

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

**RULING ON CLIFFS' MOTION TO
QUASH SUBPOENAS**

On May 14, 2015, Northern Conservation, LLC, and Cliffs Mining Company (jointly, Cliffs) filed a Motion to Deny Respondents' Requests for Subpoenas.¹ On May 28, 2015, 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 Response to Cliffs' Motion. On June 1, 2015, Cliffs filed a Reply Memorandum in Support of its Motion.

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 of Natural Resources (Department). Susan K. Wiens and William P. Hefner, Environmental Law Group, appeared on behalf of Cliffs.

Based upon the record in this matter, and for the reasons set forth in the Memorandum below,

IT IS HEREBY ORDERED as follows:

1. Cliffs' Motion to Quash the BWSR employee subpoenas is **DENIED**.
2. Cliffs shall be afforded an opportunity to take the depositions of Board of Water and Soil Resources (BWSR) employees Ken Powell, Les Lemm and Dale Krystosek prior to the hearing in this matter.

¹ Cliffs filed its Motion to Deny Respondents' Requests for Subpoenas two weeks after the subpoenas were issued. During the May 22, 2015, oral argument on the Department's Motion for Partial Summary Disposition and the County's Motion to Compel, the Administrative Law Judge indicated that Cliffs' motion would be treated as a Motion to Quash the Subpoenas.

3. As noted in the June 18, 2015, Ruling on the County's Motion to Compel Discovery, a prehearing conference shall be held by telephone conference call in this matter on **Tuesday, June 23, 2015, at 3:30 p.m.**, to discuss whether any adjustments to the schedule in this matter are necessary. To participate, parties must call **1-888-742-5095** at that time and, when prompted, enter conference code **371 152 3559#**. If that time is inconvenient, parties should notify Kendra McCausland, Legal Assistant, immediately.

Dated: June 19, 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 plans include 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.²

On April 24, 2015, the County requested that subpoenas be issued for the appearance of three employees of the BWSR to serve as witnesses in this contested case hearing.³ The three subpoenaed BWSR employees are Ken Powell, Wetland Banking Coordinator; Les Lemm, Wetland Conservation Act Coordinator; and Dale Krystosek, Wetland Special Project Lead. In its subpoena request, the County indicated that the proposed testimony of these individuals would relate to the following issues:

1. Ken Powell: Mr. Powell is familiar with the Williams Creek Wetland Mitigation restoration site and project and will provide testimony relevant to the suitability and viability of the restoration site for the development of replacement wetlands and the characteristics of wetlands that naturally occur in the landscape area. Mr. Powell will also provide testimony relevant to the wetland banking procedures under the Wetland Conservation Act.
2. Les Lemm: Mr. Lemm is familiar with the Williams Creek Wetland Mitigation restoration site and project and will provide testimony relevant to the suitability and viability of the restoration site for the development of replacement wetlands and the characteristics of wetlands that naturally occur in the landscape area. Mr. Lemm will also provide testimony relevant to the wetland banking procedures,

² Notice and Order for Hearing (June 27, 2014) at ¶¶ 23-32.

³ County's Subpoena Requests (filed April 24, 2015).

the principles and standards for replacing wetlands, and the construction certification and monitoring procedures under the Wetland Conservation Act.

3. Dale Krystosek: Mr. Krystosek is familiar with the Williams Creek Wetland Mitigation restoration site and project and will provide testimony relevant to the suitability and viability of the restoration site for the development of replacement wetlands that naturally occur in the landscape area, and the impacts of drainage adjacent to Williams Creek site. Mr. Krystosek will also provide testimony relevant to the principles and standards for replacing wetlands and the construction certification and monitoring procedures under the Wetland Conservation Act.⁴

On April 28, 2015, Chief Administrative Law Judge Tammy Pust issued the requested subpoenas compelling the appearance of Messrs. Powell, Lemm and Krystosek at the contested case hearing in this matter.

Cliffs' Objections

Cliffs objects to the issuance of the subpoenas for the three BWSR employees. Cliffs contends that the testimony to be provided by these three witnesses is outside the realm of common knowledge and, as such, must be obtained from a qualified expert with sufficient experience, skill, knowledge, and education. Cliffs maintains that the County is essentially seeking to elicit expert witness testimony from lay witnesses without complying with the expert witness disclosure requirements of the Second Prehearing Order (Order) in this matter.⁵ The Order required the County to "identify expert witnesses and serve expert witness statements for experts it intends to call in its case-in-chief, or for matters for which it has the burden of proof."⁶ Cliffs points out that both it and the Department have filed timely expert witness disclosures in compliance with the Order. The County, on the other hand, did not file any expert witness disclosures despite indicating in its responses to Cliffs' interrogatories that it intends to elicit "expert opinion testimony" through the BWSR employees.⁷

Cliffs asserts that the proposed testimony from the three BWSR employees at issue concerns scientific and technical standards for wetland development, drainage and natural hydrology of the Williams Creek site, and related issues concerning the suitability and viability of the site to support restored wetlands. Cliffs contends that the testimony is clearly outside the realm of common knowledge and that the County is attempting to disguise expert witnesses as lay witnesses in order to avoid the written expert witness disclosure requirements. Cliffs argues that it is prejudicial to permit the

⁴ *Id.* See also Affidavit of Susan Wiens, Exhibit A (County's Response to Cliffs Interrogatory Requests), Response to Interrogatory Request 5.

⁵ SECOND PREHEARING ORDER (January 20, 2015).

⁶ *Id.*

⁷ See Aff. of S. Wiens, Ex. A (County's Response to Cliffs Interrogatory Requests), Response to Interrogatory Requests 4 and 5.

County to provide expert testimony through the BWSR employees when Cliffs has not received a written report of the proposed expert testimony and has not had the opportunity to depose the witnesses.

Accordingly, Cliffs maintains that the subpoenas should be quashed or, in the alternative, the County should be compelled to file the appropriate written expert disclosures for the three employees and Cliffs should be provided the opportunity to depose the employees without delaying the current hearing schedule.

Cliffs also argues that the subpoenas should be quashed because the County seeks to introduce expert witness testimony not previously disclosed in discovery. According to Cliffs, the County indicated for the first time in the subpoena requests that Messrs. Powell, Lemm and Krystosek will testify to the “characteristics of wetlands that naturally occur in the landscape area” and that Mr. Krystosek will testify to the “principles and standards for replacing wetlands and the construction certification and monitoring procedures under the Wetland Conservation Act.” Cliffs contends that the County did not disclose any of this information during the discovery period, and thereby deprived Cliffs of the opportunity to depose these witnesses regarding their intended testimony.

County’s Response

The County argues that Cliffs’ motion to quash the subpoena is without merit and should be denied. The County asserts that it did not retain the BWSR employees to provide expert testimony within the meaning of Rule 702 of Minnesota Rules of Evidence. Instead, according to the County, the employees are “lay expert witnesses” who will testify based on facts they perceived in the course of their employment with BWSR.⁸

The County maintains that the BWSR employees are personally familiar with the Williams Creek Wetland Mitigation site and project, and that their opinions are based on facts to which they have each been exposed as a result of their employment with BWSR. The County asserts that each of the BWSR employees played a part in the review of the Williams Creek Wetland Mitigation Project approved by the DNR. As a result, each employee is being subpoenaed to testify about his first-hand knowledge and perception of the project. While these employees do have expertise, the County states that they are not witnesses who were “retained” to give opinions on hypothetical questions, nor do they regularly provide testimony as part of their employment duties. Instead, the BWSR employees are fact witnesses. The County argues further that Cliffs was properly notified of its intent to elicit their testimony as fact witnesses and that any request on the part of Cliffs to depose these individuals now after discovery has closed should be denied.

⁸ County’s Memorandum in Opposition to Motion at 6 (May 28, 2015).

Rules of Evidence

Rule 702 of the Minnesota Rules of Evidence states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.⁹

Expert witness testimony is required where the subject matter of the testimony is outside the realm of common knowledge so that expert testimony can assist the trier of fact in reaching its decision.¹⁰ However, the mere fact that a witness is capable of being qualified as an expert by virtue of his education, training, or experience does not serve as a valid objection to his expression of lay opinion testimony.¹¹ A written report is required of all witnesses who intend to provide expert testimony if the witness is “retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony.”¹²

In contrast, Rule 701 of the Minnesota Rules of Evidence states:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinion or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.¹³

The Committee Comment following Rule 701 notes:

The rule is consistent with existing practice in Minnesota. The rule permits testimony by means of opinion and inference when it is based on firsthand knowledge and will be helpful to an effective presentation of the issues. Because the distinction between fact and opinion is frequently impossible to delineate, the rule is stated in the nature of a general principle, leaving specific application to the discretion of the trial court.¹⁴

⁹ MINN. R. EVID. 702.

¹⁰ *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 762 (Minn. 1998).

¹¹ *Duluth Lighthouse for the Blind v. C.G. Bretting Mfg., Co., Inc.*, 199 F.R.D. 320, 323 (D. Minn. 2000).

¹² MINN. R. CIV. P. 26.01(b)(2).

¹³ MINN. R. EVID. 701.

¹⁴ *Id.*, Committee Comment – 1977.

Under Minnesota case law, lay witness testimony is generally limited to inferences and opinions drawn from first-hand knowledge.¹⁵

Analysis

Under Rule 702 of the Minnesota Rules of Evidence, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify “in the form of an opinion or otherwise” regarding scientific, technical, or other specialized knowledge to assist the trier of fact to understand the evidence or to determine a fact in issue. The basis for expert opinions “acquired or developed in anticipation of litigation or for trial” must be disclosed under the Minnesota Rules of Civil Procedure.¹⁶ An expert consulted prior to the time the party could anticipate litigation or before preparation for trial is not subject to the expert disclosure requirements but rather is covered by the discovery rules relating to non-expert witnesses.¹⁷ Pursuant to Rule 701 of the Minnesota Rules of Evidence, non-expert lay witnesses may also provide opinion testimony if the testimony is “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.”¹⁸

The essential difference between a qualified expert witness and an ordinary witness who may also have expert credentials is that a qualified expert may testify not only as to first-hand knowledge, but may answer hypothetical questions based on facts made known to the expert at or before the hearing.¹⁹ As noted previously, the mere fact that a witness could be qualified as an expert based on education, training or experience does not preclude that witness from expressing lay opinion testimony.²⁰ Similarly, the fact that the present hearing concerns highly technical and scientific wetland mitigation issues does not necessarily require a finding that the BWSR employees are expert witnesses within the scope of Rule 702.

The record indicates that the County did not retain the three BWSR employees to provide expert testimony in this matter and it does not appear that their testimony will be based on information that was acquired or developed in anticipation of litigation or for this hearing. Rather, the three are employed by BWSR and are personally familiar with the Williams Creek Wetland Mitigation project. Based on the County’s subpoena requests and its answers to interrogatories, their proffered testimony regarding the suitability and viability of the Williams Creek restoration site for the development of replacement wetlands appears to be primarily factual, based on the witnesses’ first-hand knowledge, and thus is exempt from the disclosure requirements of Minn. R. Civ.

¹⁵ See, e.g., *ADT Sec. Servs., Inc. v. Swenson*, 276 F.R.D. 278, 320 (D. Minn. 2011) (if a witness is not testifying as an expert, then testimony expressing opinions or inferences is limited to those rationally based on the witness’s own perception).

¹⁶ MINN. R. CIV. P. 26.02(e).

¹⁷ *Id.*, Advisory Committee Note – 1975.

¹⁸ MINN. R. EVID. 701.

¹⁹ See *Hartzell Manufacturing, Inc., v. American Chemical Technologies, Inc.*, 899 F. Supp. 405, 409 (D. Minn. 1995) (chemist employed by a third party with personal knowledge of the development of water glycol hydraulic fluids used in operating the plaintiff’s machinery is not an expert witness).

²⁰ *Id.* at 408 (citing *Farner v. Paccar, Inc.*, 562 F.2d 518, 529 (8th Cir. 1977)); *Duluth Lighthouse for the Blind v. C.G. Bretting Mfg., Co., Inc.*, 199 F.R.D. 320, 323 (D. Minn. 2000).

P. 26.02(e). Testimony confined to these general matters does not run afoul of the rules governing expert disclosure. Cliffs' motion to quash the subpoenas based on the County's alleged violations of the expert witness disclosure requirements is denied.

The Administrative Law Judge also is not persuaded by Cliffs' argument that the subpoenas should be quashed because the County is seeking to introduce expert witness testimony not previously disclosed in discovery. Cliffs asserts that the County's April 24, 2015, subpoena requests were the first time the County indicated that Messrs. Powell, Lemm and Krystosek will testify to the "characteristics of wetlands that naturally occur in the landscape area" and that Mr. Krystosek will testify to the "principles and standards for replacing wetlands and the construction certification and monitoring procedures under the Wetland Conservation Act." However the record demonstrates that the County did, in fact, disclose in its March 30, 2015, Response to Interrogatory No. 5 that these witnesses would testify generally to the "suitability and viability" of the Williams Creek restoration site and the replacement standards under the Wetland Conservation Act.²¹

The deadline for the completion of discovery in this matter was April 1, 2015, just a few days after the County disclosed its intent to elicit "expert opinion testimony" from the BWSR employees. To avoid any possibility of prejudice, the Administrative Law Judge will allow Cliffs the opportunity to take the depositions of Messrs. Powell, Lemm and Krystosek prior to the hearing in this matter.

B. L. N.

²¹ Aff. of S. Wiens, Exhibit A (County's Response to Cliffs Interrogatory Requests), Response to Interrogatory Request No. 5.