

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Saint Cloud
Wastewater Treatment Plant
NPDES Permit.

**ORDER ON MOTIONS
OBJECTING TO
SUPPLEMENTAL
EVIDENCE**

The above-entitled matter is before Administrative Law Judge Richard C. Luis on motions objecting to supplemental evidence filed by the Minnesota Center for Environmental Advocacy (MCEA). The motions were filed by the Minnesota Pollution Control Agency staff (MPCA staff) on February 12, 2003 and the City of Saint Cloud (City) on February 17, 2004. MCEA filed its response on February 23, 2004. The record in these motions closed with the filing of MCEA's response.

No hearing was held on these motions. The record on these motions closed with the last responsive filing by MCEA.

Robert B. Roche, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota, 55101-2127, represents the MPCA staff. Christopher M. Hood, Flaherty & Hood, P.A., 444 Cedar Street, Suite 1200, St. Paul, Minnesota, 55101, represents the City of St. Cloud. Janette K. Brimmer, Staff Attorney for the MCEA, 26 East Exchange Street, Suite 206, St. Paul, Minnesota, 55101-1667, represents MCEA.

Based upon all the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS ORDERED:

1. The City's and MPCA staff's objections to MCEA's Supplemental Testimony of Mark Ten Eyck are DENIED, except for objections to Ten Eyck Exhibit 4, which are GRANTED. The admitted testimony is allowed into the record for the limited purpose of addressing the MPCA's practices regarding the inclusion of a 1 mg/L limitation in NPDES permits.
2. The City's and MPCA staff's objections to pages 7 through 9 of Dick Osgood's testimony and Osgood Exhibits 1a and 1b are GRANTED.

3. The City's and MPCA staff's objections to MCEA's Supplemental Testimony of Dr. Richard Wedlund are DENIED, except for objections to pages 22-24, which are GRANTED.
4. The MPCA staff's objection to the testimony of John Enblom is DENIED, except for the objection to page 9, which is GRANTED.
5. The City's objections to Dr. Engstrom's supplemental testimony are DENIED, except for the objections to pages 11 and 14, which are GRANTED
6. The City's objections to Oberts' testimony are DENIED, except for the objection to pages 4-5 which is GRANTED.
7. The MCEA's request to reconsider the exclusion of the testimony of James Klang is DENIED.

Dated: February 27, 2004.

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

MEMORANDUM

This matter is awaiting hearing, pursuant to the remand from the Minnesota Court of Appeals for contested case hearing.^[1] In its remand order, the Court of Appeals described the proper application of the phosphorus rule as follows:

We agree with the MPCA's arguments that the Statement of Need and Reasonableness requires a measurement of individual impact prior to application of the phosphorus rule and the phosphorus rule cannot be triggered merely by measuring the cumulative impact of several discharge sources upon a lake or reservoir or by presuming a source that discharges phosphorus has a measurable effect on a lake or reservoir.^[2]

At the scheduling conference held in this matter on January 29, 2004, MCEA requested the opportunity to file supplemental testimony. That request was granted, subject to the instruction the parties "should be guided by the previous evidentiary rulings in this matter regarding relevance to ensure that only admissible evidence is submitted."^[3]

MCEA filed supplemental testimony on February 10, 2004. MPCA staff and the City objected to portions of the supplemental testimony on a number of grounds, and MCEA has responded to the objections.

As ruled in the prior evidentiary order, the essential showing to be made in this matter is “the presence or absence of a measurement of individual impact on a lake or reservoir.”^[4] The prior order sets out a description of issues raised in the earlier phase of this contested case that are irrelevant, stating:

The Court of Appeals has stated expressly that the phosphorus rule is not applied where only cumulative impacts are demonstrated. Similarly, the Court of Appeals has ruled explicitly that no presumption exists that an upstream discharger of phosphorus necessarily has a measurable effect on a downstream lake or reservoir.^[5]

MCEA maintains that the evidence being provided fits within the categories of 1) new data, and 2) “further honing and evolution of all the parties’ arguments.”^[6] The arguments of the parties will be assessed on a witness-by-witness basis.

Ten Eyck

MCEA filed supplemental testimony from Mark Ten Eyck that sets out the history of the adoption of the phosphorus rule (Ten Eyck Ex. 1), documents from the NPDES permit application from the City of Greenwood (Ten Eyck Ex. 2), a similar document from the application for Rush City (Ten Eyck Ex. 3), and the Environmental Assessment Worksheet (EAW) for the City of Otsego (Ten Eyck Ex. 4),

MPCA staff objected to Ten Eyck Exhibits 2, 3 and 4 as outside the scope of the supplementation allowed in this matter. MPCA staff and the City each noted that the contents of the exhibits do not provide any information about phosphorus levels in the areas at issue in this proceeding. The City objected to the filing of these documents now, since they were available in 2002. The City maintains that there is inadequate foundation for the documents, since MCEA submitted only portions of the permit documentation for each municipality. MCEA maintains that the documents show that MPCA staff have supported imposition of phosphorus limits without modeling of individual impacts on downstream waters.^[7]

As discussed in the earlier evidentiary order, the Court of Appeals based its decision on an interpretation of the phosphorus rule (that the Court of Appeals attributed to the MPCA) that was described as follows:

The MPCA's interpretation of the rule further strikes us as unreasonably inflexible. There is undisputed evidence in the record that the St. Cloud treatment facility has been responsible for between 15% and 51% of the phosphorus entering the Coon Rapids Dam Pool. Yet under the MPCA's interpretation, this contribution would not be considered a measurable "effect" warranting application of the phosphorus effluent limit unless the St. Cloud treatment facility were the sole contributor. We believe this

result is inconsistent with the goal of the phosphorus strategy to provide a workable framework for the way phosphorus concerns will be considered in the permitting process.^[8]

The MPCA staff has denied that any such interpretation of the phosphorus rule has ever been made. The Ten Eyck Exhibits 2 and 3 address explicitly how the 1 mg/L standard of the phosphorus rule can be adopted voluntarily by a NPDES permit applicant. These two exhibits also show inferentially when the MPCA refrains from imposing the phosphorus rule.^[9] Since the Court of Appeals ruling has raised the issue of MPCA interpretation of the phosphorus rule, evidence regarding the prior application of the rule is relevant to an issue that should be addressed in this contested case. Since this issue is newly raised, the prior existence of the documents is immaterial.

Ten Eyck Exhibit 4 is the EAW for the City of Otsego. MCEA asserts that the document impeaches MPCA staff assertions that cumulative downstream impacts are not considered.^[10] The EAW indicates that the wastewater discharge would be directly to Otsego Creek. MPCA identified Otsego Creek as a Class 7 limited resource water.^[11] The EAW states, “The proposed effluent limits were established by the MPCA after evaluating the project and the stream classification **needed to protect Otsego Creek.**”^[12] While MPCA set effluent limits for the discharger, there is no reference to any lake or reservoir that would trigger the phosphorus rule. The limit imposed on the Otsego permit was intended to protect a sensitive receiving water where the phosphorus rule, by its terms, would not apply. The subject matter of Ten Eyck Exhibit 4 is irrelevant to the issues present in this proceeding. Therefore, the City’s and MPCA staff’s objections to the exhibit are granted.

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Osgood

MCEA filed supplemental testimony by Dick Osgood that added some information to his existing testimony, struck out some prior testimony, and added two exhibits (Osgood Exs. 1a and 1b). The City and MPCA staff objected to the Osgood supplemental testimony as irrelevant to the issues in this contested case. The basis for the objection is that the supplemental testimony all goes to the cumulative effects of phosphorus. MCEA has characterized these objections as disagreements over the precision of modeling used by MPCA staff (known as BATHTUB modeling) and differing approaches to determination of downstream effects on lakes and reservoirs. Such disagreements between experts, MCEA maintains, is the reason for contested case proceedings.^[13]

The purpose of allowing supplemental testimony is to afford the parties the opportunity to update the record, prior to the hearing, with newly discovered evidence. In addition, since the Court of Appeals has clarified the issues presented in this matter, the parties are entitled to supplement their cases with testimony directed toward these issues. The Osgood supplemental testimony does neither. The Court of Appeals has stated that the phosphorus rule is triggered where, at a minimum, modeling shows that

imposition of the rule will reduce the phosphorus level by a measurable amount in a downstream lake or reservoir.^[14] The Osgood supplemental testimony does no modeling, makes no prediction regarding phosphorus reduction downstream, and maintains that the reduction in phosphorus must come before any reduction in the effects of phosphorus will be observed.

The immediacy of any effect on a lake or reservoir is irrelevant to the issues in this matter. Evidence meeting the standard set out by the Court of Appeals is whether some form of modeling will show that a particular discharger has a measurable effect on a downstream lake or reservoir.^[15] The Osgood supplemental testimony does not address the issues presented in this proceeding. The City and the MPCA staff's objections to this testimony are granted.

Wedlund

MCEA submitted supplemental testimony by Richard Wedlund discussing cumulative impacts of phosphorus discharges on downstream waters. Included in the supplemental testimony is documentation of NPDES permit applications by the municipalities of Worthington (Wedlund Ex. 7a), McGregor (Wedlund Ex. 8), Rush City (Wedlund Ex. 9), Hinkley (Wedlund Ex. 10), and Cannon Falls (Wedlund Ex. 11). The City and MPCA staff assert the same objections that were advanced against the Ten Ecyk exhibits.

The Wedlund exhibits are admitted for the same limited purpose as the Ten Ecyk exhibits, that is, to demonstrate the MPCA's practices in addressing phosphorus concerns from point source dischargers. The Cannon Falls document, Wedlund Ex. 11, appears to express dual reasons for imposing a phosphorus limit. The Cannon River discharge is directly to an outstanding value resource water (OVRW), which is a stated basis for the limit.^[16] Were that the only reason, this document would be irrelevant to the issues in this proceeding. But the document also asserts that the phosphorus rule applies to the discharge. This assertion is due to an interpretation by Dr. Wedlund of the MPCA's Phosphorus Strategy that "affects" include "aggregate, cumulative basin-wide loading rather than solely on individual source loading."^[17] How this interpretation came to be expressed in an assessment is a relevant issue to be explored in this contested case proceeding. Whether this interpretation is consistent with the Court of Appeals holdings on this issue is also an issue to be explored.

MPCA staff objected to Dr. Wedlund's testimony, at pages 21-24. This testimony criticized the use of the BATHTUB model for determining the impact of a particular discharger on a downstream lake or reservoir. That testimony, MPCA staff asserts, is outside the scope of the supplemental testimony permitted in this matter. MCEA responded that the prior practices of the MPCA staff demonstrated that BATHTUB was not necessary to impose the phosphorus rule limit on a discharger and that the model was not a good tool to demonstrate affects on a lake or reservoir.

No witness has identified any BATHTUB modeling that has been done to determine what percentage of the phosphorus present downstream is attributable to the

City's discharge. The absence of such modeling in the record makes criticism of that model irrelevant to the issues in this proceeding. More fundamentally, criticism of a model is not the same as providing the evidence that the model would produce. MPCA staff's objection to Dr. Wedlund's testimony is granted, beginning with "Because ..." at the top of page 22 and continuing to the top of page 24.^[18] That testimony is stricken.

MPCA staff objected to Dr. Wedlund's testimony on page 9 as "regarding presumed effects from phosphorus contribution." The complained of testimony asks Dr. Wedlund to assume that the City's discharge is responsible for between 15 to 51 percent of phosphorus in the Coon Rapids Pool and asks if that is considered an effect under the phosphorus rule. Dr. Wedlund responds that the discharge will affect that water body due to the discharge's impact on total phosphorus concentration. MCEA maintains that Dr. Wedlund's testimony should be accepted as contrary to the MPCA and City's positions and "therefore relevant and necessary to the full consideration of this case."^[19]

Merely holding a contrary opinion does not render expert opinion relevant in a contested case. The contrary opinion must relate to an issue in the proceeding and must be based upon evidence that can be assessed. The testimony is structured as a hypothetical, assuming that a certain percentage of the phosphorus located in the Coon Rapids Pool is attributable to the City. Dr. Wedlund can, consistent with the standards governing expert testimony, provide his opinion regarding the impact of that amount of phosphorus. Of course, the factual basis for the hypothetical and for the conclusion will be subject to exploration on cross-examination. Also to be determined is whether the Coon Rapids Pool is a reservoir within the meaning of the phosphorus rule. MPCA staff's objection to page 9 of Dr. Wedlund's supplemental testimony is denied.

MPCA staff objected to Dr. Wedlund's supplemental testimony on pages 18 and 19. That testimony describes Dr. Wedlund's opinion regarding how MPCA staff has addressed cumulative impacts under both the phosphorus rule and the Phosphorus Strategy. The testimony does not distinguish clearly between dischargers that trigger the phosphorus rule, and those who fall under the Phosphorus Strategy. The Phosphorus Strategy is directed explicitly toward reductions in cumulative loading to affected waters. The relevance of this testimony is the same as presented by the Cannon Falls document.^[20] As with that document, Dr. Wedlund's testimony on this subject will be assessed in light of the **St. Cloud** and **Owatonna/Faribault** decisions.

Klang

MCEA asserts that, due to the small amounts of phosphorus at issue in the Greenfield, Rush City, and Otsego permits, the cumulative impact testimony of James Klang should admitted, despite that testimony having been stricken. The three permits cited had a voluntary limit (Greenfield), no limit (Rush City), or a discharge to an OVRW and not a lake or reservoir (Otsego). MCEA has not explained how either of the two Court of Appeals decisions relevant to this matter (**St. Cloud** and **Owatonna/Faribault**) show that cumulative effects form a basis for imposing the phosphorus rule. Since the

relevance standards set out in those two cases have not been met, the exclusion of the Klang testimony will not be reversed.

Engstrom/Oberts

Due to the anticipated unavailability of Dr. Engstrom, MCEA has proposed to substitute Gary L. Oberts, P.G., as the witness who will adopt Dr. Engstrom's direct testimony and respond to cross-examination of that testimony. The City objected to the substitution, asserting that Oberts lacks the background and experience sufficient to permit him to evaluate and adopt Dr. Engstrom's testimony. The City also asserted that the Engstrom testimony was based upon idiosyncratic experience that Oberts does not share.^[21] The City objected on the basis of hearsay to the adoption of Dr. Engstrom's conclusion based on a statement by Steve Heiskary of the MPCA.

MCEA has provided Oberts' curriculum vitae.^[22] On its face, Oberts' training and experience appears to qualify him to adopt the objective portions of Dr. Engstrom's testimony. The scope of Oberts' knowledge can be explored in detail at the hearing.

Hearsay evidence can be accepted in contested case proceedings where that evidence "is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs."^[23] The subject testimony is one person's adoption of another person's opinion, based on a conclusory statement of a third person for which no basis in fact is provided. It is double hearsay offered to establish what may be an ultimate fact in this proceeding. This ALJ is reluctant to admit even "single" hearsay as to an ultimate fact (phosphorus level contribution). Therefore, this ALJ concluded that the allegation as to what Heiskary believes is not the type of evidence that is sufficiently reliable to be admitted in this proceeding. The supplemental testimony of Dr. Engstrom on page 11 is stricken.^[24]

The City also objected to a portion of Dr. Engstrom's supplemental testimony on page 14 that expresses his belief that a direct relationship exists between the percentage of phosphorus in a lake and any deleterious effect caused by phosphorus. No scientific support has been advanced for such a principle. The City correctly points out that an earlier objection on this basis was denied, since no witness made such an express statement. The statement in Dr. Engstrom's testimony is the type of bald statement that lacks any cited scientific support. Based on the standards for accepting expert testimony, it is appropriate to strike this portion of Dr. Engstrom's testimony.^[25]

Oberts' testimony at pages 4-5 contains a statement regarding the "long-term impact of St. Cloud's discharge" and compares that other "ecoregion levels" for setting phosphorus goals. The City objected to the statement as being outside the scope of the issues in this proceeding. The issue to be determined in this matter is whether the phosphorus discharge by the City has a measurable effect on a lake or reservoir. Long-term effects are appropriately addressed in subsequent NPDES permits. "Ecoregion levels" are irrelevant to the issues in this proceeding. The testimony regarding long-term effects on pages 4-5 is stricken.

Enblom

MCEA filed supplemental testimony from John Enblom, Aquatic Biologist Senior with the Division of Ecological Services with the Department of Natural Resources (DNR). MPCA staff had originally objected to Enblom's testimony being received as being contradictory to the DNR position. That objection had been denied. MPCA staff renewed the objection, asserting that the new information has the same purpose, that is to contradict the official DNR position on this issue. MCEA responded that Enblom was not contradicting the DNR position, but rather clarifying and elaborating the DNR's decision-making process.^[26]

The application of the Court of Appeals decision in *National Audubon Society v. MPCA*^[27] to this situation was fully discussed in the prior evidentiary order in this matter. The supplemental testimony clarifies that DNR relied upon MPCA staff in making its decision regarding the phosphorus strategy and details the actions taken in arriving at that decision. This is the sort of information that is legitimately examined in the course of a contested case proceeding. The information is not attempting to indicate that DNR has or should have taken a different position. The information merely details how carefully DNR examined the issues here. MPCA staff's motion to strike this portion of Enblom's supplemental testimony is denied.

MPCA staff also objected to the new testimony on page 9 of Enblom's supplemental testimony as presuming adverse impacts. The wording of the testimony is unambiguous in expressing that Enblom has no quantifiable information linking the City's phosphorus discharge to any particular effects in a lake or reservoir. Enblom "cannot conceive of how, under these facts, [the City's discharge] is not [having an effect]."^[28] Further, Enblom states "Phosphorus grows algae and St. Cloud's phosphorus has to be having that effect in both these bodies of water."^[29] This is presuming that a source discharging phosphorus has a measurable effect on a lake or reservoir. The Court of Appeals has unambiguously held that the phosphorus rule is not triggered by such a presumption.^[30] MPCA staff's objection to page 9 of Enblom's supplemental testimony is granted.

Withdrawn Testimony

The City objected to some of the testimony stricken from MCEA's witnesses' testimony. The City asserted that a party cannot voluntarily withdraw testimony at this stage of the proceeding. MCEA responded that it was entitled to withdraw any testimony that it saw fit. MCEA is correct. Any prefiled testimony can be withdrawn up to the time that the testimony is accepted as an exhibit at the hearing. Further, any party that recognizes that an issue is no longer contested should, as a matter of good practice, inform other counsel and the ALJ of that fact, and, where appropriate, withdraw the witness testimony on that issue. Counsel should be sure, however, that the testimony will not be needed regarding a different issue before withdrawing any testimony.

R.C.L.

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- [1] **City of St. Cloud Wastewater Treatment Facility Request**, C3-03-75 (Minn.App. September 12, 2003).
- [2] **City of St. Cloud Wastewater Treatment Facility Request**, *supra*.
- [3] ALJ Letter, January 30, 2004.
- [4] ALJ Order on Motions in Limine, at 5 (December 17, 2003).
- [5] *Id.* at 5-6.
- [6] MCEA Response, at 3.
- [7] MCEA Response, at 6.
- [8] **City of St. Cloud Wastewater Treatment Facility Request**, *supra*.
- [9] See, e.g. Ten Eyck Ex. 2, at 7 (comparing the strikeout language with the underlined language). See also, Ten Eyck Ex. 3, at 5-6 (relying on phosphorus modeling to determine impact on a lake or reservoir). The use of Minnesota Department of Natural Resources Bulletin 25 is also an issue in this proceeding. The information in Ten Eyck Ex. 3 is relevant to this issue.
- [10] MCEA Response, at 10.
- [11] Ten Eyck Ex. 4, at 10.
- [12] *Id.* (emphasis added).
- [13] MCEA Response, at 17.
- [14] **ITMO the City of Owatonna's NPDES/SDS Proposed Permit Reissuance for the Discharge of Treated Wastewater** (A03-331), at 15 (Minn. App. January 6, 2004).
- [15] **ITMO the City of Owatonna's NPDES/SDS Proposed Permit**, at 15.
- [16] Wedlund Ex. 11.
- [17] *Id.*, at 2.
- [18] The testimony prior to that stricken merely describes the BATHTUB model and is relevant to this matter. The testimony after the stricken portion identifies the exhibits that are allowable.
- [19] MCEA Response, at 22.
- [20] Wedlund Ex. 11.
- [21] City Objections, at 4.
- [22] Oberts Ex. 1.
- [23] Minn. Rule 1400.7300, subp. 1.
- [24] The testimony is found in the Engstrom Supplemental Testimony, at 11.
- [25] The scientific technique must be generally accepted within the relevant scientific community, and the particular evidence introduced must have a scientifically reliable foundation. **Goeb v. Tharaldson**, 615 N.W.2d 800, 810 (Minn. 2000) (reaffirming adherence to **Frye-Mack** standard after **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579 (1993)).
- [26] MCEA Response, at 14.
- [27] 569 N.W.2d 211 (Minn.App. 1997).
- [28] Enblom Supplemental Testimony, at 9.
- [29] *Id.*
- [30] **City of St. Cloud Wastewater Treatment Facility Request**, *supra*.