OAH 82-2002-39627

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of Denial of Public Waters Work Permit Application #2022-2335	**ORDER GRANTING MOTION FOR SUMMARY DISPOSITION**

This matter comes before Administrative Law Judge Barbara Case on a Motion for Summary Disposition filed by the Department of Natural Resources (Department) on January 12, 2024. Timothy Maciej (Appellant) filed no response to the Motion for Summary Disposition by the filing deadline of January 29, 2024. Alternatively, Appellant filed a Notice of Dismissal of Application on January 29, 2024. On January 30, 2024, the Department filed an objection to the Notice of Dismissal of Application. Appellant filed a response to the Department's objection on February 5, 2024.

On February 6, 2024, Judge Case ordered that Appellant's Notice of Dismissal of Application was not granted prior to a hearing and ordered both parties to be prepared to address both the Motion for Summary Disposition and the Notice for Dismissal of Application at the motion hearing. The motion hearing was held on February 6, 2024, where both parties appeared. After the motion hearing, the Department filed Exhibit A, a copy of Appellant's Demand for a Hearing in this matter. The record for both the Motion for Summary Disposition and the Notice of Dismissal of Application closed at the end of business on February 6, 2024.

Peter J. Farrell, Assistant Attorney General, appeared on behalf of the Department.

William Erhart, Erhart Legal LLC, appeared on behalf of Appellant.

Based on the record and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

IT IS HEREBY ORDERED:

1. The Department's Motion for Summary Disposition is **GRANTED**.

2. Appellant's Notice of Dismissal of Application is **DENIED**.

3. Appellant's appeal is **DISMISSED**. Further proceedings in this matter are **CANCELLED**.

RECOMMENDATION

4. The Commissioner **AFFIRM** the denial of the Appellant's Public Waters Permit.

Dated: April 3, 2024

BARBARA J. CASE
Administrative Law Judge

NOTICE

This Order is a recommendation, not a final order. The Commissioner of the Department of Natural Resources (Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2022), the Commissioner shall not make a final decision until this Order has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Order and the Commissioner must consider the exceptions in making a final decision. Parties should contact Commissioner, 500 Lafayette Road, St. Paul, MN 55155, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Order and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Order will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2022). To comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1 (2022), the Commissioner is required to serve the final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

I. 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 (2022), the Department is vested with the authority to control and supervise activity that changes the course,

[1] Minn. Stat. § 103G.101 (2022).

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 set forth minimum standards and criteria for the issuance and denial of permits for proposed projects in public waters.[3] These rules are 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."[4]

A person must have a 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] The Department may issue a public-water work permit "only if the project will involve a minimum encroachment, change, or damage to the environment, particularly the ecology of the waterway."[7] The burden is on the permit applicant to demonstrate "the proposed project is reasonable, practical, and will adequately protect public safety and promote the public welfare."[8]

II. Factual Background

Appellant applied for an after-the-fact public-water work permit 2022-2335 (Application) to authorize the placement of fill for the creation of two trails[9] within Public Water 02-520P.[10] Public water 02-520P is over 2,000 acres in size and is mostly located within the Carlos Avery Wildlife Management Area. It is included on the Public Water Inventory map for Anoka County.[11] The trails in question are located adjacent to property owned by Appellant in Section 17, Township 32, Range 22, Anoka County and has a mailing address of 16300 Zodiac Street, Forest Lake, Minnesota 55025.[12] This is Appellant's second application for an after-the-fact public-water work permit for the same trails and fill.

In 2017, the Department received notice from the Coon Creek Watershed District that Appellant may have constructed trails in Public Water 02-520P.[13] The Department investigated and determined that Appellant had placed fill in Public Water 02-520P to

---

[2] Minn. Stat. § 103A.201, subd. 1.
[3] Minn. R. 6115.0160 (2023).
[4] Minn. R. 6115.0150 (2023).
[5] Minn. Stat. § 103G.245 (2022).
[6] Minn. R. 6115.0170, subp. 11; .0190, subp. 2 (2023).
[7] Minn. Stat. § 103G.245, subd. 7a.
[8] Minn. Stat. § 103G.315, subd. 6(a) (2022).
[9] The structures at issue in Appellant's after-the-fact public waters work permit have been alternatively called trails and roads. Appellant placed the fill in question into the wetland to facilitate motor vehicle travel, among other things.
[10] Notice and Order for Hearing at 2 (Nov. 13, 2023).
[11] https://files.Department.state.mn.us/waters/watermgmt_section/pwi/ANOK1_OF2.pdf. *See also* Minn. Stat. § 103G.005, subd. 15 (2022) (defining "public waters").
[12] Declaration (Decl.) of John Gleason ¶ 2. (Jan. 12, 2024).
[13] Decl. of J. Gleason ¶ 3.

create two trails without a permit and for prohibited purposes.[14] Specifically, the Department determined that "fill for the [trail] had been placed within the bed of the public water wetland."[15]

In 2018, the Department issued a Public Waters Restoration Order (2018 Restoration Order) to Appellant.[16] Among other things, the 2018 Restoration Order required Appellant to remove the fill and repair the bed of Public Water 02-520P to its pre-project elevation.[17] It also required that Appellant complete the restoration work by June 28, 2019 unless Appellant exercised his appeal rights.[18] Appellant appealed the 2018 Restoration order on November 30, 2018.[19] The Department affirmed the 2018 Restoration Order on April 12, 2019 and Appellant appealed that decision, requesting a contested case hearing on May 9, 2019.[20]

The Department and Appellant appeared at a contested case evidentiary hearing before Administrative Law Judge Kimberly Middendorf on two issues: (1) Did Appellant place fill below the ordinary high-water level (OHWL) of Unnamed Basin #02-520P- an Anoka County public water—in violation of state law? and (2) Did Appellant demonstrate that he is entitled to an after-the-fact permit to place fill in a public water.[21] The parties stipulated to facts including that:

1. Appellant traveled along the trails by foot and motorized vehicles.

2. In 2009, firefighters used the trails while fighting a fire in the Carlos Avery Wildlife Management Area, which is next to the Appellant's property.[22]

On October 28, 2020, Judge Middendorf issued her decision and recommendation to the Commissioner.[23] Judge Middendorf determined that Appellant placed fill below the OHWL of Public Water #02-520P, in violation of Minn. Stat. § 103G.245 and Minn. R. 6115.0190, subps. 3A and 3F (2023) and without a permit for purposes prohibited by Minn. R. 6115.0190, subp. 3 (2023). In addition, Judge Middendorf found Appellant had failed to establish that he should be issued an after-the-fact permit for the fill. Judge Middendorf recommended the Commissioner affirm the 2018 Restoration Order.[24] Regarding the issue of firebreaks, Judge Middendorf stated "While the roads may be used by wildlife and were once used to fight a wildfire, there is no exception to the rule for such purposes."[25]

---

[14] *Id.*
[15] Decl. of J. Gleason, Exhibit (Ex.) 1 (Public Waters Restoration Order, Oct. 31, 2018).
[16] Decl. of J. Gleason ¶ 4, Ex. 1.
[17] Decl. of J. Gleason ¶ 4, Ex. 1.
[18] Decl. of J. Gleason ¶ 4, Ex. 1.
[19] Decl. of J. Gleason, Ex. 2 (Department Affirmation off Restoration Order, April 12, 2019).
[20] Decl. of Peter J. Farrell, Ex. 1 at 5 (*In the Matter of the Public Waters Restoration Order Issued to Timothy Maciej*, No. 21-2002-36351, Findings of Fact, Conclusions of Law, and Recommendation (Minn. Office Admin. Hearings Oct. 28, 2020)) (Jan. 12, 2024).
[21] *Id.*
[22] *Id.* at 1-2.
[23] *Id.*
[24] *Id.*
[25] *Id.* at 12.

On March 29, 2021, the Commissioner affirmed the 2018 Restoration Order, with the modification that Appellant complete the restoration by July 1, 2022.[26] Particularly, the Commissioner concluded that "Minnesota Rules chapter 6115 does not provide any exemption for fill used to construct or maintain trails used for fire breaks or emergency access."[27] Appellant appealed the final agency decision to the Minnesota Court of Appeals.

On January 10, 2022, the Minnesota Court of Appeals affirmed the 2018 Restoration Order.[28] The Court of Appeals held that the Commissioner did not err by determining that Appellant's placement of fill violated Minn. R. 6115.0190, subp. 3, and that the Department did not err by determining that Appellant was not entitled to an after-the-fact permit to place fill in a public water.[29] The Court of Appeals specifically noted the facts about the 2009 fire that broke out in the Carlos Avery Wildlife Management Area and the use of the trails at issue in the case to fight the fire as firebreaks.[30] The Court of Appeals then addressed and rejected Appellant's "contention that the placement of fill was 'for the purpose of constructing or maintaining firebreaks,' which he asserts is not prohibited under rule 6115.0190."[31] Appellant petitioned the Minnesota Supreme Court for review.[32]

While the appeals over the 2018 Restoration Order were pending, the parties entered a stipulation to continue the stay of enforcement of the 2018 Restoration Order. The original stipulation was signed between the parties and confirmed by the Commissioner on July 12, 2021, while the Court of Appeals case was pending.[33] On March 22, 2022, the parties entered an Amended Stipulation to Stay Enforcement Pending Appeal while the petition for review before the Minnesota Supreme Court was pending.[34] The Amended Stipulation stated that Appellant must complete restoration as stated under the 2018 Restoration Order within 60 days of any Minnesota Supreme Court decision that denied review of the Court of Appeals decision.[35]

The Minnesota Supreme Court denied review of on April 19, 2022, and the Minnesota Court of Appeals entered judgment on May 26, 2022.[36] Under the Amended Stipulation, the deadline for Appellant to complete the work ordered in the

---

[26] Decl. of P. Farrell ¶ 4, Ex. 3 (*In the Matter of the Public Waters Restoration Order Issued to Timothy Maciej*, No. 21-2002-36351, Final Agency Decision (Minn. Dep't Natural Resources March 29, 2021)).
[27] Decl. of P. Farrell, Ex. 3 at 2.
[28] *In the Matter of the Public Waters Restoration Order Issued to Timothy Maciej,* A21-0544, 2022 WL 92962 (Minn. Ct. App. Jan. 10, 2022), *review denied* (Minn. April 19, 2022).
[29] *Id.*
[30] *Id*. at *1, *3.
[31] *Id.* at *6.
[32] Decl. of P. Farrell, Ex. 7 (Minn. S. Ct. Order Den. Rev., Apr. 19, 2022).
[33] Decl. of P. Farrell, Ex. 4 (Stipulation to Stay Enforcement Pending Appeal and Order, July 12, 2021).
[34] Decl. of P. Farrell, Ex. 6 (Amended Stipulation to Stay Enforcement Pending Appeal, March 22, 2022).
[35] *Id.* at 4.
[36] Decl. of P. Farrell, Ex.7, 8 (Minn. Ct. App. May 26, 2022).

2018 Restoration Order was June 18, 2022.[37] Appellant did not complete the restoration by this deadline.[38]

Instead, on July 1, 2022, Appellant applied again for an after-the-fact permit (2022 Application) for the placement of the same fill on the road, already addressed in the original application. The 2022 Application repeated the claim that the "purpose of the project is the placement of stable trails within the indicated area. The trails can serve as firebreaks, or strips of open space that prevent the spread of forest fires."[39] With the 2022 Application, Appellant attached a letter from Robert Quady, dated July 1, 2022 (Quady letter).[40] The Quady letter provided a list of Quady's credentials, including that he was employed by the Department in the Division of Forestry from 1981 until his retirement in 2013. The Quady letter concluded that to mitigate wildfire potential Appellant should "maintain his trails and firebreaks, including the ones crossing low areas."[41]

On July 18, 2022, the Department determined that Appellant had violated the 2018 Restoration Order by failing to complete the restoration by June 18, 2022, but extended the deadline to complete the restoration to July 29, 2022.[42] On November 3, 2023, the Department initiated a separate action in Minnesota District Court to enforce the Restoration.[43]

On January 18, 2023, the Department deemed Appellant's 2022 Application to be complete, and Appellant paid the application fee.[44] The Department requested comments on the 2022 Application on January 23, 2023.[45] The Department received comments from its Ecological and Water Resources Division, its Fish and Wildlife Division, and its Forestry Division.[46] Allissa Reynolds, a Department subject matter expert in "Fuels, Fire behavior, and Wildfire Mitigation" provided comments from the Forestry Division opining that contrary to the Quady letter, the trails at issue in this case "will not function effectively as firebreaks."[47]

On June 8, 2023, the Department issued its Findings of Fact, Conclusions and Order denying the Application. The Department concluded that the Application was:

(1) barred by the doctrine of res judicata;

(2) barred by the doctrine of collateral estoppel; and

---

[37] Decl. of J. Gleason ¶ 7.
[38] *Id.*
[39] *Id.*, Ex. 3 (Public Waters Work Permit Application, July 1, 2022).
[40] Appellant Reply Letter, Ex. 1 (Feb. 2, 2024).
[41] *Id*.
[42] Decl. of P. Farrell, Ex. 4 ¶ 24 (Department Findings of Fact, Conclusions and Order regarding After-the-Fact Permit Application No. 2022-2335, June 8, 2023).
[43] Department's Motion for Summary Disposition at 9 (Jan. 12, 2024); Appellant Reply Letter (Feb. 2, 2024).
[44] *Id.* ¶ 27.
[45] *Id.* ¶¶ 29-30.
[46] *Id.* ¶¶ 32-37.
[47] *Id.* ¶¶ 34-37.

(3) even if it were not barred by the doctrines of res judicata and collateral estoppel, [Appellant] has failed to meet his burden to prove that the proposed project is reasonable, practical, and will adequately protect public safety and promote the public welfare.[48]

On June 30, 2023, Appellant submitted a "demand for public hearing pursuant to Minn. Stat.§ 103G.311."[49] The Commissioner interpreted this as a request to initiate a contested case hearing under Chapter 14 to appeal the Commissioner's decision to deny the application.[50]

III. Appellant's Request for Voluntary Dismissal of Appeal

On January 29, 2024, Appellant submitted a Notice of Dismissal of Application and proposed Order for Dismissal.[51] Appellant claimed he was dismissing the 2022 Application due to allegedly "having commenced and will comply with the 2018 Restoration Order, thus rendering moot Public Waters Work Permit Application."[52]

The Department opposes dismissal.[53] The Department argues that Appellant cannot dismiss a contested case without consent from the agency.[54] In addition, the Department asserts that dismissal of this case is not proper because it would cause substantial hardship to the Department due to Appellant's stated plans to file yet another after-the-fact permit application for the same unlawful roads and fill.[55]

Appellant filed a response to the Department's opposition, arguing that he has not acted in bad faith with respect to the 2022 Application.[56] According to Appellant, because he has taken substantial steps towards compliance, allegedly, with a separate Minnesota District court order, the proceeding before this court is moot.[57]

Minn. R. 1400.6600 (2023) directs motion practice in contested case proceedings. Generally, motions are provided for under the Minn. R. 1400.5100-.8400 (2023), such as a motion for summary disposition.[58] However, when these rules are silent, "the judge shall apply the Rules of Civil Procedure for the District Court for Minnesota to the extent that it is determined appropriate in order to promote a fair and expeditious proceeding."[59]

A voluntary dismissal of a contested case proceeding by one of the parties is not contemplated under the contested case rules, Minn. R. 1400.5100-.8400. Looking to the

---

[48] *Id.*
[49] Notice and Order for Hearing, Allegation 32.; Appellant's Demand for Hearing, on file with OAH.
[50] *Id.*
[51] Appellant Notice of Dismissal of Application (Jan. 29, 2024).
[52] *Id.* at 2.
[53] Department Opposition Letter (Jan. 30, 2024).
[54] *Id.* at 1.
[55] *Id.* at 1-2.
[56] Appellant Reply Letter (Feb. 2, 2024).
[57] *Id.* at 3.
[58] *See* Minn. R. 1400.5500(K).
[59] Minn. R. 1400.6600.

Rules of Civil Procedure, Minn. R. Civ. Pro. 41.01 addresses the standards for voluntary dismissal by a plaintiff. An action may be dismissed by the plaintiff without a court order by filing a notice of dismissal before the adverse party files a motion for summary judgment or, by stipulation signed by all parties to the action.[60] Factors to consider in determining whether to grant a voluntary dismissal include:

(1) the defendant's effort and the expense of trial preparation;

(2) the plaintiff's excessive delay and lack of diligence;

(3) insufficient explanation of plaintiff's need for dismissal; and

(4) whether defendant moved for summary judgment.[61]

A dismissal that would strip a defendant of a defense that would otherwise be available may be sufficient prejudice to justify denial of a motion for voluntary dismissal.[62]

Applying these factors, this Court will not grant Appellant's Notice of Dismissal of Application. Appellant has forced the Department to expend yet more effort occasioned by Appellant's unlawful actions in 2016. The Department expended the effort to respond to Appellant's second permit application and prepare the case before this tribunal. Likewise, the Department has moved for summary disposition. A motion that Appellant did not respond to and made no arguments about at the February 6, 2024 hearing. Appellant's lack of diligence regarding an issue before this court, namely the Department's arguments in its summary disposition motion, is not indicative of good faith.

Finally, Appellant's explanation for the need for dismissal is insufficient. In his Notice of Dismissal of Application, Appellant states he has commenced and will comply with "the 2018 Restoration Order, thus rendering moot Public Waters Work Permit Application #2022-2335."[63] Appellant provides no additional explanation. It is only in response to the Department's objection to the voluntary dismissal that Appellant explains how he plans to comply with a district court order dated December 14, 2023 (Injunction Order) where a district court granted an injunction to DNR to compel Appellant to finally remove the unlawfully-placed fill by April 1, 2024.[64] While Appellant's attorney claims that Appellant has "substantially removed the trails and complied with the Court's order," Appellant provides no evidence of this work or the plans to comply with the Injunction Order. Appellant failed to follow the Amended Stipulation to Stay Enforcement Pending Appeal whereby Appellant agreed to "complete restoration within 60 days of any decision from the Minnesota Supreme Court that denies review."[65] Thus, Appellant's statement

[60] Minn. R. Civ. P. 41.01(a).
[61] *Altimus v. Hyundai Motor Co.*, 578 N.W.2d 409, 411 (Minn. Ct. App. 1998).
[62] *Id.*
[63] Appellant Notice of Dismissal of Application.
[64] Appellant Reply Letter at 2.
[65] Department Motion for Summary Disposition, Ex. 6 (Amended Stipulation to Stay Enforcement Pending Appeal).

about future compliance does not hold much weight and is insufficient for this court to grant a voluntary dismissal. Appellant's request for dismissal is **DENIED**.

IV. Motion for Summary Disposition

A. Summary Disposition Standard

Summary disposition is the administrative law equivalent of summary judgment.[66] A motion for summary disposition shall be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law.[67] The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition in contested case matters.

The function of the Administrative Law Judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine, material factual issues exist.[68] The Administrative Law Judge does not weigh the evidence; instead, the judge views the facts and evidence in a light most favorable to the non-moving party.[69]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[70] A fact is material if its resolution will affect the outcome of the case.[71] If the moving party meets the initial burden, the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.[72] A genuine issue is not a "sham or frivolous" one, and it cannot rely on mere allegations or denials.[73] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[74]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[75] Thus, summary disposition is only proper when no fact issues need to be resolved.[76]

B. Analysis

The Department moved for summary disposition, arguing res judicata and collateral estoppel preclude Appellant's 2022 Application as a matter of law. Res judicata

---

[66] Minn. Stat. § 103G.101.
[67] Minn. Stat. § 103A.201, subd. 1.
[68] Minn. R. 6115.0150.
[69] *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[70] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[71] *O'Malley v. Ulland Bros*., 549 N.W.2d 889, 892 (Minn. 1996) (citing *Zappa v. Fahey*, 245 N.W.2d 258, 259-260 (Minn. 1976)).
[72] *Thiele,* 425 N.W.2d at 583.
[73] *Highland Chateau, Inc. v. Minnesota Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984) (citing *A & J Builders, Inc. v. Harms*, 179 N.W.2d 98, 103 (Minn. 1970)).
[74] Minn. R. Civ. P. 56.05.
[75] *Sauter*, 70 N.W.2d at 353.
[76] *Id*.

and collateral estoppel are related doctrines, but distinct in their effect.[77] Both res judicata and collateral estoppel apply to administrative agency decisions when "an agency acts in a judicial or quasi-judicial capacity."[78]

Res judicata is a finality doctrine that mandates there be an end to litigation. Under res judicata, a party is "required to assert all alternative theories of recovery in the initial action."[79] Res judicata not only applies to all claims actually litigated, but to all claims that could have been litigated in the earlier action.[80] A judgment on the merits constitutes an absolute bar to a second suit for the same cause of action, and is conclusive between parties, not only as to every matter which was actually litigated, but also as to every matter which might have been litigated.[81] Res judicata precludes a subsequent claim when:

(1) the earlier claim involved the same set of factual circumstances;

(2) the earlier claim involved the same parties or their privies;

(3) there was a final judgment on the merits;

(4) the estopped party had a full and fair opportunity to litigate the matter.[82]

Collateral estoppel precludes the re-litigation of issues that are identical to issues previously litigated and that were necessary and essential to the prior judgment.[83] The elements to apply the collateral estoppel doctrine are:

(1) the issue must be identical to one in a prior adjudication;

(2) there was a final judgment on the merits;

(3) the estopped party was a party or was in privity with a party to the prior adjudication; and

(4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.[84]

Both res judicata and collateral estoppel apply to this second after-the-fact public waters work permit case. Appellant's litigation on the 2018 Restoration Order has a final judgment on the merits and the parties were the same as in this proceeding.[85] The facts of the roads and a prior fire in 2009 were thoroughly addressed in the original litigation of

---

[77] *Hauschildt* v. *Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004).
[78] *Graham v. Special Sch. Dist. No. 1*, 472 N.W.2d 114, 115-16 (Minn. 1991).
[79] *Hauschildt*, 686 N.W.2d at 840.
[80] *Id*.
[81] *Id*.
[82] *Id.*
[83] *Aufderhar v. Data Dispatch, Inc*., 452 N.W.2d 648, 650 (Minn. 1990).
[84] *Care Inst., Incorporated-Roseville v. Cty. of Ramsey,* 612 N.W.2d 443, 448 (Minn. 2000).
[85] *See In the Matter of the Public Waters Restoration Order Issued to Timothy Maciej,* A21-0544, 2022 WL 92962 (Minn. Ct. App. Jan. 10, 2022), *review denied* (Minn. April 19, 2022); Decl. of P. Farrell, Exs. 7-8.

the 2018 Restoration Order: Judge Middendorf's 2020 Findings of Fact, Conclusions of Law, and Recommendation ("While the roads may be used by wildlife and were once used to fight a wildfire, there is no exception to the rule for such purposes. Thus, no after-the-fact permit should be issued.");[86] Appellant's Memorandum of Exceptions and Argument ("Judge Middendorf entirely omitted and disregarded in her Findings and Conclusions the fire protection and safety benefits provided by improvements on Roads 1 and 2");[87] the Department's Final Agency Decision ("Conclusion 27: Minnesota Rules chapter 6115 does not provide any exemption for fill used to construct or maintain trails used for fire breaks or emergency access."); and the Minnesota Court of Appeals ("We are not persuaded otherwise by Maciej's contention that the placement of fill was 'for the purpose of constructing or maintaining firebreaks,' which he asserts is not prohibited under rule 6115.0190.").[88]

Appellant now points to footnote 5 of the Court of Appeal's decision as the basis for the 2022 Application. In footnote 5, the Court of Appeals stated:

> Under rule 6115.0191, filling for purposes not specifically listed must comply with Rule 6115.0190, subparts 2-5, and proposals must come with information showing that '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 that 'the proposal will adequately protect public safety and promote the public welfare.' Minn. R. 6115.0191, subp. 8. Building a firebreak could theoretically be a permittable reason for placing fill if a landowner applied for a permit and met the requirements of subpart 8.[89]

While this footnote leaves the possibility of a circumstance where a firebreak could be a reason for placing fill in public waters, Appellant fails to acknowledge that the Court of Appeals specifically held that his first after-the-fact application was properly denied despite his firebreak claims. No facts in Appellant's 2022 Application establish any change in circumstances from the facts the Court of Appeals analyzed. The question of firebreaks has been thoroughly addressed in multiple venues since Appellant's violation of law was discovered in 2017.

Therefore, the Administrative Law Judge concludes that the Motion for Summary Disposition should be **GRANTED**.

---

[86] Decl. of P. Farrell, Ex. 1.
[87] Decl. of P. Farrell, Ex. 2 (Timothy Maciej's Memorandum of Exceptions and Argument, dated Dec. 30, 2020).
[88] *In the Matter of the Public Waters Restoration Order Issued to Timothy Maciej,* A21-0544, 2022 WL 92962 (Minn. Ct. App. Jan. 10, 2022), *review denied* (Minn. April 19, 2022).
[89] *Id.* at *9 fn. 5.

V. Conclusion

For the reasons stated above Appellant's Notice of Dismissal of Application is **DENIED.** In addition, the Department's Motion for Summary Disposition is **GRANTED**.

B. J. C.