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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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People to Save the Sheyenne River, Inc.,
the Peterson Coulee Outlet Association,
the National Wildlife Federation and the
Government of the Province of Manitoba,

STATE OF NORTH DAKOTA

Appellants,

**Supreme Court No. 20070118
District Court No. 06-C-00252**

v.

North Dakota Department of Health, and
North Dakota State Water Commission,

Appellees.

APPEAL FROM THE DISTRICT COURT
RAMSEY COUNTY, NORTH DAKOTA
NORTHEAST JUDICIAL DISTRICT

HONORABLE MICHAEL G. STURDEVANT

BRIEF OF APPELLEE NORTH DAKOTA
STATE WATER COMMISSION

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I. INTRODUCTION

This appeal concerns a dispute over the modification of a water quality discharge permit for the Devils Lake Outlet, a flood control project authorized by the North Dakota Legislature (1999 N.D. Sess. Laws ch. 535, § 3). Since 1993, Devils Lake has risen nearly 25 feet in elevation, resulting in extensive flood damage to property around the lake. (Initial Certificate of Record (“ICR”) 126-27).¹ The flood control project is part of the state’s response to the high level of Devils Lake. (ICR 126).²

II. STATEMENT OF THE FACTS

This Court has previously affirmed the North Dakota Department of Health’s (“Department”) decision to grant the Water Commission (“Commission”) a North Dakota Pollution Discharge Elimination Permit (“NDPDES Permit”) for the Devils Lake Outlet (“Outlet Project”). People to Save the Sheyenne River, Inc. v. North Dakota Dep’t of Health, 2005 ND 104, 697 N.W.2d 319. Although the Court has previously described the nature, scope, and history of the Outlet Project in People to Save the Sheyenne River, 2005 ND 104 at ¶¶ 2-7, certain aspects of the original NDPDES Permit process and Outlet Project’s geographic location within the Sheyenne River Basin are relevant to this appeal.

A. Project location and relevant permit requirements.

The Outlet Project is designed to pump water from Devils Lake into the Sheyenne River southeast of Maddock, North Dakota. See maps showing location of Outlet Project. (ICR 108, 116); (Certificate of Record for the Modified Permit or Devils Lake Modified (“DLM”) 5, 612). Because maintenance of the

¹ The ICR is the original Certificate of Record compiled for People to Save the Sheyenne River, Inc. v. North Dakota Dep’t of Health, 2005 N.D. 104, 697 N.W.2d 319.

² The Commission adopts by reference the Health Department’s brief in this appeal. N.D.R.App.P. 28(j).

Sheyenne River's water quality is the primary focus of the NDPDES Permit, the Commission is required to monitor the effects of mixing Devils Lake water with the Sheyenne River by sampling the river water upstream and downstream of where Devils Lake water enters the river. (ICR 397). The names of the two monitoring sites are Flora (upstream) and Bremen (downstream). (ICR 395-410); (DLM 5, 612). The original NDPDES Permit restricted the concentration of sulfate at Bremen to 300 mg/l and allowed the Commission to release water into the Sheyenne River "during the open-water season, the months May through November" as long as the effects of adding Devils Lake water did not cause the level of sulfate at Bremen to rise above 300 mg/l. (ICR 397-98). The same regulatory concept applied to the Total Suspended Solids ("TSS") restriction, which was set at 100 mg/l. Id.

B. Water quality and computer modeling.

As explained above, the original NDPDES Permit incorporated a numeric water quality constraint for sulfate. The numeric standard for the Sheyenne River is 450 mg/l. N.D. Admin. Code § 33-16-02.1-09(3)(b). (ICR 65). To work within these requirements, a computer-based water quality model was used to estimate the potential downstream effect of discharging Devils Lake water into the river (ICR 2447-49) and to provide the regulatory framework for the NDPDES Permit. (ICR 134, 190).

The computer modeling was conducted by the United States Army Corps of Engineers ("Corps") and United States Geological Survey ("USGS") in conjunction with the federal government's Final Environmental Impact Statement ("FEIS") for a proposed federal outlet from Devils Lake to the Sheyenne River. (ICR 134, 190, 2435, 2441, 2447, 2466); see complete FEIS (ICR 2408-3193). The name of the computer model used by the Corps was HEC5-Q. See

summary discussion of HEC5-Q (ICR 1522-1547); complete discussion of HEC5-Q water quality model at Appendix A of FEIS (ICR 2447-2534).

C. 2005-2006 years of operation.

In 2005, the first year of operation, the Outlet Project was limited to a discharge rate of 50 cubic feet per second ("cfs"). (ICR 364). The Outlet Project operated in August of that year, but high sulfate levels in the Sheyenne River prevented further operation. (DLM 504-22, 523). The natural baseline sulfate concentration (sulfate concentration in the river without outlet operation) in the Sheyenne River at Bremen and Flora was at or exceeded the state water quality standard for that class of stream. (DLM 43, 514, 516, 617-21). The sulfate concentration at Bremen was briefly low in the spring of 2006 but rose as high as 900 mg/l in September 2006. (DLM 617). The baseline sulfate concentration near Flora behaved similarly except that it rose as high as 1200 mg/l. (DLM 618-25).

D. Post-operation investigation.

The State Engineer, interested in why sulfate levels at Flora and Bremen were higher than estimated, requested that Commission staff investigate the phenomena. (DLM 1, 7). Two Commission employees subsequently conducted an investigation and developed a report entitled Sources and Processes Affecting Dissolved Sulfate Concentrations in the Upper Sheyenne River (hereinafter "Report" or "CSR"). (DLM 5-64). The CSR provides a review of the sources and processes affecting sulfate concentrations in the upper Sheyenne River and assesses their relationship to the regulatory framework created for the Outlet Project. (DLM 7).

One of the conclusions within the CSR is that the assumptions in the Corps' HEC5-Q water quality model produced water quality results or estimates that wrongly portrayed the baseline water quality in the Sheyenne River at Flora

and Bremen. (DLM 43). The CSR further concludes that based upon the new water quality information derived from sampling at Flora and Bremen, the regulatory restrictions in the permit are not representative of the water quality in that particular stretch of the river. (DLM 43-45). The conclusion is supported by water quality sampling conducted by the USGS on the Sheyenne River in September 2005. (DLM 27-29).

The record contains a section of materials produced by the USGS, otherwise known as the Sheyenne River Synoptic Water-Quality Sampling 2005-06. (DLM 609-14). The documents include a short background statement, a graph showing sulfate measurements on the Sheyenne River near Warwick from 1972 to 2006, a map showing the locations of the synoptic sampling sites, and the USGS's preliminary findings. Id.

E. Contents of Commission request.

Based upon the new information summarized in the CSR, the Commission filed two requests with the Department to modify the NDPDES Permit. (DLM 1-3). The first request outlined the conclusions of the CSR and proposed that the sulfate restrictions in the NDPDES Permit be raised from 300 mg/l at Bremen to 450 mg/l. (DLM 2). Alternatively, the Commission requested that the Outlet Project be allowed to operate when the sulfate concentration - after mixing - is greater than 300 mg/l but no more than 15 percent above the baseline concentration at Bremen. Id. The Commission also requested that the Department expand the operating period to allow operation if the ice is off Devils Lake and the Sheyenne River and flooding is not a concern. (DLM 3). The Commission later amended its first request asking that the 15 percent change be in place only when the baseline sulfate concentration in the Sheyenne River exceeds 260 mg/l. (DLM 4). This formula would permit discharges from the Outlet Project into the Sheyenne River when the combined concentration of

sulfate in the Sheyenne River is the greater of 300 mg/l sulfate, or has an increase of 15 percent in the sulfate concentration. Id. In addition, the Commission requested that the TSS limit be removed or revised. Id.

F. Permit modification.

The Department held a public comment hearing under the authority of N.D.C.C. § 61-28-04. (DLM 147-94). On August 16, 2006, the Department's Chief Health Officer concurred with the staff recommendation's approval of the NDPDES Permit. (DLM 429-32). And the Department formally approved the modification on August 17, 2006. (DLM 433-48). The permit was modified as follows: 1) the sulfate limitation was adjusted to allow for a 15 percent increase above base conditions not to exceed 450 mg/l; 2) any reference to specific months was removed to allow the Outlet Project to operate during the "open water season"; and 3) the TSS limitation was eliminated. (DLM 429-48).

III. ARGUMENT

A. Standard of review.

A district court judgment may be reviewed by the Supreme Court in the same manner as provided in N.D.C.C. § 28-32-46. See N.D.C.C. § 28-32-49. Although the Court reviews the agency's decision, the district court's analysis is entitled to respect if its reasoning is sound because the legislatively mandated district court review cannot be ineffectual. Elshaug v. Workforce Safety and Ins., 2003 ND 177, ¶ 12, 671 N.W.2d 784 (citing Kraft v. State Bd. of Nursing, 2001 ND 131, ¶ 10, 631 N.W.2d 572). The Commission is satisfied with Appellant's³ ("Manitoba") statement of the standards in N.D.C.C. § 28-32-46. N.D.R.App.P. 28(c)(5).

³ Appellants include The People to Save the Sheyenne, the National Wildlife Federation, the Peterson Coulee Outlet Association, and the Government of the Province of Manitoba ("Manitoba").

Permit hearings conducted for the purpose of receiving public comment under N.D.C.C. ch. 61-28 are not adjudicative proceedings under N.D.C.C. ch. 28-32. N.D.C.C. § 23-01-23; see also People to Save the Sheyenne, 2005 ND 104 at ¶ 19. Thus, the Department is not required to issue findings of fact and conclusions of law under N.D.C.C. § 28-32-39. People to Save the Sheyenne, at ¶ 21. A court's review of such non-judicial decision-making is limited to whether a decision is arbitrary, capricious, or unreasonable. Id. at ¶ 22. An "arbitrary and capricious standard is more restrictive than substantive evidence standard because under [an] arbitrary and capricious standard [a] court must uphold [an] agency if there is any rational basis for [the] decision." Id. at ¶ 24 (citing 5 Stein, Mitchell, Mezines, Administrative Law § 43.02[6] (2004)).

In People to Save the Sheyenne, this Court explained that because agency decisions such as the Department's NDPDES Permit process are not adjudicative proceedings, the Department's decision is entitled to even greater deference than a proceeding after an adjudicative proceeding. 2005 ND 104, at ¶ 24. And, the deferential standard is particularly applicable where, as here, the subject matter is complex or technical and involves agency expertise. Id. Finally, if the rationale for the agency's decision is discernable from the record, the court's standard is satisfied. Id. at ¶ 22 (citing Little v. Traynor, 1997 ND 128, ¶¶ 12-17, 565 N.W.2d 766).

B. Regulatory framework for modifying NDPDES permits.

The primary authority for issuing water quality permits is vested with the U.S. Environmental Protection Agency ("EPA"). The EPA, however, has delegated this authority in North Dakota to the Department. See generally 33 U.S.C. § 1342(b); N.D. Admin. Code ch. 33-16-01. The Department has promulgated rules for issuing and modifying NDPDES permits in N.D. Admin. Code art. 33-16. Section 33-16-01-25 allows a permit to be modified for cause

and section 33-16-01-25(2) incorporates the causes listed in 40 C.F.R. § 122.62(a).

Under 40 C.F.R. § 122.62(a)(2), permits may be modified during their terms if the director receives new information, provided the information was not available at the time the permit was issued (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance. A permit may also be modified to “correct technical mistakes, such as errors in calculation, or mistaken interpretations of law made in determining permit conditions.” 40 C.F.R. § 122.62(a)(15).

C. The Department properly modified the time constraints and total suspended solids parameter in the NDPDES Permit and properly complied with its anti-degradation requirements.

Manitoba argues that the Department was not justified in modifying the TSS standard, the operational time period, and that the Department failed to follow its anti-degradation requirements. The Commission adopts the Department's responses to these arguments.

D. The Department properly modified the sulfate limitations in the Commission's NDPDES Permit based upon new information.

Manitoba argues on appeal that the Department's modification of the NDPDES Permit was unjustified because the modification failed to meet the “for cause” standard in the Department's regulations. Manitoba's Brief, at 23. The District Court's conclusion with respect to this issue was as follows:

Since data integral to the conclusions of the Report was quite literally not previously available due to the fact that the gages were not established at the time of the granting of the Permit, this court concludes that as a matter of common sense the resultant information should be viewed as “new” – even without deferring to the expertise of the Department.

(App. at 37). The District Court further reasoned that the Department did not act in an arbitrary, capricious or unreasonable manner (citing to the Department's Findings 2.0, 3.0 and 4.0 at MCR or DLM 431) and that the court "cannot and will not attempt to substitute its judgment for the expertise of the Department as memorialized in its Fact Sheet and Findings and Conclusions." (App. at 38). The District Court affirmed the Department's modification of the Permit to allow for a 15 percent increase above the base conditions of sulfate in the Sheyenne River not to exceed 450 mg/l. Id.

The Commission believes that the District Court's decision is sound and should be affirmed, but the following argument is provided to further support the decision. The Department explained in Finding 2.0 that it modified the NDPDES Permit based upon the receipt of new information:

The specific conductance⁴ measurements at the Flora and Bremen gages were established during 2005. Prior to 2005, there were limited data available at the point of insertion. In the process of developing a relationship between specific conductance and sulfate concentration, it was recognized that the natural background levels for sulfate at the point of insertion were higher and more variable than known previously.

(DLM 431); see discharge monitoring reports that include sulfate and specific conductance at same date for Flora, the Outlet, and Bremen (DLM 504-608). The Department's response to comments (DLM 450-51) repeats this finding and adds that "[t]he modification request included detailed information on the factors influencing sulfate and mineral chemistry in the Sheyenne River near the point of

⁴ Specific conductance, also referred to as conductivity or electrical conductivity, measures the water's ability to conduct electricity. Conductivity can be measured with direct, continuous reading instruments that provide real time information. Since the conductivity of water is based on its salt content (TDS), a relationship between the conductivity and the TDS or a component of the dissolved solids such as sulfate can be developed. This allows a continuous, real time estimate of TDS and sulfate content. (DLM 120).

discharge which was not available when the permit was first considered.” (DLM 450).

The CSR further provides valuable and reasoned context for the Department’s conclusion. The report explains that the Corps’ HEC5-Q water quality model did not consider or include any water quality data for the Flora and Bremen locations on the Sheyenne River because no information was available. (DLM 10, 43). The assumption programmed into the computer model, however, was that the Sheyenne River’s water quality upstream of Warwick was uniformly identical to the river’s water quality at Warwick. Id. See also FEIS (ICR 2459, 2475) (stating that inflow quality between Peterson Coulee [outlet insertion point into Sheyenne River] and Warwick was assumed to be the same as that at the Sheyenne River headwaters, which was set at Highway 30). And during the first year (2005) of water quality sampling, actual data indicated that the baseline sulfate concentrations at Flora and Bremen were much higher than near Warwick. (DLM 27, 37, 39). Based upon data collected at Flora and Bremen and the USGS synoptic sampling, the authors of the report described the 300 mg/l constraint in the NDPDES Permit at Flora and Bremen as “over aggressive.” (DLM 27). In other words, the baseline condition used to establish the regulatory framework of the NDPDES Permit, derived from the Sheyenne River’s water quality at Warwick, assumed that the water quality at Flora and Bremen was much better than actual conditions indicated. These conclusions and all of the following new information were submitted to the Department or relied upon by the Commission to justify its request to modify the permit:

1. 2005 Flora and Bremen water chemistry data, including TDS and sulfate, collected five days per week. (DLM 504-608).
2. The 2005 USGS synoptic sampling of ten gauging locations on the upper Sheyenne River and its tributaries; used to further identify

sulfate sources upstream of the Outlet Project insertion point and their effects downstream of the Outlet Project. (DLM 609-14).

3. The analysis of sulfate sources in upstream soils in the Commission report based on soil chemistry data acquired by Western Plains Consulting Inc., in the fall of 2005, and on soil maps first assembled and analyzed with reference to river salinization in early 2006. (DLM 12-24, 60-64).
4. Analyses of river electrical conductivities (a surrogate for dissolved solids) versus flow regimes under different climatic patterns. (DLM 23, 52-57).
5. Analysis of groundwater chemistry, using a local well survey, as an indicator of the differences in chemistry of local base-flow water sources between Flora and Bremen and Warwick. (DLM 30-32).
6. Analysis of the chemistry of a surface water source, Trappers Coulee, in the North Branch of the Sheyenne River, to help explain differences in North Branch and South Branch contributions of dissolved sulfate at Flora and Bremen. (DLM 31-32).

The new information submitted to the Department justifies the District Court's conclusion that the Department properly followed its regulatory requirements for modifying the NDPDES Permit.

E. Manitoba agrees that the Department relied upon information that was not available when the NDPDES Permit was issued.

Manitoba admits that there are now "additional, specific data points derived after August 22, 2003, from the Flora and Bremen gauges." Manitoba's Brief, at 30. As explained above, the Department primarily relied upon this data to modify the permit; thus the Court need not address this issue any further. (DLM 431). Manitoba's argument, however, is that the Department should have known that conditions at Flora and Bremen were different than at Warwick based upon existing data trends and inferences. Stated differently, Manitoba believes that this Court should rely upon inferences and trends as opposed to the Department's analysis of new, hard data from the USGS and sampling at Flora and Bremen.

Manitoba argues that the USGS Synoptic Sampling Report supports its position that data was available prior to the issuance of the NDPDES Permit in 2003:

The USGS Report demonstrates that an increase in the sulfate levels in the Sheyenne River occurred 'in the late 1990s,' essentially between 1994 and 1999, and that this rise represented a marked and sustained departure from the entire previous twenty year period, during which sulfate levels had remained relatively stable (AR 610, 611, Figure 1). Further the USGS Report shows that, since the late 1990s, while high sulfate levels have *persisted*, there has not been an appreciable change in such levels.

Manitoba's Brief, at 28. The primary weakness in Manitoba's argument is that the only sulfate levels demonstrated or illustrated in Figure 1 of the USGS Report are for the area of the upper Sheyenne River near Warwick. (DLM 611). Even if the Court believes that data collected near Warwick between 1994 and 1999 is relevant, whether it represents a "marked and sustained departure" from the "entire" previous 20-year period is debatable; the 1994-1999 Warwick data have similarities to other earlier periods of increasing sulfate levels that were immediately followed by lower values. Id. And if a so-called "trend" constitutes "available information," the pre-1999 variability illustrated in the graph may not constitute a trend because the variability is very large. Id. Also, an upward trend may only be established through the existence of post-2000 data – where the entire sample set shifts into the upper range. Id. That being the case, there is scant evidence in the graph through 1999 that would suggest the likelihood of sustained high values observed after 2000. Id.

In addition, Manitoba argues that water quality information from a USGS gauge at Harvey was also available to the Commission and Department prior to issuance of the NDPDES Permit. Manitoba's Brief, at 32. And, that the

Department could have “logically inferred” what sulfate levels at Flora and Bremen would be because “[s]ulfate concentrations at Flora and Bremen are almost an exact approximation of the mean of Harvey and Warwick. . . .” Id. Again, Manitoba is asking the Court to rely upon inferences and apparent trends to determine that the information supplied by the Commission was not new when in fact the Commission supplied data collected only after the permit was issued.

Manitoba also argues that “[t]he available data could easily have been reviewed by the Department, just as it reviewed data from Flora and Bremen in 2006 to support the modification of the permit, without the resort to complex modeling or scientific calculations.” Manitoba’s Brief, at 30. Nowhere, however, does the law penalize or restrict the Department from modifying an NDPDES permit if the agency allegedly fails to extrapolate or infer certain facts and data at the outset of the permit process which it discovers or confirms after a permit is issued.

Finally, Manitoba states that “[i]t appears from the record that the North Dakota agencies chose to ignore relevant data in 2003.” Manitoba’s Brief, at 30. Manitoba’s support for this statement is a comment from a private citizen named Dr. Gary Pearson, a doctor of veterinary medicine. Id. The record relied upon as the source of Manitoba’s argument is solely the opinion of Pearson. Manitoba can adopt Pearson’s comments, but the record does not support Manitoba’s position that North Dakota agencies ignored data; it is only Pearson’s opinion within the record that “supports” this position.

IV. CONCLUSION

The Department’s decision to modify the NDPDES Permit for the Devils Lake Outlet should be affirmed.

Dated this 12th day of July, 2007.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

People to Save the Sheyenne River, Inc.,)
the Peterson Coulee Outlet Association,)
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Appellants,)

v.)

North Dakota Department of Health, and)
North Dakota State Water Commission,)

Appellees.)

**AFFIDAVIT OF SERVICE
BY MAIL**

**Supreme Court No. 20070118
District Court No. 06-C-00252**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Peggy Graf states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 12th day of July, 2007, I served the attached **BRIEF OF APPELLEE NORTH DAKOTA STATE WATER COMMISSION** upon William Delmore, Joseph J. Cichy, Daniel E. Buchanan, James Murphy, Eldon Greenberg, and Richard Wegman by placing true and correct copies thereof in envelopes addressed as follows:

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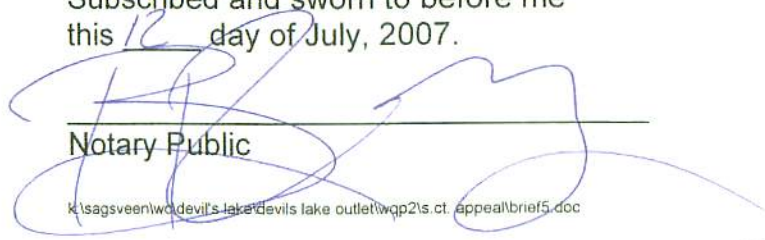
and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota; and

3. I personally served the attached **BRIEF OF APPELLEE NORTH DAKOTA STATE WATER COMMISSION** upon Dean J. Haas, by delivering a true and correct copy with a clerk or other individual in charge thereof:

Dean J. Haas
Assistant Attorney General
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509


Peggy Graf

Subscribed and sworn to before me
this 12 day of July, 2007.


Notary Public

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B. RENZ
Notary Public
State of North Dakota
My Commission Expires Dec. 22, 2011