11-2000-17249-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Revocation of the Private Fish Hatchery License for Spring Valley Ponds, LLC, and the Public Waters Restoration and Replacement Order No. W830836

RULING ON PETITION FOR INTERVENTION

This matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to a Notice and Order for Prehearing Conference dated April 24, 2006. On May 2, 2006, a Petition for Intervention was filed on behalf of the Minnesota Center for Environmental Advocacy, Trout Unlimited, and the Minnesota Trout Association. Spring Valley Ponds and John Bondhus filed an Objection to the Petition on May 11, 2006. Oral argument with respect to the Petition for Intervention was heard on June 5, 2006, at which time the record with respect to the Petition closed.

David P. Iverson, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, appeared on behalf of the Department of Natural Resources. Charles N. Nauen and Harry E. Gallaher, Attorneys at Law, Lockridge Grindal Nauen, P.L.L.P., Suite 2200, 100 Washington Avenue South, Minneapolis, MN 55401-2179, appeared on behalf of John Bondhus and Spring Valley Ponds, LLC ("Spring Valley"). Michael D. Madigan and Edward M. Tillman, Attorneys at Law, Madigan, Dahl & Harlan, P.A., 701 Fourth Avenue South, Suite 1700, Minneapolis, MN 55415, appeared on behalf of the Petitioners for Intervention (the Minnesota Center for Environmental Advocacy, Trout Unlimited, and the Minnesota Trout Association).

Based upon the record in this matter, and for the reasons set forth in the attached Memorandum, IT IS HEREBY ORDERED as follows:

1. The Petition for Intervention filed by the Minnesota Center for Environmental Advocacy, Trout Unlimited, and the Minnesota Trout Association is hereby GRANTED. The Intervenors shall be permitted to participate as parties in this proceeding with all the rights and responsibilities associated with party status.

2. The Intervenors shall comply with the First Prehearing Order entered in this matter on June 26, 2006.

3. The Intervenors' presentation shall be limited to issues relevant to this proceeding, and they will be expected to work in a cooperative manner with

the Department of Natural Resources to coordinate the presentation of evidence and avoid the introduction of duplicative evidence.

Dated: July 5, 2006.

s/Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Background

The Notice and Order for Prehearing Conference issued by the Department of Natural Resources ("DNR" or "the Department") in this matter indicates that John Bondhus purchased Spring Valley Ponds, LLC, a private fish hatchery located in Fillmore County, in 2003 and added it to his existing Private Fish Hatchery License and Approved Waters List (License No. 90).[1] Spring Valley Ponds is located along Spring Valley Creek, which the DNR alleges is a cold water creek that is a designated trout stream of the state.[2] The Department alleges that the trout population in Spring Valley Creek is dependent upon cold water flowing into the creek from natural spring tributaries located along its length, including the spring tributary located on Spring Valley Ponds' property.[3] The DNR further asserts in the Notice of Prehearing Conference that the Spring Valley Ponds facility historically appropriated water from this cold water spring for its operations, and diverted the spring flow by the use of surface ditches through a series of artificial ponds, which were ultimately discharged into Spring Valley Creek through two discharge outfalls.[4]

The Department alleges that, in approximately August 2003, Mr. Bondhus appropriated waters of the state by constructing a concrete structure at the spring head, installing lifters, and diverting the appropriated water through a new underground distribution system.[5] The DNR also asserts that hatchery pond modifications were made that resulted in the construction of three new outfalls for discharge of the appropriated water into Spring Valley Creek once the water was routed through the modified pond system.[6] The DNR contends that this work was done without a public waters works permit or a water appropriations permit.[7] The DNR has determined that the construction and appropriation "may have a detrimental impact on Spring Valley Creek and its trout fishery by increasing the temperature of the spring water discharged into the creek."[8]

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[1] Notice of Prehearing Conference, ¶ 2.
[2] *Id*., ¶ 3.
[3] *Id*.
[4] *Id*., ¶ 4.
[5] *Id.*, ¶ 7.
[6] *Id.*
[7] *Id*.
[8] *Id.*, ¶ 8.

By letter dated September 7, 2005, the Department amended Mr. Bondhus' existing 2005 Private Fish Hatchery License and Approved Waters List to remove the Spring Valley Ponds facility from his license.[9] In addition, on September 8, 2005, by Public Waters Restoration and Replacement Order No. W830836, the DNR ordered Mr. Bondhus to "restore public waters by, among other things, removing the concrete structure, lifters, distribution system, and outfalls constructed with in the spring and creek, and to discontinue appropriating such water for use in the unlicensed hatchery."[10] The Notice of Prehearing Conference contends that DNR's actions were appropriate because Spring Valley Ponds has failed to provide DNR with sufficient data to conclude that the unauthorized modifications will not have a detrimental impact on Spring Valley Creek and the creek's trout fishery; Spring Valley Ponds has not shown that the unauthorized work will preserve the natural character of the Creek and the existing trout fishery; Spring Valley Ponds has not demonstrated the use of measures to mitigate adverse effects to the Creek resulting from the unauthorized work; the work may have a detrimental impact on the trout fishery by increasing the temperature of the receiving waters; the modifications exceed the minimal impact solution to meet the needs of the hatchery operation and unreasonably endanger the ecology of the waters of the Creek; and the proposed appropriation is not in the public interest.[11]

Parties' Arguments regarding Petition to Intervene

The Petitioners seek to intervene as parties in this matter to show that the Respondent has not obtained proper permits for operation of the fish hatchery, capture of the spring, moving of the spring outfall which feeds the Creek, extensive grading and construction of hatchery ponds, dredging of an artificial stream bed, or discharge of storm water and wastewater, and to show that these actions have and will cause degradation to Spring Valley Creek and the natural resources that depend on it, including but not limited to trout populations. They contend that their legal rights, duties, or privileges will be determined or affected by this contested case proceeding due to this degradation and that their members' use and enjoyment of Spring Valley Creek will be directly affected by the outcome of this proceeding. The Petitioners assert that the Respondent's actions are detrimental to the Creek and "have caused and are likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources within the state." The Petitioners contend that they have a statutory right to intervene under Minn. Stat. § 116B.09, subd. 1, and that they also meet the criteria for intervention set forth in Minn. R. 1400.6200. The Petitioners filed supporting affidavits from Kevin Reuther, staff attorney with the Minnesota Center for Environmental Advocacy; John Hunt, a member of Trout Unlimited; and Jeffrey Broberg, President of the Minnesota Trout Association. All of these individuals expressed their belief that Mr. Bondhus and Spring Valley Ponds have engaged in conduct that has caused and will continue to cause impairment, pollution, or destruction of the water, land, and other natural resources located in the state as well as degradation to Spring Valley Creek and the natural resources that depend on it, including but not limited to trout populations;

[9] *Id.*, ¶ 9.
[10] *Id.*
[11] *Id.*, ¶ 10 (a) – (h).

more feasible and prudent alternatives are available; and the Respondent's actions have detrimentally affected their members' use and enjoyment of the Creek and, if continued, will detrimentally affect future use and enjoyment.

An Objection to the Petition to Intervene was filed on behalf of John Bondhus and Spring Valley Ponds. They contend that the concerns raised by the Petitioners exceed the narrow scope of this contested case proceeding, since the only issues to be determined here are whether the DNR exceeded its authority by removing Spring Valley Ponds from Mr. Bondhus' license, issuing Cease and Desist Order No. 830836, and issuing Public Waters Restoration and Replacement Order No. 830836. Mr. Bondhus and Spring Valley Ponds contend that they have either applied for or received all required permits and licenses, and assert that this is not the proper forum for the Petitioners to air a multitude of complaints they may have about Spring Valley Ponds. They also point out that the Petitioners will have an opportunity to submit public comments on the pending permit applications and on an Environmental Assessment Worksheet that is being completed with respect to the project.

Mr. Bondhus and Spring Valley Ponds further assert that there has been no proper showing that the legal rights, duties, or privileges of the Petitioners' members will be affected or that they have any concern or interest that differs from that of the DNR. The Respondent argues that the Petitioners have not alleged that they possess superior knowledge or expertise, or otherwise explained why the DNR is incapable of representing the interests of the public and the Petitioners' members in the use and enjoyment of Spring Valley Creek. The Respondent also contends that the right to intervention set forth in Minn. Stat. § 116B.09, subd. 1, may be limited in scope and purpose or denied where the petitioner fails to demonstrate that its interest is not adequately represented by an existing party. To the extent that the Petitioners are allowed to intervene in this matter, the Respondent requests that their involvement be limited to the submission of a written brief limited to the issues in dispute, without acquiring the status of a party.

In their reply brief, the Petitioners asserted that the Respondent's objection to their intervention exceeded the seven-day period set forth in Minn. R. 6200, subp. 2, and should be disregarded. They also contended that neither of the cases cited by the Respondent serve as a bar to intervention, and point to a proceeding in which intervention by Clean Up Our River Environment ("CURE") in a DNR contested case proceeding was permitted.[12]

Counsel for the DNR indicated during oral argument that the DNR supports the Petition for Intervention and the Commissioner is interested in hearing from all possible sources in reaching the final decision in this matter. The DNR believes that the Petitioners would contribute expertise and history if they are allowed to participate in this proceeding. The Petitioners argued that their interest in protecting health of the Creek is somewhat different from that of the DNR, since they contend that the DNR is

[12] *In the Matter of the Application of the Lac Qui Parle – Yellow Bank Watershed District to Excavate Four Floodways in the Lac Qui Parle River*, 1995 WL 6419 (Minn. App. 1995).

also interested in promoting "aquaculture."[13] The Petitioners asserted that their participation will be of assistance in this matter, and they plan to provide expert testimony from a renowned authority on trout streams. The Respondent argued that the issues involved in this case are very limited and focused and contended the Intervenors seek to broaden the scope of the hearing to include every aspect of the Spring Valley Ponds facility.

Discussion

After careful consideration, the Administrative Law Judge has concluded that it is appropriate to grant the Petition for Intervention. Minn. Stat. § 116B.09, subd. 1, specifies that, except as otherwise provided in Minn. Stat. § 116B.10 (which is not pertinent here), "any partnership, corporation, association, organization or other legal entity having shareholders, members, partners, or employees residing within the state *shall* be permitted to intervene *as a party*" in "any administrative . . . proceeding" upon "the filing of a verified pleading asserting that the proceeding . . . involves conduct that has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state."[14] Each of the organizations petitioning to intervene in the present case filed affidavits in which an individual affiliated with the organization attested to his belief that Spring Valley Ponds and Mr. Bondhus, its manager, "have engaged in conduct that has caused and will continue to cause impairment, pollution, or destruction of the water, land, and other natural resources located within the State," specifically "degradation to Spring Valley Creek and the natural resources that depend on it, including but not limited to trout populations." Under these circumstances, the Administrative Law Judge is required by Minn. Stat. § 116B.09, subd. 1, to permit the petitioners to intervene as parties.

Moreover, the Petition for Intervention meets the standards set forth in the procedural rules of the Office of Administrative Hearings. Minn. R. 1400.6200, subp. 1, states in relevant part as follows:

> Any person not named in the notice of hearing who desires to intervene in a contested case as a party shall submit a timely written petition to intervene to the judge and shall serve the petition upon all existing parties and the agency. . . . The petition shall show how the petitioner's legal rights, duties, or privileges may be determined or affected by the contested case; shall show how the petitioner may be directly affected by the outcome or that petitioner's participation is authorized by state, rule, or court decision; shall set forth the grounds and purposes for which intervention is sought; and shall indicate petitioner's statutory right to intervene if one should exist.

[13] "Aquaculture" is defined in Minn. Stat. § 17.47, subd. 2, to mean "the culture of private aquatic life for consumption or sale." Under Minn. Stat. § 17.49, aquaculture programs are coordinated through the Commissioner of Agriculture, who "shall direct the development of aquaculture in the state."
[14] Emphasis added.

Subpart 3 of Minn. R. 1400.6200, states that the Administrative Law Judge "shall allow intervention upon a proper showing pursuant to subpart 1 unless the judge finds that the petitioner's interest is adequately represented by one or more parties participating in the case."

Here, the Petitioners submitted and served a timely written petition to intervene within one week after the Notice of Hearing was filed. The Petitioners have made an adequate demonstration that their members may be directly affected by the outcome of this case, their legal rights, duties, or privileges may be determined or affected by the contested case, and their participation is authorized by state statute. The Petitioners have indicated that they seek to intervene as parties to show that the Respondent has not obtained proper permits for its operation of the fish hatchery and the modifications it has made, and to show that these actions have and will cause degradation to Spring Valley Creek and the trout populations and other natural resources that depend on it.

As a general matter, the showing required to establish that existing parties do not adequately represent the petitioner's interests is minimal.[15] In *Costley v. Caromin House, Inc*.,[16] the Minnesota Supreme Court noted that it has followed a policy of encouraging all legitimate interventions, and quoted with approval the following portion of Wright and Miller's treatise on Federal Practice and Procedure: "[I]f [the applicant's] interest is similar to, but not identical with that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but he ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee."[17] Although the interests of the DNR may be similar in certain respects to those of the Petitioners since the DNR is expected to represent the public interest in protecting the environment, the DNR's interests are broader and not identical to those of the Petitioners.[18] The Petitioners have shown that they have a particular interest in ensuring the environmental quality of Spring Valley Creek and the health of its trout population. It is not possible to ascertain based on the present record that the Petitioners' interests will be adequately represented by the DNR. In addition, the evidence that may be offered by the Petitioners concerning the Creek and its trout population may be of assistance in developing the factual record in this case. It is concluded that the Petitioners have made the requisite showing that their interests are not adequately represented by the DNR in this matter. Because the positions ultimately taken by the DNR and the Petitioners may be similar despite their slightly different interests, they will be expected to coordinate their presentations so as to avoid duplication.

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[15] G. Beck, M.B. Gossman, L. Nehl-Trueman, Minnesota Administrative Procedure (2d ed. 1998), § 6.2.3.
[16] 313 N.W.2d 21 (Minn. 1981).
[17] 7A C. Wright & A. Miller, Federal Practice & Procedure § 1909, at 524 (1972).
[18] For example, Minn. Stat. § 116B.04 refers to the State's "paramount concern" for the protection of its air, water, land, and other natural resources from pollution, impairment or destruction; Minn. Stat. § 84.941 states that it is the policy of the State that "fish and wildlife are renewable natural resources to be conserved and enhanced through planned scientific management, protection, and utilization;" Minn. Stat. § 17.49, subd. 2a specifies that the State (through the Commissioner of Agriculture) "may establish a Minnesota aquaculture development and aid program that may support . . . marketing, promotion, broodstock development, and other services."

In addition, it appears that the matters the Intervenors seek to address are, in fact, relevant to the issues presented in this contested case proceeding. As set forth in the Notice and Order for Prehearing Conference issued by the DNR and clarified by the parties during the June 5 Prehearing Conference, the issues for hearing are (1) whether the DNR's removal of the Spring Valley Ponds facility from Mr. Bondhus' 2005 private fish hatchery license was appropriate; (2) whether the DNR properly ordered the Respondent to restore the public waters; and (3) whether the DNR properly ordered the Respondent to discontinue appropriating such waters for use in the hatchery. The DNR alleges in the Notice and Order for Prehearing Conference that its actions were warranted because, among other things, the modifications made by the Respondent were not authorized by State permit, will not preserve the natural character of Spring Valley Creek, and may have an adverse impact on the Creek and existing resources such as the Creek's trout fishery. Accordingly, in order to assess whether the DNR's orders were proper, the issues to be addressed at the hearing will, of necessity, include evidence relating to what, if any, impact the Respondent's actions have had on Spring Valley Creek and whether there has been impairment or harm to public resources.

This ruling is consistent with several prior rulings by Minnesota Administrative Law Judges permitting various groups and associations to intervene in DNR cases.[19] In addition, this ruling is not inconsistent with the cases cited by the Respondents in which intervention was denied, since the facts in the present case are distinguishable. Unlike the situation in *Powderly v. Erickson*,[20] the petition in this matter was timely filed, there has been an adequate showing that the interests of the Petitioners are not adequately represented by the existing parties, and the Petitioners do, in fact, allege that they have additional information and an interest that differs from that of the DNR. And, unlike the situation in *SST, Inc. v. City of Minneapolis*,[21] there has been no showing that the timely-filed Petition in the present case will cause substantial prejudice to the existing parties.

B.L.N.

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[19] *See, e.g., In the Matter of the Application of the Lac Qui Parle – Yellow Bank Watershed District to Excavate Four Floodways in the Lac Qui Parle River,* OAH Docket No. 6-2000-8388-2 (1994), *aff'd,* 1995 WL 6419 (Minn. App. 1995) (CURE (Clean Up Our River Environment), a group opposing the grant of a permit by the DNR, was permitted to intervene in case involving the DNR and the watershed district seeking the permit); *In the Matter of the Application of Channel Drive Homeowners Association to Dredge a Channel in an Inlet on the East Side of St. Alban's Bay of Lake Minnetonka in the City of Greenwood,* OAH Docket No. 9-2000-5410-2 (1992) (St. Alban's Green Homeowners Association was allowed to intervene in a case involving the DNR, the City of Greenwood, and the applicant (Channel Drive Homeowner's Association); *In the Matter of the Application of the City of Brooklyn Park to Extend 73rd Avenue North Across a Wetland between Boone Avenue and Highway 169,* OAH Docket No. 6-2000-1385-2 (1987) (Northland Development Company's petition to intervene in a case in which the city sought to gain DNR approval to extend a road across a wetland was granted because Minn. Stat. § 116B.09, subd. 1, "required its approval" and because the petition met the standards contained in Minn. R. 1400.6200, subp. 1); and *In the Matter of Determining the Natural Ordinary High Water Level of Lake Pulaski, Wright County,* OAH Docket No. 6-2000-8512-2 (1985) (City of Buffalo and the Save Lake Pulaski Association were permitted to intervene in a case initiated by the DNR to make a new determination of the natural ordinary high water level of the lake).

[20] 285 N.W.2d 84 (Minn. 1979).

[21] 288 N.W.2d 225 (Minn. 1979).