OAH 5-2002-37830

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Denial of Public Waters Work Permit Application No. 2020-3321	**ORDER GRANTING MOTION FOR SUMMARY DISPOSITION AND RECOMMENDATION FOR FINAL DISPOSITION**

This matter came before Administrative Law Judge Jim Mortenson on the Department of Natural Resources' (Department) Notice of Motion and Motion for Summary Disposition (Motion). The Motion was served and filed on February 4, 2022. Eric Peterson (Applicant) did not respond to the Motion. The Motion record closed on February 25, 2022.

J. Qortney McLeod, Assistant Attorney General, represents the Department. Eric Peterson (Applicant) is unrepresented by counsel.

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

IT IS HEREBY ORDERED,

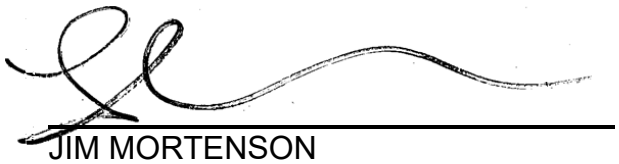
1. The Department's Motion is **GRANTED**;

2. Further proceedings in this matter are **CANCELLED**; and

IT IS RECOMMENDED,

3. The Commissioner **AFFIRM** the denial of the Applicant's Public Waters Work Permit.

Dated: March 18, 2022



JIM MORTENSON
Administrative Law Judge

MEMORANDUM

I. Introduction

This case concerns the application for a 30-foot-wide by 70-foot-waterward by six-inch-deep beach sand blanket on Little Birch Lake. Applicant seeks a Public Waters Work Permit to install the beach sand blanket near his property on the lake. The Department denied the application because the proposal greatly exceeded the criteria under Minnesota law.

The Department moved for summary disposition arguing there are no material facts in dispute and that it is entitled to judgment as a matter of law. Applicant failed to respond to the motion.

II. Regulatory Background

The Department is the state regulatory body responsible for the conservation and development of the public waters of the state, including but not limited to, the issuance of any permits to alter those waters.[1] Under Minn. Stat. § 103A.201 (2020), the Department is vested with the authority to control and supervise activity that changes the course, current, or cross section of public waters. The aim of this policy is "[t]o conserve and use water resources of the state in the best interests of its people, and to promote the public health, safety, and welfare . . ."[2]

Department rules establish the guidelines for "the orderly and consistent review of permit applications in order to conserve and utilize the water resources of the state in the best interest of its people."[3] The rules set forth minimum standards and criteria for the issuance and denial of permits for proposed projects on public waters.[4]

A person must have a public waters-work-permit to change or diminish the course, current, or cross section of public waters by any means, including filling, excavating, or placing of materials in or on the beds of public waters.[5] Filling is defined as the placement of unconfined or loosely confined materials on the bed or bank of any public water.[6] It is the goal of the Department to limit the placement of fill material into public waters in order to minimize encroachment, change, or damage to the environment and regulate the quality and quantity of fill based upon the capabilities of the waters to assimilate the material.[7]

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[1] Minn. Stat. § 103G.101 (2020).
[2] Minn. Stat. § 103A.201, subd. 1 (2020).
[3] Minn. R. 6115.0150 (2021).
[4] Minn. R. 6115.0160 (2021).
[5] Minn. Stat. § 103G.245 (2020).
[6] Minn. R. 6115.0170, subp. 11; .0190, subp. 2 (2021).
[7] Minn. R. 6115.0190, subp. 1 (2021).

III. Uncontested Facts

In October 2020, Applicant contacted Department Area Hydrologist Mark Anderson by email to discuss a proposed 50' x 50' sand blanket for shoreline on his property on Little Birch Lake in Todd County.[8] Anderson informed Applicant that a sand blanket of that size would not only require a permit but would be difficult for the Department to approve without significant justification under Minnesota Rules.[9]

Little Birch Lake is a public water that is included on the Todd County public water inventory map. The Department lists Little Birch Lake as a Lake of Biological Significance, and the Todd County Water Plan identifies the lake as being a high-quality resource.[10]

Despite Anderson's warnings, Applicant submitted a public waters work permit application on November 25, 2020, for a private sand blanket that extended 70' waterward from the Ordinary High-Water Level (OHWL).[11] Prior to issuing an invoice for the application, Anderson contacted Applicant with the opportunity to withdraw the application, explaining that it was unlikely to be approved and the fee for permit applications is non-refundable.[12] Anderson simultaneously reached out to Todd County, the Sauk River Watershed District (SRWD) and Department staff regarding the application. After consultation, Anderson informed Applicant that each of the interested parties expressed concern that the proposed project could have potential adverse impacts to Little Birch Lake and reaffirmed that it was unlikely that his permit application would be approved.[13] Anderson once again offered Applicant the opportunity to withdraw the permit application, but Applicant decided to move forward and paid the application invoice on December 15, 2020.[14]

Anderson circulated the application through the Department's "Request for Comments" period.[15] As a part of the comment process, staff from the Todd County Planning & Zoning Division, SRWD, Todd County Soil and Water Conservation District, and the Department's Fisheries Division. Each group provided comments expressing

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[8] Exhibit (Ex.) B, Permit Denial, Findings of Fact, Conclusion, and Recommendation dated April 27, 2021.
[9] *Id.* at 1.
[10] The Department identifies and classifies Lakes of Biological Significance based upon unique plant or animal presence. https://gisdata.mn.gov/dataset/env-lakes-of-biological-signific.
[11] Ex. A, Permit Application #2020-3321; Ex. B at 1; Ordinary high-water level means the boundary of water basins, public waters, and public waters wetlands, and is an elevation delineating the highest water level that has been maintained for a sufficient period to leave evidence upon the landscape, commonly the point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial. Minn. Stat. § 103G.005, subp. 14 (2020).
[12] Ex. B at 1.
[13] *Id.* at 2.
[14] *Id.*
[15] *Id.*

concern with the proposed project as having the potential to degrade Little Birch Lake environmentally and ecologically.[16]

On April 5 and April 19, 2021, Anderson visited Applicant's property and took measurements.[17] Based on his experience and expertise as a Department hydrologist, Anderson determined that a sand blanket should be limited to a depth no greater than 2.5 feet below the OHWL in order to minimize impact by limiting the potential for in-lake sediment transportation.[18] Anderson found that the 2 ½ foot water depth was located approximately 20 feet waterward from the OHWL.[19]

The Department then offered Applicant the option to install a sand blanket extending twice the distance waterward of the "no permit required" specifications (a total of 20 feet waterward of the OHWL) at Minn. R. 6110.0190, subp. 4(1) (2021).[20] Applicant rejected this compromise.[21]

On April 27, 2021, the Department denied Applicant's public waters work permit application finding that the proposed project would violate Minn. Stat. § 103G.315 (2020), Minn. R. 6115.0190, and Minn. R. 6115.0191 (2021). Bases for the denial included:

- Unforeseen impacts for a lake ranked at the highest priority level of protection status;
- Concern about the impact on nearby bulrush beds, which provide habitat for multiple species of animals, nearby underwater vegetation; and the importance of shoreline and sediments as travel corridors, which will result from the displacement of the sand over time;
- Concern about the slope and depth of the area, and the displacement of sediment;
- The proposal exceeds minimum encroachment; [and],
- The desired uses of the lake can be made by simply using the lakebed as is, or boating into deeper water for swimming.[22]

On May 18, 2021, Applicant appealed the Department's decision.[23]

IV. Summary Disposition Standard

[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*.
[23] Ex. C, Applicant's correspondence, check and certified-mail envelope.

Summary disposition is the administrative equivalent of summary judgment.[24] The Office of Administrative Hearings generally follows the summary judgment standards developed in judicial courts in considering motions for summary disposition.[25] A motion for summary disposition may be granted when no genuine issue of material fact exists.[26] A genuine issue is one that is not a sham or frivolous, and a fact is material if resolving it will affect the result or outcome of the case.[27]

The moving party must initially show the absence of a genuine issue of material fact.[28] To successfully resist a motion for summary disposition, the responding party must show that there are specific facts in dispute which have a bearing on the outcome of the case.[29] Facts at issue must be established by substantial evidence, and the parties may not rest upon general averments or denials.[30] Evidence offered to support or defeat summary judgment must be such evidence as would be admissible at trial,[31] though the evidence presented need not be in a form that would be admissible.[32] "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial."[33]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[34] Summary disposition is only proper when no fact issues need to be resolved.[35] When considering a motion for summary disposition, the evidence must be viewed in the light most favorable to the nonmoving party, and doubts and factual inferences must be resolved against the moving party.[36] The trial court's function is not to decide the facts at issue, but to determine whether a genuine dispute of material fact exists.[37] If there is no genuine dispute of material facts, then judgment can be rendered based on the undisputed facts.[38]

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[24] *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2021).
[25] *See* Minn. R. 1400.6600 (20121); Minn. R. Civ. P. 56.
[26] *In re Gillette Children's Specialty Healthcare*, 883 N.W.2d 778, 785 (Minn. 2016).
[27] *Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare,* 356 N.W.2d 804, 808 (Minn. Ct. App. 1984), *review denied* (Minn. Feb. 6, 1985).
[28] Minn. R. Civ. P. 56.01; *Anderson v. Dep't of Natural Res.*, 693 N.W.2d 181, 191 (Minn. 2005).
[29] *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).
[30] *Id.* at 70-71.
[31] *Hopkins v. Empire Fire & Marine Ins., Co.*, 474 N.W.2d 209, 212 (Minn. Ct. App. 1991).
[32] *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. Ct. App. 1989).
[33] *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995).
[34] *See Sauter v. Sauter,* 70 N.W.2d 351, 353 (Minn. 1955).
[35] *See id*.
[36] *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 661 (Minn. 2015).
[37] *See id.* at 664 (citing *DLH*, 566 N.W.2d at 70).
[38] *Sauter,* at 353.

V. Analysis

Minn. R. 6115.0190 (2021) outlines nine criteria that must be met in order for the Department to approve a permit for the filling of public waters.[39] Specifically, a project must meet all nine of the following criteria:

1. the project does not exceed more than a minimum encroachment, change, or damage to the environment, particularly the ecology of the waters;

2. the fill consists of clean inorganic material that is free of pollutants and nutrients;

3. the existence of a stable, supporting foundation is established by appropriate means, including soil boring data were deemed necessary by the commissioner;

4. where erosion protection is deemed necessary by the commissioner, the site conditions and fill material are capable of being stabilized by an approved erosion control method such as riprap, retaining wall, or other method which is consistent with existing land uses on the affected public water;

5. the proposed project represents the minimal impact solution to a specific need with respect to all other reasonable alternatives;

6. the size, shape, depths, shoreline, and bottom character and topography, and susceptibility of the beds of public waters to actions of wind, waves, and currents are such that the fill will be stable;

7. adverse effects on the physical or biological character of the waters are subject to feasible and practical measures to mitigate the effects;

8. the proposed filling is consistent with applicable floodplain, shoreland, and wild and scenic rivers management standards and ordinances for the waters involved; and

9. the proposed filling is consistent with water and related land management plans and programs of local and regional governments, provided such plans and programs are consistent with state plans and programs.[40]

In addition to these criteria, permit applications for beach sand blankets must also include information to show that:

[39] Minn. R. 6115.0190, subp. 5.
[40] *Id.*

(A) the intended purpose of the fill is reasonable with respect to all other alternatives and there are no feasible and practical means to attain the intended purpose without filling; and

(B) the proposal will adequately protect public safety and promote the public welfare.[41]

Applicant's permit application proposed a beach sand blanket measuring six inches deep, 30 feet wide, and 70 feet waterward of the OHWL. While most types of filling into public waters requires a permit, there are exceptions which may occur without one.[42] Specifically, a beach sand blanket may be installed without a permit if: (1) the sand layer does not exceed six inches in thickness, 50 feet in width along the shoreline, or one-half the width of the lot, whichever is less, and does not extend more than ten feet waterward of the OHWL; (2) does not cover emergent vegetation, unless authorized by a separate aquatic plant management permit; and (3) local watershed district and zoning officials are given at least seven days' notice by the landowner.[43] If these criteria are not met, a permit is required.[44] Because Applicant's proposed project extends well beyond ten feet waterward of the OHWL, he must obtain a permit prior to proceeding.

There is no dispute that Applicant's proposed sand blanket exceeds the size allowable under Minnesota law and would have the high potential to cause biological and ecological impacts to Little Birch Lake.[45] Applicant has neither articulated nor presented any facts upon which to argue that the Department's rationale is in error. Under Minn. R. 6115.0190, the Department's goal in limiting fill material in public waters is to:

A. minimize encroachment, change, or damage to the environment;

B. regulate the quantity and quality of fill and the purposes for which filling may be allowed based upon the capabilities of the waters to assimilate the material; and

C. maintain consistency with floodplain, shoreland, and wild and scenic rivers management standards and ordinances.[46]

Placement of fill in public water, when a permit is required, must meet all nine of the Department's criteria under Minn. R. 6115.0190, subp. 5, and, minimally, the two criteria at Minn. R. 6115.0191, subp. 8. It is undisputed that project would not meet at least five of the criteria under Minn. R. 6115.0190, subp. 5 and both of the criteria under Minn. R. 6115.0191, subp. 8. The proposed project does not represent a minimum impact solution. The proposed fill may not be stable, and it is not consistent with land

[41] Minn. R. 6115.0191, subp. 8.
[42] Minn. R. 6115.0190, subp. 4.
[43] *Id.*
[44] *Id.*
[45] Ex. D, Expert Disclosure of Mark Anderson, dated January 14, 2022.
[46] Minn. R. 6115.0190, subp. 1.

management plans and programs of local governments. The fill may adversely affect the physical or biological character of the lake.

VI. Conclusion

The Department has shown there is no genuine dispute of material facts. It has also shown the permit denial was carefully considered in accordance with legal requirements. Further, Applicant has not made any showing contesting the Department's determination and has not articulated any reason to doubt the Department's findings and determination. Therefore, summary disposition is appropriate. The Judge respectfully recommends the Commissioner **AFFIRM** the denial of the Applicant's Public Waters Work Permit.

J. R. M.