It did not advise the opposing party that the it had 10 days to file a written response if it was to object to the motion and to request a hearing on the motion. The Administrative Law Judge finds the request adequate for two reasons. First, Administrative Law Judges normally encourage the parties to resolve discovery disputes informally by directing the parties to contact the judge to arrange for a telephone or in-person conference. Thus, it is not at all unusual not to impose the formal motion requirements of Minn. R. 1400.6600 on discovery disputes. In this case, both parties indicated that discovery was proceeding reasonably well, so such a provision was not placed in the first prehearing order. Secondly, the Brants had reached an agreement with the Department to allow the site inspection and counsel had informed the Administrative Law Judge of that agreement on September 28, 1999. Two days before the agreed upon inspection date, that agreement was revoked. The Brants

are hardly in a position to complain about the short time frame. Moreover, the Brants have shown no prejudice. They were fully able to present their arguments, including a 14 page brief, at the time of the October 6, 1999 conference at the Office of Administrative Hearings. Therefore, the Brants' request that the requirements of Minn. R. 1400.6600 be strictly applied is denied.

DISCOVERY MOTION

Where discovery is objected to, the parties seeking discovery has the burden of showing that the discovery is needed for the proper presentation of the parties' case, is not for purposes of delay, and that the issues or amounts in controversy are significant enough to warrant the discovery. Moreover, any means of discovery available pursuant to the rules of civil procedure for the District Court is allowed.^[2]

Under Rule 26.02 of the Rules of Civil Procedure, parties may obtain discovery by several different methods, including permission to enter upon land or other property for inspection and other purposes.

Minn. Stat. § 103G.251 allows the Commissioner of Natural Resources to investigate activities being conducted without a permit that may affect waters of the state. It also permits the Commissioner to make findings and issue orders with or without a hearing. If they are issued without a hearing, the recipient of the order may demand a hearing. Such a hearing "must be held in the same manner and with the same requirements as a hearing held under Section 103G.311, subd. 5."^[3]

Minn. Stat. § 103G.311 governs the procedures for a permit hearing. It permits the Commissioner to waive the hearing on an application for a permit and to order the permit to be issued or to be denied without a hearing. However, if a hearing is waived and the permit is denied, under subdivision 5, the applicant may demand a hearing on the application and hold a hearing as though the previous order had not been made.^[4] Finally, Minn. Stat. § 103G.245, subd. 1 requires a person to have a public waters permit to, among other things, change or diminish the course, current, or cross section of public waters, entirely or partially within the state, by any means.

The effect of the foregoing statutes is that the Department has authority under Minn. Stat. § 103G.251 to investigate and to issue Findings of Fact and an Order where activities have been conducted without a permit that affect the waters of the state and, in particular, change or diminish the course, current, or cross section of public waters. A further effect of the statutes is that where such an order is appealed, a hearing is held and the standards and procedures applicable to a permit application apply. In other words, the applicant must show that it meets the criteria for the issuance of a permit for its activity. Those criteria are generally set out in Minn. Stat. §§ 103G.245 and 103G.315. In particular, those requirements impose the burden upon the person of proving that the proposed project is reasonable, practical, and will adequately protect public safety and promote the public welfare.^{[5][6]}

The Brants argue that the Department should not now be allowed to do the investigation it should have done previously. It cites numerous excerpts from the depositions of two Department witnesses who apparently were the ones who made the calculations of the impacts of the excavation that are set out in the Findings of Fact.

Those excerpts essentially show the two as stating they did not make the actual measurements upon which the calculations are based. However, the Findings of Fact clearly describe that the Department scientists based their calculations upon data derived from a survey prepared by Barr Engineering and upon other appropriate source material such as the Natural Resource Conservation Service's soil property sheets. The detailed allegations in the Findings of Fact and Order appear to demonstrate on their face that there is sufficient basis for their issuance. While the Administrative Law Judge is sensitive to an argument that agencies may not proceed arbitrarily, that does not appear to be the case here. The Brants have not supported their allegation that, "the Department is unlawfully trying to bootstrap itself into an investigation now that it is apparent that the record evidence is wholly inadequate."^[7]

Having thus determined that the proceeding is properly before the Administrative Law Judge, the question becomes whether the Department is entitled to the discovery it has requested. It appears to the Administrative Law Judge that each of the observations the Department desires to make relates to the issues in this case as outlined by the Findings of Fact and Order, the Brants' discovery responses and applicable statutes and rules. Regardless of the burden of proof, the Department is entitled to discovery of such information because it is needed for proper presentation of its case and the amounts in controversy are significant enough to warrant the discovery. Clearly the request has not been interposed for purposes of delay.

Finally, the Brants have raised a question as to the authority of the Department to enter upon the land and the authority of the Administrative Law Judge to issue such a discovery order. Constitutional rights to enter upon land are not an issue here. The issue is whether the discovery is appropriate under the relevant statutes and rules. As discussed above, the discovery is appropriate.

SMM

^[1] Obj. to the Hearing and Discovery at 1-2.

^[2] Minn. R. 1400.6700, subp. 2.

^[3] Minn. Stat. § 103G.251, subd. 2(c).

^[4] Minn. Stat. § 103G.311, subd. 5.

^[5] Minn. Stat. § 103G.315, subd. 6.

^[6] The Brants have indicated that they do not agree with the allocation of the burden of proof and intend to file a motion on the issue according to the previously established schedule. The Administrative Law Judge will consider the arguments submitted at that time.

^[7] Obj. to Hearing and Discovery at 3.