ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

20070118

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

Appellants,

-vs-

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

Appellees.

APPELLANTS' REPLY BRIEF

Supreme Court No. 20070118

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STATE OF NORTH DAKOTA

(Ramsey County Case No. 06-C-00252)

APPEAL FROM THE MEMORANDUM OPINION, ORDER, AND JUDGMENT ISSUED ON APRIL 17, 2007 AND ENTERED ON APRIL 17, 2007 DISTRICT COURT, RAMSEY COUNTY, NORTHEAST JUDICIAL DISTRICT THE HONORABLE MICHAEL G. STURDEVANT, PRESIDING

w/ attachment

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I. INTRODUCTION.

The North Dakota Department of Health ("NDDH" or the "Department") and the State Water Commission (the "SWC" or the "Commission") strain to justify the Department's decision to approve modification of the SWC's North Dakota Pollutant Discharge Elimination System ("NDPDES") permit for the Devils Lake outlet (the "Permit Modification"). They seek to make a straightforward case of an agency's violation of its regulatory obligations appear complicated, technical and dependent upon the exercise of "agency expertise," and they urge the Court to defer to the Department's decision-making. In so doing, they repeatedly misstate the requirements of the Department's own regulations, supply rationales for the Department's action that are missing in the record and misread the factual record before the Department. The deference they urge is thus unwarranted, and their arguments are ultimately unpersuasive.

II. ARGUMENT.

A. The Department's Failure to Conduct an Anti-Degradation Review was Unlawful.

In an effort to convince the Court that there was no need for an anti-degradation review under Appendix IV to N.D.A.C. Ch. 33-16-02.1 in connection with the Permit Modification, NDDH first claims that its anti-degradation rules have not been violated because the Department found that the Permit Modification would not affect "beneficial uses" of downstream waters. NDDH Brief at 6, 16, citing NDDH Finding 5.0 (CR 431).[1]

[1] References set out as "CR [Page No.]" in parentheses are to documents in the Certified Administrative Record for the Permit Modification. References set out as "AR [Page No.]" in parentheses are to the administrative record for the original NDPDES permit. The Appendix is cited herein as "App. [Page No.]" in parentheses.

Indeed, NDDH argues that this finding "ends the matter." NDDH Brief at 6. Such a result is not supported by the language of the regulations.

The anti-degradation rules specify that an anti-degradation review must be conducted for any activities that have a "significant permanent effect" on *either* "water quality *or* beneficial uses" (AR 97) (emphasis added).[2] A finding that beneficial uses alone are not impacted is thus insufficient to avoid anti-degradation review where, as in this case, there also may be significant effects on water quality. Indeed, a review must be undertaken "where significant effects are projected for one or more water quality parameters." *Id.*

In fact, the U.S. Army Corps of Engineers (the "Corps") documented, prior to issuance of the original NDPDES permit, that, because of historically higher sulfate levels in Devils Lake than in the Sheyenne River, sulfate discharges from the outlet would result in adverse consequences on water quality, affect beneficial uses of the River such as drinking water and irrigation and substantially increase downstream municipal water treatment costs. *See* U.S. Army Corps of Engineers, *Final Devils Lake, North Dakota, Integrated Planning Report and Environmental Impact Statement* 5-81 – 5-83, 6-51, 6-59, 6-71 – 6-73 (April 2003) (AR 1531-1533, 1659, 1667, 1679-1681).

[2] NDDH half-heartedly argues that the Permit Modification can also be excluded from anti-degradation review because its effects are only "temporary" within the meaning of the regulations. NDDH Brief at 16 and note 10. However, Judge Sturdevant properly rejected this argument (App. 43), and it is clear that the outlet, a major civil works project that may be operated for decades, with long-term consequences for the downstream environment and downstream water users, cannot be fairly characterized in this fashion.

More importantly, the anti-degradation rules establish an *objective*, numerical standard to determine whether there are "significant permanent effects" on water quality or beneficial uses, in this case, an "increase [in] permitted pollutant loadings to a water body by more than 15 percent" (AR 97). The 15% rule exists precisely to avoid the kind of *subjective*, non-numerical decision-making NDDH would have this Court endorse.

NDDH also seeks to convey the impression that the 15% rule only establishes a "presumption" that "can be overcome" by the Department's subjective findings regarding the impacts of the Permit Modification. NDDH Brief at 16. There is no support for this argument in the language of the regulations. Appendix IV to N.D.A.C. Ch. 33-16-02.1 establishes strict standards which *must* be followed by the Department, not mere "presumptions" that can be rebutted by claiming in some non-numerical way that impacts are not significant.

Equally unavailing is NDDH's argument that no anti-degradation review is required because "mass loading criteria" are not relevant to the outlet project, on the theory that such criteria are only relevant when lakes and reservoirs are receiving waters. NDDH Brief at 17-18. Appendix IV to N.D.A.C. Ch. 33-16-02.1 merely states, "The 'zone of influence' is determined as appropriate for the parameter of concern, the characteristics of the receiving water body (e.g. lake vs. river, etc.), and other relevant factors" (AR 99). It does not itself suggest that rivers, such as the Sheyenne River, are to be excluded from the "zone of influence" when sulfate discharges are at issue, and NDDH did not interpret the regulations this way in 2003 when it conducted a full anti-degradation review on the original NDPDES permit application (AR 122). Further,

NDDH effectively acknowledges that mass loading would be relevant to Lake Ashtabula -- a reservoir downstream of the outlet -- and it is no excuse to avoid anti-degradation review to state that "freshening of the waters will minimize the effect." NDDH Brief at 18. Whether or not the waters "freshen" or effects will be "minimized," if the 15% criterion is exceeded, an anti-degradation review is required.

Finally, NDDH claims that no "evidence" has been adduced showing that the 15% standard would be exceeded. NDDH Brief at 18. However, there is no need for an evidentiary submission to demonstrate this point. The exceedance of the standard follows as a matter of basic arithmetic, requiring no particular scientific or computational expertise, from the combination of extending the period of outlet operations and allowing discharges by 15% over ambient sulfate levels up to a maximum limit of 450 milligrams per liter ("mg/l") in the Sheyenne River. Indeed, NDDH's statement that it "isn't *necessarily* true" that the 15% standard will be exceeded, NDDH Brief at 17 (emphasis added), implicitly recognizes this fact. To be sure, in any one year, it is possible that the outlet would operate for a period equal to or shorter than the original May-November timeframe or that sulfate levels in the Sheyenne River would never exceed 300 mg/l. However, for purposes of regulatory analysis, such assumptions are inappropriate. Rather, it must be assumed that the outlet would operate to the full extent allowed under the modified permit conditions. In those circumstances, it is unquestionable that the 15% standard would be exceeded.

B. There was No Cognizable Basis for Modification of the Total Suspended Solids Limit or the Period of Outlet Operation.

NDDH's fundamental argument in support of both the elimination of the 100 mg/l limit for Total Suspended Solids ("TSS") and the expansion of the operational period for the outlet outside of the May-November timeframe is basically that these changes represent sound policy choices. *E.g.*, NDDH Brief at 19, 20. However, whatever discretion NDDH may have to formulate permit conditions based upon policy considerations when it processes an initial NDPDES permit application, modification of an NDPDES permit must meet the "for cause" standard in N.D.A.C. § 33-16-01-25 and 40 C.F.R. § 122.62(a). These regulations governing modification of permits are in place for a reason -- to ensure the integrity and stability of the NDPDES program. If the Department's action is inconsistent with the regulations, that is, if the standards of N.D.A.C. § 33-16-01-25 and 40 C.F.R. § 122.62(a) are not met, then that action must be struck down by the Court.

Nor is it sufficient for counsel after-the-fact to devise rationales for agency action that the agency did not itself articulate. NDDH contends that the imposition of the 100 mg/l standard was a "technical error" which the Department can correct under the authority of 40 C.F.R. § 122.62(a)(15). NDDH Brief at 19. Similarly, NDDH's sole defense of the expansion of the operational period is that this is just another "correction of a technical mistake." NDDH Brief at 20. Yet, the Department itself never invoked this regulatory rationale when it approved these elements of the Permit Modification, and it thus cannot today support the Department's action.

Last of all, it does not advance its cause for NDDH to claim that a "numerical (100 mg/l limit) on TSS is unprecedented," and this somehow justifies the Permit

Modification. NDDH Brief at 19, citing NDDH's Response to Comments, p. 4 (CR 453) and Finding 7.0 (CR 432). First, according to information supplied by NDDH, numerical TSS limits are commonly used in NDPDES permits. *See* Attachment A. Second, even assuming *arguendo* a numerical TSS limit were unprecedented for this type of project, NDDH presumably would have known this when it approved the Permit Modification, and so it cannot credibly argue that the limit was the result of a technical error or that its modification on this basis is warranted by "new information."

C. There was No "New Information" to Justify Modification of the Sulfate Limitation.

The Department launches the defense of its decision to raise the sulfate limitation by arguing that this action "won't have any adverse environmental consequences," NDDH Brief at 20, or "impact the beneficial use of the Sheyenne or Red rivers." NDDH Brief at 21. Whatever the environmental consequences of the Department's regulatory decision, they are not relevant to the question whether or not there has been a regulatory violation. What is at issue is whether there was "cause" for modification within the meaning of N.D.A.C. § 33-16-01-25 and, more particularly, whether there was "new information" before the Department, that is, "information [that] was not available at the time of permit issuance . . . and would have justified the application of different permit conditions at the time of issuance." 40 C.F.R. § 122.62(a)(2).

NDDH also spends considerable effort arguing that the determination whether information is "new" is "technical" in nature, and the Court should defer to the "substantial agency expertise" purportedly exercised by the Department. NDDH Brief at

20-25. NDDH relies particularly upon *Calcasieu League for Environmental Action Now v. Thompson*, 661 So. 2d 143 (La. App. 1995), and *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). Neither case supports its position.

In *Calcasieu*, the Court did not rule that deference was required to the agency determination at issue, and, indeed, the issue was one related to interpretation of a regulation that did not implicate agency expertise. The Court's holding was only that a determination whether the "new information" test for issuance of a hazardous waste permit was met would be judged against the "arbitrary, capricious or manifestly contrary to [regulations]" standard. 661 So. 2d at 149-150. Appellants are not arguing that a different standard should be applied in this case. Rather, their contention is that the Department's action in ignoring information available to it was indeed arbitrary, capricious and contrary to regulation.

In *Marsh*, the issue before the Court was not whether the information before the agency was "new" or previously "available" but rather whether it was "significant" enough to warrant preparation of a supplemental environmental impact statement, that is, the issue turned "on the *value* of the new information." 490 U.S. at 374 (emphasis added). Such a determination requires the exercise of substantially more judgment than a straightforward determination of "newness" and "availability," and the Supreme Court decided that deference to agency expertise was appropriate.

NDDH seeks to bring this case within *Marsh*, arguing that determining whether data constitute new information within the meaning of 40 C.F.R. § 122.62(a)(2) is the same thing as determining whether the data have value. NDDH Brief at 23. However,

this case is not about the "significance" or "value" of information: it is about whether the Department had information "available" to it in 2003 indicating that sulfate levels in the Sheyenne River were likely going to be high and thus a significant constraint on outlet operation under the 300 mg/l limitation, so that the information obtained from 2005 outlet operation only should have confirmed what the Department already knew. As explained at length in our opening brief (at 27-30), the record shows that NDDH plainly had such information available from a number of sources, including the Corps, the U.S. Geological Survey and the Commission.

The Commission claims that Appellants are asking the Court to "rely on inferences and trends as opposed to the Department's analysis of new, hard data from the USGS and sampling at Flora and Bremen." SWC Brief at 10. To the contrary, our point is that "hard data" were available in 2003 for the Department to conclude that sulfates in the Sheyenne River were going to severely limit outlet operations. Indeed, from points both upstream of the outlet (at Harvey) and downstream of the outlet (at Warwick), the Department in 2003 had far more "hard data" establishing that high sulfate conditions existed and were persisting in the Sheyenne River, than the relatively limited set of data points from a few months of outlet operation in 2005 upon which the Department primarily relied in approving the Permit Modification.

Lastly, the Commission seeks to discount the importance of the voluminous and highly relevant historical data from the upstream monitoring site at Harvey, by suggesting that Appellants are asking the Court to substitute its judgment for that of the Department in concluding that the Flora and Bremen sulfate levels would represent the mean between

Harvey and Warwick. SWC Brief at 12. But, the Commission's own experts reached such a conclusion. *See* Schuh, W.M. and Hove, M.H., *Sources and Processes Affecting Dissolved Sulfate Concentrations in the Upper Sheyenne River* 22 (March 22, 2006) (CR 28). More to the point, such a conclusion, which is not dependent on specific measurements at Flora and Bremen, could have been reached just as readily by the Department on the basis of the information available to it in 2003.

The bottom line is that, in 2003, the Department had available to it actual data showing that *under then-existing conditions* sulfate levels could make outlet operation problematic under a 300 mg/l limitation and there would be substantial periods of time when the outlet could not be run. Further, no exercise of sophisticated scientific or technical judgment was required to conclude that these higher sulfate levels would persist, as indeed they did. The data derived from the Flora and Bremen gauges after issuance of the original NDPDES permit, albeit from different points along the Sheyenne River, showed that nothing was changing to make outlet operations less problematic. Rather, they just reflected continuation of existing conditions.

In such circumstances, the claim that there was "new information" warranting the Permit Modification does not stand up to scrutiny.

III. CONCLUSION.

For all the reasons set forth above and in their opening brief, Appellants respectfully submit that this Court should reverse the Department's decision to approve the Permit Modification, declare the Permit Modification to be unlawful and invalid and

enjoin the Commission from operating the Devils Lake outlet under any conditions but those established by the original NDPDES permit.

RESPECTFULLY SUBMITTED this 30th day of July, 2007.

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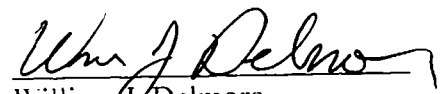
CERTIFICATE PURSUANT TO N.D.R.App.P. 32(a)(7)

I, William J. Delmore, counsel for Appellants, as the attorney responsible for the foregoing Brief, hereby certify that the Brief uses Times New Roman font with 12 point type and contains 2,500 words (relying upon the word count feature of the word-processing program used to prepare this Brief) and complies with the type-volume limitation contained in Rule 32(a)(7).



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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

People to Save the Sheyenne River, Inc., Peterson Coulee Outlet Association; the National Wildlife Federation and the Government of the Province of Manitoba.	)	
Appellants,	)	SUPREME COURT NO. 20070118
-vs-	)	(Ramsey County Case No. 06-C-00252)
North Dakota Department of Health, and North Dakota State Water Commission,	)	**CERTIFICATE OF SERVICE**
Appellees.	)	

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

MARY KAY DUCHSHERER, being first duly sworn, on oath, deposes and says: That she is a citizen of the United States, over the age of eighteen and not a party to the above-entitled action.

That on the 30th day of July, 2007, this affiant deposited in the United States Post Office at Mandan, North Dakota, a true and correct copy of the following document(s) in the above-captioned action:

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Subscribed and sworn to before me this 30th day of July, 2007.

(SEAL) LORI SPENCER
Notary Public
State of North Dakota
My Commission Expires April 18, 2012

Lori Spencer
Notary Public, State of North Dakota