

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of Hibbing Taconite
Mine and Stockpile Progression and
Williams Creek Project Specific
Wetland Mitigation

**ORDER DENYING COUNTY'S
REQUEST TO REVISE THE ISSUES
PRESENTED FOR HEARING**

On February 17, 2015, in accordance with the Second Prehearing Order in this matter, Respondents Lake of the Woods County; Lake of the Woods Soil and Water Conservation District; Mike Hirst, in his capacity as a member of the Lake of the Woods Soil and Water Conservation District Technical Evaluation Panel; and Josh Stromlund, in his capacity as Land & Water Planning Director for Lake of the Woods County (collectively, County) filed a request to revise the Statement of Issues to include five additional issues for hearing in this matter.

On March 3, 2015, the Department of Natural Resources (Department) filed a response in opposition to the County's proposed statement of issues. On March 3, 2015, Northern Conservation, LLC, and Cliffs Mining Company (jointly, Cliffs) also filed a response in opposition to the County's proposed statement of issues.

John C. Kolb, Rinke Noonan, appeared on behalf of the County. Fiona B. Ruthven, Assistant Attorney General, and Sherry Enzler, General Counsel, appeared on behalf of the Department. Susan K. Wiens and William P. Hefner, Environmental Law Group, appeared on behalf of Cliffs.

Based upon the written submissions of the parties and the record in this matter, and for the reasons set forth in the Memorandum below,

IT IS HEREBY ORDERED as follows:

1. The issues presented for hearing in this matter have been adequately identified in the June 27, 2014, Notice and Order for Hearing.
2. The County's request that the contested case hearing encompass not only the three issues identified in the Notice and Order for Hearing but also five additional issues is **DENIED**.

3. The hearing in this matter will proceed as previously scheduled on **July 20 - 24, 2015**, at **9:30 a.m.** in the courtrooms of the Office of Administrative Hearings, 600 North Robert Street, First Floor, St. Paul, Minnesota 55101.

Dated: April 8, 2015

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

MEMORANDUM

This contested case proceeding involves wetland-mitigation plans submitted by Cliffs for a project located on property in Lake of the Woods County known as the Williams Creek site. The wetland-mitigation project is part of a mining reclamation plan approved in connection with a permit to mine issued by the Department. The plan was submitted to the Department by Cliffs on January 21, 2014 (2014 Plan), and included a proposal to use approximately 13 acres of the Williams Creek Site as replacement wetlands for wetland impacts at Cliffs' Hibbing Taconite Mine and Stockpile Progression.¹

On April 28, 2014, the Commissioner of the Department of Natural Resources (Commissioner) determined that the 2014 Plan satisfied the applicable requirements and issued a notice of decision approving the Plan.² The County objected to the Commissioner's determination that the Plan was adequate and, on June 2, 2014, the Department received the County's request for a contested case hearing.³ On June 27, 2014, the Department issued a Notice and Order for Hearing initiating the present proceeding before the Office of Administrative Hearings (OAH).

The Notice and Order for Hearing issued by the Department set forth the following statement of the issues presented:

1. Was the Commissioner's approval of Cliffs' Williams Creek Wetland Mitigation Project was [sic] issued in conjunction with a valid permit to mine and an approved mining reclamation plan pursuant to the requirements of Minn. Stat. § 103G.222, subd. 1 (2012)?
2. If there are surplus wetland mitigation credits developed by Cliffs at Williams Creek Wetland Mitigation Project, can they be used to mitigate mining-related wetland impacts at Cliffs' mining operations at Northshore Mining Company, United Taconite and Cliffs Erie, pursuant to Minn. R. 8420.0930, subp. 4A (2013) without being deposited in a state wetland bank?

¹ Notice and Order for Hearing (June 27, 2014) at ¶¶ 23-32.

² *Id.* at ¶ 33.

³ *Id.* at ¶ 34.

3. Did the Commissioner have cause to approve the Williams Creek Wetland Mitigation project pursuant to Minn. Stat. § 103G.222, subd. 1 (2012) and Minn. R. 8420.0930 (2013)?⁴

On August 20, 2014, the Administrative Law Judge granted Cliffs' petition to intervene in this proceeding.

During the Prehearing Conference held in this matter on January 16, 2015, the County noted that it believed the hearing should encompass additional issues beyond the three issues set forth in the Notice and Order for Hearing. The Department and Cliffs objected to the inclusion of additional issues. After discussion with counsel, the Administrative Law Judge determined that: (1) the County would be permitted to file a statement by February 17, 2015, regarding its position that the issues presented in this matter should be revised or clarified; and (2) the Department and Cliffs would be permitted to file responses within ten working days of their receipt of the County's submissions.

County's Proposed Issues

In its February 17, 2015, submission, the County argues that the Department's articulation of the issues on appeal in the Notice and Order for Hearing does not encompass all of the bases the County cited in support of its request for a contested case hearing. The County requests that, in addition to the three issues noted in the Notice and Order for Hearing, the Administrative Law Judge consider the following five issues:

4. Did the Commissioner act arbitrarily in characterizing the Williams Creek Wetland Mitigation Project as a project-specific replacement plan under a valid permit to mine and approved mining reclamation plan rather than as a wetland banking application?
5. Was it lawful for the Commissioner to use permit-to-mine wetland replacement procedures, which are neither published nor promulgated as rules by the Commissioner, rather than the currently promulgated Wetland Conservation Act rules and replacement plan procedures?
6. Was it lawful for the Commissioner to approve any surplus wetland mitigation credits as part of the Williams Creek Wetland Mitigation Project under the approvals process of Minn. R. 8420.0930 (2013)?
7. Does the agency record support a finding that the Williams Creek Wetland Mitigation Project will not result in wetland types or characteristics that do not naturally occur in the landscape area in which the replacement will occur pursuant to Minn. R. 8420.0522, subp. 5B (2013)?

⁴ *Id.* at 7.

8. Does the agency record support a finding that the Williams Creek Wetland Mitigation Project is ecologically suitable and sustainable?⁵

The County contends that the Department has improperly attempted to narrow the issues in this proceeding. It asserts that it is entitled to a full administrative hearing on all of the issues it mentioned in its request for a contested case hearing, and asks that the Administrative Law Judge permit the hearing to encompass all eight issues identified above.

Department's Response

In its response to the County's submission,⁶ the Department asserts that the Notice and Order for Hearing does not improperly narrow the issues the County raised in its appeal letter, but merely clarifies those issues. The Department argues that the issues it identified in the Notice and Order for Hearing already encompass the additional issues the County seeks to include.

The Department contends that the majority of the five proposed issues fall within Issue 3, which states that the one of the issues for hearing is whether the Commissioner "had cause" (i.e., a proper basis) to approve the wetland mitigation project pursuant to Minn. Stat. § 103G.222, subd. 1, and Minn. R. 8420.0930. In addition, the Department asserts that the County's Proposed Issue 4 (regarding whether the Commissioner acted arbitrarily when it characterized the project as an project-specific replacement plan under a permit to mine/mining reclamation plan rather than treating it as a wetland banking application) is separately encompassed within Issue 1, and Proposed Issue 6 (regarding whether it was lawful for the Commissioner to approve any surplus wetland mitigation credits under Minn. R. 8420.0930), is separately encompassed within Issue 2.

The Department also maintains that, by phrasing the proposed issues in the manner it has, the County is improperly seeking to have the Administrative Law Judge apply a standard of review in this matter that is used by appellate courts under Minn. Stat. § 14.69 (2014). For example, the Department emphasizes that the County's Proposed Issue 4 asks whether the Department acted "arbitrarily" in its characterization of the project; Proposed Issues 5 and 6 ask whether the Department's decision was based upon "unlawful procedure;" and Proposed Issues 7 and 8 ask whether the agency record supports a particular finding. The Department asserts that these are not standards that the Administrative Law Judge should apply during the contested case proceeding itself.

The Department further argues that the County's request to expand the issues is procedurally improper because only the agency has the authority to identify the issues for hearing in a contested case proceeding. The OAH rules governing contested case hearings provide that "[t]he agency shall issue the notice of and order for hearing, unless the substantive law requires it to be issued otherwise."⁷ Under the rules

⁵ Letter to Administrative Law Judge from John C. Kolb (Feb. 17, 2015).

⁶ Letter to Administrative Law Judge from Fiona B. Ruthven (March 3, 2015).

⁷ Minn. R. 1400.5400 (2013).

applicable to this matter, the Department is required to “identify its statutory authority to hold the hearing and to take the action proposed,” and to set forth “[a] statement of the allegations or issues to be determined together with a citation to the relevant statutes or rules allegedly violated or which control the outcome of the case.”⁸ The Department points out that the contested case rules allow only the agency to make amendments to the Notice and Order for Hearing,⁹ and contends that non-agency parties may not interpose new issues in contested case proceedings without agency approval.

Cliffs’ Response

Cliffs also opposed the County’s request to expand the statement of issues in this matter.¹⁰ Cliffs contends that the three issues currently identified in the Notice and Order for Hearing are written sufficiently broadly enough to encompass all of the issues the County suggests are lacking. In addition, Cliffs maintains that permitting the addition of the County’s five new issues will cause unnecessary confusion over the application of the current three issues.

Like the Department, Cliffs asserts that the County’s Proposed Issues 4, 7, and 8 are already subsumed within, and will be examined under, current Issues 1 and 3. The Cliffs maintain that both Proposed Issue 4 and current Issue 1 seek to determine whether the approval of Cliffs’ wetland mitigation project was made in accordance with the Wetland Conservation Act. According to Cliffs, whether its mitigation project was appropriately found to be project-specific and whether such a determination was “arbitrary” necessarily requires a review of the same law and rules mentioned in Issue 1. Because Proposed Issue 4 is duplicative of Issue 1, Cliffs contends it should not be included as a separate issue for the contested case hearing.

Cliffs also asserts that Proposed Issues 7 and 8 are subsumed under Issue 3. Proposed Issues 7 and 8 ask the Administrative Law Judge to determine whether the Department appropriately applied Minn. R. 8420.0522 when it approved the Williams Creek Wetland Mitigation Project. Issue 3 asks whether the Commissioner had cause to approve the Williams Creek Mitigation project pursuant to Minn. Stat. § 103G.222, subd. 1, and Minn. R. 8420.0930. Minnesota Rules part 8420.0930 provides that approved wetland replacement plans must meet the principles and standards for replacing wetlands under Minn. R. 8420.055-.0528 (2013).¹¹ Cliffs argues that Issue 3 encompasses virtually all potential challenges available to a party contesting a wetland restoration project, including whether the project meets the specific requirements of Minn. R. 8420.0522.

Cliffs maintains that, because the County’s Proposed Issues 4, 7 and 8 fall within the expansive parameters of Issues 1 and 3, the County’s request to identify additional issues for the contested case hearing should be denied. Cliffs also contends that the County’s Proposed Issue 5 (regarding whether it was lawful for the Commissioner to

⁸ Minn. R. 1400.5600, subps. 2C, 2D (2013).

⁹ *Id.*, subp. 5.

¹⁰ Letter to Administrative Law Judge from Susan K. Wiens (March 3, 2015).

¹¹ Minn. R. 8420.0930, subps. 2 and 3.

use wetland replacement procedures that are “neither published nor promulgated as rules”) is “misplaced and entirely unsupported in the law.”¹² Cliffs argues that Minn. R. 8420.0930, subp. 4, already makes it clear that the procedures required for permits to mine are applicable here. In any event, Cliffs asserts that the evidence presented at the contested case hearing will provide the Administrative Law Judge with “an adequate opportunity to review the process applied by the DNR” when it approved the mitigation project.¹³

Finally, Cliffs asserts that the County’s Proposed Issue 6, which asks the Administrative Law Judge to determine whether it was lawful for the Commissioner to approve surplus wetland mitigation credits as part of the wetland mitigation project, is subsumed in Issue 2. Cliffs argues that the only difference between the County’s Proposed Issue 6 and current Issue 2 is the implication that the Commissioner has already approved the wetland mitigation credits. Cliffs argues that the Commissioner has yet to approve any surplus mitigation credits at the Williams Creek Wetland Mitigation Project and that, therefore, this proposed issue is encompassed in Issue 2.

Ruling

After consideration of the arguments presented by the parties, the Administrative Law Judge is persuaded that the Issues identified in the Department’s Notice and Order for Hearing adequately encompass the issues proposed to be included by the County and that it is unnecessary to revise the Statement of Issues to include the five proposed by the County. Ultimately, it is evident that Issues 1-3 require consideration of whether the Commissioner acted lawfully and in compliance with Minn. Stat. § 103G.222, Minn. R. 8420.0930, and other applicable statutes and rules in approving the wetland replacement plan, as well as the further question of whether the Project meets applicable replacement standards. The five topics mentioned by the County thus will fall within the issues to be addressed at the hearing.

The Administrative Law Judge further finds that adding the wording of the County’s proposed additional issues to the issues stated in the Notice and Order for Hearing would confuse rather than clarify the matters to be addressed during the hearing. The County’s proposed issues include terms that apparently were drawn from Minn. Stat. § 14.69. That statute governs the scope of a court’s judicial review of a *final* agency decision *following* a contested case proceeding. Among other things, the statute directs courts conducting such review to consider whether the agency’s final decision was “arbitrary or capricious,” “made upon unlawful procedure,” or “unsupported by substantial evidence in view of the entire record.”¹⁴ Whether the Commissioner acted “arbitrarily” or the decision is supported by “substantial evidence” are not arguments to be considered by the Administrative Law Judge at the contested case hearing stage. Rather, those are appellate standards that are ultimately to be applied

¹² Letter from S. Wiens (March 3, 2015) at 3.

¹³ *Id.*

¹⁴ Minn. Stat. § 14.69(c)-(f) (providing that, upon judicial review, the court may reverse or modify an agency’s decision if it is made upon unlawful procedure; affected by other error of law; unsupported by substantial evidence in view of the entire record; or arbitrary or capricious.)

by a reviewing court after the contested case is concluded, the final agency decision is issued, and an appeal is filed. In contrast, at the contested case stage, a preponderance of the evidence standard is generally applied to determine whether the party “proposing that certain action be taken” has proven the facts at issue.¹⁵

For all of these reasons, the County’s request to revise or clarify the issues set forth in the Notice of and Order for Hearing is denied.¹⁶

B. L. N.

¹⁵ Minn. R. 1400.7300, subp. 5 (2013) (“The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard. A party asserting an affirmative defense shall have the burden of proving the existence of the defense by a preponderance of the evidence. In employee disciplinary actions, the agency or political subdivision initiating the disciplinary action shall have the burden of proof.”).

¹⁶ While the Administrative Law Judge agrees that the County’s proposed issues are already adequately encompassed in the issues set forth in the Notice and Order for Hearing, the Administrative Law Judge is not persuaded by the Department’s argument that only an agency has the authority to identify the issues for hearing in a particular case. Administrative Law Judges assigned to a contested case proceeding at times find it necessary or helpful to simplify, clarify or re-frame the issues to be determined in a contested case proceeding, and this Administrative Law Judge is not aware of any decisions challenging their authority to do so. In addition, Administrative Law Judges are expressly authorized under the contested case rules to issue rulings on motions; grant or deny a demand by a non-agency party for a more definite statement; make preliminary, interlocutory, or other orders as deemed appropriate; and “do all things necessary and proper to the performance” of their duties. See Minn. R. 1400.5500 A, D, J, Q; Minn. R. 1400.6600 (2013).