Minnesota Equal Access to Justice Act
"Leveling the Playing Field"

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I. HISTORY, POLICY AND PURPOSE OF THE EQUAL ACCESS TO JUSTICE ACT.

The Minnesota Equal Access to Justice Act (MEAJA), which was enacted by the Minnesota Legislature in 1986, is modeled after the Federal Equal Access to Justice Act (EAJA), 28 U.S.C. § 2255-2460.

The EAJA was passed by the U.S. Congress to provide redress to certain parties – individuals, small businesses and others – who were perceived as being subject to overly zealous federal agencies. Governmental agencies and interests that support vigorous enforcement were resistant to provide an opportunity for the recovery of attorney fees to private litigants. Although the EAJA was enacted in an era of Republican ascendancy, the EAJA received support from members of both major political parties. Within recent years, Wisconsin's U.S. Senator Russ Feingold sponsored a successful move to expand EAJA to provide for attorney fee recovery in cases where the federal government has sought an "excessive demand."

Under the EAJA, the federal government may be required to pay the fees and expenses of an aggrieved litigant. The EAJA and its Minnesota counterpart, MEAJA, are exceptions to both the doctrine of sovereign immunity, which serves to limit recoveries against government, and the so-called "American Rule," where each party is expected to bear the cost of its own attorney fees.

The EAJA is a fee-shifting statute which places the burden on the federal government to show that its case was "substantially justified." The EAJA provisions are triggered in cases where the federal government loses and where an eligible party has prevailed on the merits.

The legislative history of the EAJA reflects the concern of fundamental fairness for individuals, small businesses and other parties who may face unreasonable government demands together with the prospect of staggering legal fees to defend themselves:

> [T]he Government with its greater resources and expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views. In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue. . . .
>
> Providing an award of fees to a prevailing party represents one way to improve citizen access to courts and administrative proceedings. When there is an opportunity to recover costs, a party does not have to choose between acquiescing to an unreasonable Government order or prevailing to his financial detriment.... By allowing a decision to contest Government action to be based on the merits of the case rather than the cost of litigating, [the EAJA] helps assure that administrative decisions reflect informed deliberation.

INS v. Jean, 496 U.S. 154, 165 n. 14 (1990), citing H.R. Rep. No. 96-1418, p.12 (1980).

After the EAJA was enacted the National Federation of Independent Business (NFIB), which advocates for the interests of small businesses, initiated an effort to encourage states to pass EAJA laws to protect the interests of small businesses, their owners and others who may face unwarranted enforcement action from state government. Thirty seven (37) states have enacted laws which provide for the recovery of attorneys fees. The NFIB was instrumental in lobbying for the passage of MEAJA. As was the case with the federal law, state agencies lined up to testify against the need for this measure.

During the 1986 Legislative Session MEAJA received support from both major political parties. The Senate sponsor was DFL Senator Gerald Willett, who later was named by Governor Rudy Perpich to head the Minnesota Pollution Control Agency (MPCA). Senator Willett argued that while he did not expect to see a great number of MEAJA claims, eligible parties including small businesses and their owners, deserved recourse against the state when its agencies went too far and pursued a case that was unsound or otherwise lacked merit.

Although MEAJA's provisions are analogous to those of the EAJA, they differ in one significant way. MEAJA places the burden of proof on an aggrieved litigant to show that the state's case was not "substantially justified." A copy of MEAJA is found at Appendix A.

MEAJA applies to "civil actions," that is, cases other than those sounding in tort filed in state district court and to "contested case proceedings" held before the Office of Administrative Hearings. Under MEAJA an eligible party who can show that the state's case was not "substantially justified" may be entitled to an award of attorney fees and expenses. Attorney fees are capped at $125 per hour. Minn. Stat. 15.471, subd. 5(c). However, this rate is subject to a cost of living increase and may be enhanced based on "special factors" including limited availability of counsel or a case that requires specialized expertise. To obtain an award, a party must convince the court that the state's position did not have "a reasonable basis in law and fact, based on the totality of the circumstances before and during litigation or a contested case proceeding." Minn. Stat. § 15.471, subd. 8.

When MEAJA was enacted in 1986 the Office of Administrative Hearings was directed to promulgate rules governing fee applications in contested cases. Minn. Stat. § 15.474, subd.1. Unfortunately, small business interests were not represented in the rulemaking process. State agencies and the Attorney General's Office "filled the void" and actively pushed for procedural rules that had the effect of sharply restricting the rights of parties to seek or obtain fee awards in the administrative setting. As originally drafted the rules imposed onerous conditions on applicants that had the effect of discouraging parties from availing themselves of MEAJA's protections. The procedures had the practical effect of negating MEAJA as an effective tool in the contested case setting. In 2001 the Office of Administrative Hearings revised its rules and agreed to delete all of the provisions that were inconsistent with MEAJA's statutory provisions and sharply limited potential recoveries. The revised rules, which conform to the statutory provisions, are found in Appendix B, permit eligible parties to seek redress under MEAJA.

The Minnesota Legislature recently reaffirmed its support for MEAJA. In 2000 with strong bipartisan support the Legislature expanded the definition of parties who may be eligible for an award, increased the hourly rate of recovery (from $100 to $125 per hour) and provided

that the cost of any study, analysis, engineering report, test or project may be recovered under MEAJA.

Since the 1980s federal courts have applied the EAJA against federal agencies with increasing frequency and granted attorneys fees and expenses to numerous parties. As a result there is a substantial body of reported federal case law. In sharp contrast, there are only a limited number of reported state court decisions applying and interpreting MEAJA.

II. RECOVERY THRESHOLD UNDER MEAJA

A. Types of Cases Where MEAJA Recovery is Permitted.

1. **Limited Waiver of Sovereign Immunity.** Minnesota courts have found MEAJA to be a limited waiver of sovereign immunity. As a result, courts have strictly construed the provisions of the law. State by Humphrey v. Ballion Co., 503 N.W.2d 799 (Minn. Ct. App. 1993).

2. **Requirement for State Government Action**.

   a. **Action Brought By or Against the State.** Under MEAJA, a party may seek recovery of its fees and expenses in a civil action or contested case proceeding brought by or against the state unless special circumstances make an award unjust. Minn. Stat. § 15.472 (a).

   b. **MEAJA Fee Claims Not Permitted in Tort Actions.** MEAJA specifically provides that recovery is not permitted in tort actions.

   c. **MEAJA Limited to State Agency Actions.** MEAJA awards are available to eligible parties who may be subject to administrative or regulatory actions by the State of Minnesota or one its agencies. Minn. Stat. §15.471, subd. 8 defines "State" as the State of Minnesota or an agency or official of the state acting in an official capacity. Numerous state agencies, including the Minnesota Pollution Control Agency (MPCA), the Minnesota Department of Transportation and Department of Revenue, have paid MEAJA awards.

      The Minnesota Court of Appeals has reviewed and concurred with awards of fees and expenses against state agencies. State Campaign Finance and Public Disclosure Bd. v. Minnesota Democratic Farmer Labor Party, 671 N.W.2d 894 (Minn. Ct. App. 2003) (awarding political party fees and costs under MEAJA was not an abuse of discretion as position of State Campaign Finance and Public Disclosure Board on political party's reporting expenses for two pieces of campaign materials as multicandidate expenditures did not have a reasonable basis in law and in fact, in light of the plain language of statute governing such expenditures); State by Humphrey v. Baillon Co., 503 N.W.2d 799 (Minn. Ct. App. 1993) (MEAJA applies to an appeal of award of condemnation commissioners in eminent domain proceeding).

3. **Actions of Other Units of Government Not Covered.** MEAJA does not apply to the actions of municipalities, counties or watershed districts. In City of Mankato v.

Mahoney, 542 N.W.2d 689 (Minn. Ct. App. 1996), the Court of Appeals determined that a landlord's dispute with the City of Mankato was not the equivalent of the State noting that the City Council did not have statewide jurisdiction. City of Mankato v. Mahoney, 542 N.W.2d 689 (Minn. Ct. App. 1996); see also In re Application of Lac Qui Parle-Yellow Bank Watershed Dist., No. C7-94-1592, 1995 WL 6419 (Minn. Ct. App. January 10, 1995) (prevailing party had no valid claim for attorney fees because watershed district does not constitute "state" under MEAJA).

B. MEAJA Claimant Must Be Prevailing Party. To receive an award of fees and expenses under MEAJA a party must be a "prevailing party." Minnesota courts apply the standard analysis of whether a party is a prevailing party. Minn. Stat. § 15.472 (a). To determine who is the prevailing party, the Minnesota Supreme Court, in Borchert v. Maloney, 581 N.W.2d 838 (Minn. 1998) has held that:

> In determining who qualifies as the prevailing party in an action, the general result should be considered, and inquiry should be made as to who has, in the view of the law, succeeded in the action. The prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment is entered.

Borchert, 581 N.W.2d at 840 (Minn. 1998) (footnotes omitted) (quotation omitted).

C. MEAJA Claimant Must Show That State's Position Was Not Substantially Justified. A party seeking an award under MEAJA must show that the "position of the state was not substantially justified." Minn. Stat. § 15.472 (a) and (b).

1. **Burden of Proof.** A party seeking a MEAJA award bears the burden of proof. Even if a party meets its burden, the state may argue that an award is not appropriate. The court may deny an award if it is determined to be "unjust." Minn. Stat §15.472(a).

2. **Definition of "Substantially Justified."** MEAJA defines the term "substantially justified" to mean that "the state's position had a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation or contested case." Minn. Stat. § 15.471, subd. 8.

   The focus of a court's inquiry as to whether an award of fees and expenses under MEAJA is warranted is a review of the position of the state. If a party "prevails" against the state, the court will look deeper into the conduct of the state in the entire case before granting an award of fees and expenses. The Minnesota Court of Appeals has commented on the meaning of the term "substantially justified" as follows:

   > While Minnesota courts have not yet interpreted the term "substantially justified," the United State Supreme Court has interpreted the words under the EAJA to mean "'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person" rather than "'justified to a high degree.'"

Donovan Contracting of St. Cloud, Inc. v. Minnesota Dept. of Transportation, 469 N.W.2d 718, 720 (Minn. Ct. App. 1991), rev. denied (Minn. Aug. 2, 1991) quoting Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541, 2550 (citations omitted).

The Donovan Contracting court held that the mere fact that party prevailed on the merits is an insufficient basis to award fees and costs under MEAJA, Department's failure to promulgate rules was not "substantially justified" entitling parties to an award of fees. See also Mbong v. New Horizons Nursing, 608 N.W.2d 890 (Minn. Ct. App. 2000) (Court of Appeals would not award claimant's costs or fees under MEAJA where Department of Economic Security's reemployment determination based on its misreading of the statute, was not without some justification).

III. WHO IS ELIGIBLE TO RECOVER ATTORNEYS FEES UNDER MEAJA?

A. Definition of a "Party"

1. **Named or Admitted Party.** MEAJA defines an eligible party to include a person named or admitted as a party or seeking and entitled to be admitted as a party in a court action or contested case proceeding or a person admitted by an administrative law judge for limited purposes who otherwise meets the statutory criteria. Minn. Stat. § 15.471, subd. 6 (a).

2. **Eligibility Criteria Under MEAJA? A party who is named or admitted as a party must meet certain other criteria related to size and entity form**.

   a. **Eligible Entities.** To file a claim for recovery or fees and expenses an entity must meet the following criteria:

      i. Entity must be an unincorporated business, partnership, corporation, association or organization who at the time the civil action was filed or the contested case proceeding was initiated had:

         1) Not more than 500 employees; and

         2) Annual revenues that did not exceed $7,000,000. Minn. Stat. § 15.471, subd.6 (a) and (b).

      MEAJA was enacted to address protect small businesses who may be targeted for enforcement by regulatory agencies. The Minnesota Court of Appeals has taken both a restrictive and an expansive view of parties that are eligible for awards under the law.

      In McMains v. Commissioner of Public Safety, 409 N.W.2d 911 (Minn. Ct. App. 1987) the court declined to permit an individual who had prevailed against the Minnesota Department of Public Safety to utilize the fee recovery provisions of the statute. In denying the MEAJA claim the court relied on legislative history including testimony of Mike Hickey of the National Federation of Independent Business (NFIB) before the House Judiciary

Committee noting that the purpose of MEAJA was primarily to protect small businesses and their owners from overly aggressive government actions.

Despite the Court of Appeals' interpretation of the limitations on the intended class of beneficiaries of MEAJA in the McMains case, the Court of Appeals permitted a group of taxpayers who prevailed against the Minnesota Department of Transportation in a matter of wrongfully withheld taxes to make a claim for $25,000 of fees under MEAJA. Snider v. State Department of Transportation, 445 N.W.2d 578 (Minn. Ct. App. 1989) (certified class was an "association" with no revenue (except for a $75,000 damage award) and one employee (their attorney) was entitled to recovery under MEAJA).

Providing recovery to a broad group of potentially affected parties under MEAJA is entirely consistent with the public policy behind the law. Federal EAJA awards have been provided to aggrieved parties, including environmental organizations and others who have fulfilled the statutory requirements for eligibility.

b. Partner, Officer and Shareholder Recovery. MEAJA provides that "a partner, officer, shareholder, member or owner of an eligible entity may recover fees." When the MPCA cites a small business, an individual – typically an owner or key shareholder – is often times also named in an enforcement action or as a party on a complaint. Often significant resources may be required to defend an individual.

B. Parties Who Are Not Eligible.

1. Statutory Exclusion. Persons providing services pursuant to a licensing or reimbursement on a cost basis by the Minnesota Department of Health or the Department of Human Services on matters involving licensing or reimbursement rates, procedure, or methodology for those services are specifically excluded from MEAJA. Minn. Stat. §15.471, subd. 6 (c).

2. Individual Not Related to an Entity. MEAJA does not protect individuals who may seek to recover fees from state agencies. McMains v. Commissioner of Public Safety, 409 N.W.2d 911 (Minn. Ct. App. 1987) (motorist was not a "party" and could not recover fees in implied consent proceeding). Individuals who do not have a sufficient "connection" to an eligible entity may not recover fees and costs from the state.

IV. FEES AND EXPENSES SUBJECT TO RECOVERY UNDER MEAJA

A. Recovery of Fees

1. Attorney Fee Recovery. MEAJA provides for the recovery of "reasonable attorney fees" that are "based on the prevailing market rates for the kind and quality of the services that are furnished" subject to the limitations specified in MEAJA. Minn. Stat. §15.471, subd. 5.

a. Statutory Hourly Fee Cap. Generally, fees may not be awarded in excess of $125 per hour. MEAJA's original hourly rate was set at $100 per hour, the same

level as that set in the EAJA. In 2000 the Minnesota Legislature raised the base hourly rate to $125 per hour, following amendments to the federal EAJA.

b. Potential For Enhanced Fee Recovery. The court or the administrative law judge may increase the hourly rate of fee recovery if the court or administrative law judge determine that 1.) an increase of the cost of living; or 2.) a special factor, such as limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. Minn. Stat. §15.471, subd. 5 (c).

i. **Cost of Living.** Courts are generally willing to grant a cost of living increase. MEAJA is silent as to how the cost of living is to be determined. Federal EAJA cases are instructive and have used the Consumer Price Index as a guide.

ii. **Special Factor.** Minnesota courts and Administrative Law Judges who have considered requests for fees under MEAJA have typically not granted requests to apply "special factors."

Attorneys have succeeded with request for an increased hourly rate recovery under the EAJA including work on environmental matters. Federal courts have recognized "specialized expertise" involved with representation on complex environmental matters and granted awards based on rates that are substantially higher than the standard $125 per hour.

2. Recovery of Other Fees. MEAJA provides for the recovery of "reasonable fees charged by a person not an attorney who is authorized by rule or law to represent the party and may include reasonable charges by the party, the party's employee or agent." "Agent fees" are subject to the $125 per hourly cap subject to cost of living increase or a determination that a special factor exists that warrants an increase. Minn. Stat. § 15.471, subd. 5(c).

B. Recovery of Expenses

a. Filing fees:

b. Subpoena fees and mileage;

c. Transcript costs and court reporter fees;

d. Expert witness fees;

In both court actions and contested case proceedings expert witness fees may not be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the state agency. See Minn. Stat. § 15.471, subd. 5 (a) and (b).

e. The reasonable cost of any study, analysis, engineering report, test or project;

f. Photocopying expense;

g. Postage and delivery costs; and

h. Service of process fees. Minn. Stat. § 15.471, subd. 4 (1) to (8)

C. Procedure for Seeking a MEAJA Award.

1. Application for Fees and Expenses. MEAJA specifies a procedure for a party seeking an award of fees. Minn. Stat. § 15.472(b).

Within 30 days of final judgment in an action, a party shall submit to the court or administrative law judge an application of fees and other expenses which shows that:

a. the party is a prevailing party;

b. the party is eligible for an award;

c. an allegation that the position of the state was not substantially justified;

d. the amount of fees and expenses that are sought;

e. an itemized statement from an attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and expenses were computed.

2. Review and Potential Reduction of Fee Claim. MEAJA provides that a court or an administrative law judge may reduce the amount to be awarded, or to deny an award, to the extent that during the proceedings the prevailing party engaged in conduct that unduly and unreasonably protracted the final resolution of the matter in controversy. Minn. Stat. § 15.472 (c).

3. Procedures for Fee Applications in Contested Case Proceedings. The Legislature directed the Office of Administrative Hearings to promulgate rules establishing procedures for applications for fees and expenses under MEAJA in contested case proceedings. Minn. Stat. § 15.474, subd. 1. The rules which are found at Minn. R. 1400.8401 and Appendix B, specify the procedures to be used when a MEAJA claim is to be presented in the context of a contested case proceeding.

4. Payment of a MEAJA Award. Minn. Stat. § 15.473 provides that awards of attorney fees and expenses obtained under MEAJA must be paid from funds of the agency.

5. Appellate Review. The Court of Appeals reviews awards of attorney fees and costs under MEAJA under an abuse of discretion standard. See State Campaign Finance and Public Disclosure Bd. v. Minnesota Democratic Farmer Labor Party, 671 N.W.2d 894 (Minn. Ct. App. 2003); Donovan Contracting of St. Cloud, Inc. v. Minnesota Department of Transportation, 469 N.W.2d 718 (Minn. Ct. App. 1991), rev. denied (Minn. Aug. 2, 1991). To withstand an appeal, a litigant must prepare an extensive record showing that it has met its burden of proof including that the client(s) satisfy MEAJA eligibility criteria and an adequate showing that the position of the state was

not "substantially justified." In addition, an applicant must produce an affidavit with backup documentation for the time expended and expenses that have been incurred.

V. MEAJA CASE STUDIES

A. State v. Rollies Sales & Service Inc., Dale Walsh and Roland Walsh

1. Background

In the early 1990s Rollies Sales & Service Inc. (Rollies), a small petroleum services business located in Osakis, Minnesota near Alexandria, installed and serviced equipment at gasoline stations and bulk petroleum plants. With the passage of federal and state environmental laws relating to underground storage tanks, Rollies expanded its business into underground storage tank removal, tank salvage and recycling petroleum tank bottoms. Rollies created an Environmental Department and hired staff to assist with tank removal operations and assist with reimbursement from the Petrofund that was managed by the Minnesota Department of Commerce.

2. MPCA Enforcement Action

In 1992 the MPCA inspected Rollies' operation and found what it believed to be violations of the state hazardous waste rules. The MPCA sent Rollies a Notice of Violation (NOV) citing alleged violations of state rules including failure to have a hazardous waste permit, failure to report spills and failure to comply with other management requirements. The MPCA alleged that the petroleum tank bottoms handled by Rollies were hazardous waste.

The MPCA maintained that the alleged violations were serious. The MPCA proposed a Stipulation Agreement to resolve the alleged violations and sought a penalty of $59,000 from Rollies and its President, Dale Walsh, and, a shareholder and Dale Walsh's father, Roland Walsh. Although Rollies offered to pay $9,000 to the MPCA, negotiations broke down. The MPCA staff sought litigation authority from the MPCA Citizen's Board. The MPCA Board authorized the Attorney General's Office to file suit against Rollies and the two named individuals. One MPCA Board Member thought the case was very serious and warranted a penalty of at least a $100,000.

3. Civil Action

The Attorney General's Office filed suit in the Seventh Judicial District (Douglas County) seeking penalties of $25,000 per day of violation as provided by Minn. Stat. § 115.071. The case was assigned to the Honorable Paul Ballard. When it filed the case the Attorney General's Office indicated that it was seeking a penalty far in excess of $100,000, perhaps as high as $250,000 or more. The state maintained that the violations were willful and also sought its attorneys fees as provided in Minn. Stat. § 115.072.

The state named the individuals as defendants under the "responsible corporate officer doctrine" as adopted in In re: Dougherty, 482 N.W.2d 485 (Minn. App. 1992). In its answer, the Rollies and the individual defendants asserted various factual and legal defenses and sought their attorney fees and expenses under MEAJA.

4. Liability Phase Trial

After pre-trial motions and extensive discovery, the court heard a week long "liability phase" trial. Rollies maintained that the petroleum related materials were products not wastes and that the hazardous waste rules did not apply. The court found the state had not proved four of its alleged violations.

The court also found that the state failed to prove that the two individual defendants, Dale and Roland Walsh, had violated any of the cited statutes or regulations. Applying the "responsible corporate officer doctrine" standard articulated in Dougherty, the court found that even though Dale and Roland Walsh held positions of responsibility; neither individual had a "nexus" with the violations. The court also found that neither individual facilitated the violations. The court noted that the state failed to name Rollies' environmental manger, Bruce Store, the person with actual control over the violations as a defendant.

5. Penalty Phase of Trial

The MPCA and the defendants met and attempted to reach a settlement but were unsuccessful. The court held a shorter penalty phase trial. The court found that the five remaining violations were minor and that there was no actual and limited potential harm to the environment. The court assessed a total of $3,400 civil penalty to Rollies.

The court also found that the violations were not willful, that Rollies had no history of violations and that the period of non-compliance was of short duration. The court noted that Rollies had invested $500,000 into its petroleum recycling operations which it abandoned after the state filed suit.

6. Application of MEAJA -Award Determination

In considering the defendants application for fees under MEAJA the court made the following findings:

a. "Substantially Justified" Standard. The court found that the Rollies corporate entity did not convince the court that the state's position against it was not substantially justified, so Rollies was not entitled to an award under MEAJA. The individual defendants convinced the court that the state's position against them was not substantially justified. The court found that the state's position against both individuals did not have a reasonable basis in law and fact before and during the litigation.

b. Prevailing Party. Both Roland Walsh and Dale Walsh were prevailing parties on all nine of the alleged violations. The court rejected the state's argument that because it had prevailed on some of the counts against the Rollies entity, a fee award for the individual defendants was not warranted.

c. Rate Adjustment. The court declined to make a cost of living adjustment or enhance the rate above the rate referenced in the statute. At the time, the statutory rate of recovery for attorney fees under MEAJA was $100 per hour and most of the fees were billed at a rate of $135 per hour.

d. Scope of Award. The court rejected the defendants' claim that pre-litigation fees should be subject to recovery. The court awarded fees from the date the civil action was commenced or when service was complete.

e. Special Circumstances. The court rejected arguments made by the state and found there were no circumstances that would make an award under MEAJA unjust.

f. Civil Penalty. The court ordered Rollies to pay $3,400 as a civil penalty for the five violations that were proved.

g. MEAJA Fee Award. The court considered and adopted the defendants' arguments related to the allocation of hours spent on matters that benefited the individuals exclusively, matters that benefited both the individuals and corporate entity, and those that solely benefited the corporate entity.

The court awarded the individual defendants awards of $31,469.16 each, or a total of $62,938.32. Rollies was awarded $3,041.85 for expenses it incurred that benefited the individuals. A copy of the Judge Ballard's Amended Findings of Fact, Conclusions of Law and Order appears at Appendix C. The state declined to file an appeal and paid the amount of fees and expenses per the court's order.

B. Alfred Schumann v. Sheryl Corrigan, Commissioner, Minnesota Pollution Control Agency

1. Background

Al Schumann resides in Eyota, Minnesota, which is south of Rochester. From 1962 to 1972 Schumann served in the Minnesota House of Representatives where he represented the Rochester area. In the 1990s Schumann was elected Mayor of Eyota. Schumann owned farmland near town and over the years Schumann received approval to develop his land. Schumann built two Additions of 5 and 19 acres, respectively.

Schumann hired an environmental consulting firm to assist with environmental permitting issues. When the Second Addition was being planned, the consultant assisted in obtaining a general construction stormwater permit from the MPCA under the NPDES program. The consultant advised Schumann that a temporary sediment pond was required during the development, but made no plans for a permanent stormwater basin after construction was complete. As the second Addition was constructed, storm sewers were constructed with flows directed to adjacent land.

The Eyota School District, which owned the neighboring property, had sought Schumann's permission to run a road through the Second Addition so that school buses could turn around. Schumann and the homeowners did not want the increased traffic and so this request was denied.

2. MPCA Enforcement Action

After a heavy rainfall event in August 2000, the School Superintendent filed a complaint with the MPCA about the ponding of stormwater on school property. The MPCA conducted an inspection and found alleged violations of the permit for the Second Addition.

The MPCA sent a Letter of Warning and a Ten Day Letter citing the permit violations and also charging that Schumann had failed to obtain a permit as required for the First Addition which had been constructed in the late 1990s. Schumann responded to the letter and agreed to try to work with the neighbor and others to attempt to site a permanent stormwater pond.

Unfortunately, the neighbors, including the MPCA's complainant, were totally uncooperative. Mr. Schumann's proposal to build a pond to contain stormwater on the school property was rejected. The MPCA directed Mr. Schumann to buy back a lot he had sold for a home and design a plan for a pond on that lot. Mr. Schumann submitted the plan, but the MPCA rejected it changing its mind and now saying the pond was not feasible. The MPCA suggested that Mr. Schumann needed to divert stormwater flows to a regional stormwater pond serving the entire area. The cost of this project, which included running pipe underground for considerable distances, ranged from $56,000 to over $100,000.

The MPCA issued Administrative Penalty Orders (APO) to Al Schumann individually and to Winona Excavating, who was also named on the MPCA permit application. The MPCA sought a civil penalty of $4,700 and, as a corrective action, required Mr. Schumann to direct stormwater flows to a regional pond. The cost of the corrective action represented a significant unknown expense. Mr. Schumann lost his bid for reelection and his successor demanded that he contribute an increasing amount to build the regional stormwater pond.

3. Petition for Review of Administrative Penalty Order

Al Schumann sought review of the MPCA's Administrative Penalty Orders in state district court as permitted under Minn. Stat. §116.072. In the Petition for Review, Schumann maintained that he was entitled to his attorney fees and expenses under MEAJA. The case was assigned to the Honorable Lawrence Collins of the Third Judicial District (Olmsted County).

4. Summary Judgment

Al Schumann filed a motion for summary judgment. In a deposition, the MPCA staff assigned to the matter admitted that the MPCA had no proof that discharges from either the First or Second Additions had entered into a "water of the state." The MPCA witness also testified that the nearest "water of the state" was more than a quarter of a mile away. Schumann argued that a permit is not required if there is no actual discharge to the "waters of the state." Schumann also maintained that an NPDES permit was not required for the First Addition because the land that was disturbed was less than five acres.

In the summary judgment motion, Schumann took the position that if the court granted summary judgment, the court should also award attorney fees and expenses under the MEAJA. The court granted summary judgment in favor of Schumann.

5. MEAJA Award

In considering the defendant's application for fees under MEAJA the court made the following findings:

a. Eligibility Determination. The court found that Al Schumann as the sole proprietor of an unincorporated business met the MEAJA criteria as having fewer than 500 employees and less than $7,000,000 in annual revenue was a "party" under MEAJA.

b. "Substantially Justified" Standard. The court found that the MPCA did not have a factual or legal basis for the positions that it took on all major issues in the case. The court found that:

> (T)he MPCA acted from the inception without sufficient basis taking and persisting in positions adverse to Petitioners without substantial justification. At least elemental investigation, simple calculations, and enlistment of scientific-based support – none of which was done here – would have spared Petitioners from the attorney fees and expenses they have unnecessarily incurred.

Alfred Schumann v. Sheryl Corrigan, Commissioner, Minnesota Pollution Control Agency, D.C. File No. C9-02-1632, page 2 (3rd Jud. Dist. Minn. 4/29/04).

c. MEAJA Award Appropriate. The court found that the Petitioners did not engage in conduct that unduly or unreasonably protracted the final resolution of the case. The court found that there were no special circumstances that made an award unjust.

d. Expense Recovery. The court permitted the recovery of expenses in the total amount of $22,508.99. This amount included expenses associated the cost of several studies, reports, tests and projects as permitted under recent MEAJA amendments. Minn. Stat. § 15.471, subd. 4(5).

The expense award included studies conducted by Schumann's consultants before and during the litigation totaling $7,218.70. The court also awarded Mr. Schumann costs for the repurchase of the lot completed in response to the MPCA's direction prior to the filing of the litigation totaling $8,000. In addition, Schumann's counsel named another environmental attorney as an expert witness. Although the attorney did not testify or submit an affidavit in support of the summary judgment motion, the court granted an award for his attorney fees totaling $2,010.80. The attorney charged at an hourly rate significantly in excess of the $125 statutory fee cap and the entire amount of his fee was awarded.

e. Rate Adjustment. The court agreed to a cost of living adjustment, but declined to enhance the rate above the $125 as adjusted for inflation. Petitioners assembled a lengthy affidavit that included all billing entries totaling 663 hours of time that the court found were all reasonably devoted to this case. The court found that there were other attorneys in the "market area" who were capable of achieving the results obtained and declined to grant an increased hourly rate as had been sought by Petitioners.

6. **Fee Award Covered All Pre-Litigation Fees and Expenses.** The court found that MEAJA does not contain a statutory limit on when fees must be incurred. The court awarded pre-litigation attorney fees from the inception of the case including fees charged in responding to the Letter of Warning issued prior to Administrative Penalty Order.

7. **Other Relief.** The court ordered Commissioner Corrigan and the MPCA to rescind the Administrative Penalty Orders and to take no further action with regard to Mr. Schumann and the issues raised in the proceeding related to stormwater enforcement.

8. **MEAJA Fee Award.** The court awarded Al Schumann $89,017.00 in fees and $22,508.99 in expenses, or a total of $111,525.99. This amount is believed to be the highest ever awarded under MEAJA. A copy of the Judge Collins' Amended Order, Order for Judgment and Judgment appears at Appendix D. The state declined to file an appeal and paid the amount of fees and expenses per the court's order.

APPENDIX A

MINNESOTA EQUAL ACCESS TO JUSTICE ACT

COSTS AND ATTORNEYS FEES

Minn. Stat. § 15.471 Definitions

Subdivision 1. **Terms defined**. For purposes of this section and sections 15.471 to 15.474, the terms defined in this section have the meanings given them.

Subd. 2. Administrative law judge. "Administrative law judge" means the official assigned to conduct a contested case hearing under chapter 14.

Subd. 3. Contested case. "Contested case" means a proceeding defined in section 14.02, subdivision 3, in which the position of the state is represented by counsel. It does not include a contested case to establish or fix a rate or grant or renew a license.

Subd. 4. **Expenses**. "Expenses" means the costs incurred by the party in the litigation, including:

(1) filing fees;

(2) subpoena fees and mileage;

(3) transcript costs and court reporter fees;

(4) expert witness fees;

(5) the reasonable cost of any study, analysis, engineering report, test, or project;

(6) photocopying and printing costs;

(7) postage and delivery costs; and

(8) service of process fees.

Subd. 5. **Fees**. "Fees" means the reasonable attorney fees or reasonable fees charged by a person not an attorney who is authorized by law or rule to represent the party and may include reasonable charges by the party, the party's employee, or agent. The amount of fees must be based upon prevailing market rates for the kind and quality of the services furnished, subject to the following limitations:

(a) In a court action, an expert witness may not be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the state.

(b) In a contested case proceeding, an expert witness may not be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the state agency involved.

(c) Attorney or agent fees may not be awarded in excess of $125 per hour unless the court or administrative law judge determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.

Subd. 6. **Party**. (a) Except as modified by paragraph (b), "party" means a person named or admitted as a party, or seeking and entitled to be admitted as a party, in a court action or contested case proceeding, or a person admitted by an administrative law judge for limited purposes, and who is:

(1) an unincorporated business, partnership, corporation, association, or organization not more than 500 employees at the time the civil action was filed or the contested case proceeding was initiated; and

(2) an unincorporated business, partnership, corporation, association, or organization whose annual revenues did not exceed $7,000,000 at the time the civil action was filed or the contested case proceeding was initiated.

(b) "Party" also includes a partner, officer, shareholder, member, or owner of an entity described in paragraph (a), clauses (1) and (2).

(c) "Party" does not include a person providing services pursuant to licensure or reimbursement on a cost basis by the department of health or the department of human services, when that person is named or admitted or seeking to be admitted as a party in a matter which involves the licensing or reimbursement rates, procedures, or methodology applicable to those services.

Subd. 7. State. "State" means the state of Minnesota or an agency or official of the state acting in an official capacity.

Subd. 8. Substantially justified. "Substantially justified" means that the state's position had a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation or contested case proceeding.

Minn. Stat. § 15.472 Fees and expenses; devil action or contested case proceeding involving state

(a) If a prevailing party other than the state, in a civil action or contested case proceeding other than a tort action, brought by or against the state, shows that the position of the state was not substantially justified, the court or administrative law judge shall award fees and other expenses to the party unless special circumstances make an award unjust.

(b) A party seeking an award of fees and other expenses shall, within 30 days of final judgment in the action, submit to the court or administrative law judge an application of fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the

rate at which fees and other expenses were computed. The party shall also allege that the position of the state was not substantially justified.

(c) The court or administrative law judge may reduce the amount to be awarded under this section, or deny an award, to the extent that the prevailing party during the proceedings engaged in conduct that unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of an administrative law judge under this section must be made a part of the record containing the final decision of the agency and must include written findings and conclusions.

(d) This section does not preclude a party from recovering costs, disbursements, fees, and expenses under other applicable law.

Minn. Stat. § 15.473. Payment of costs and fees

Subdivision 1. Civil action. A judgment against the state in a civil action for fees and expenses under section n15.472 must be paid from funds of the agency.

Subd. 2. Contested case proceeding. Fees and other expenses awarded in a contested case proceeding under section 15.472 must be paid by the agency over which the party prevails from funds of the agency.

Minn. Stat. § 15.474. Procedure for award of fees; contested case

Subdivision 1. Applications. The chief administrative law judge shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and expenses in a contested case proceeding. If a court reviews the underlying decision of the contested case under sections 14.63 to 14.68, an award for fees and expenses may be made only under subdivision 3.

Subd. 2. Appeal. A party dissatisfied with the fee determination made under subdivision 1 may petition for leave to appeal to the court having jurisdiction to review the merits of the underlying decision f the contested case. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, it may modify the determination only if it finds that the failure to make an award, or the calculation of the amount of the award, was an abuse of discretion.

Subd. 3. Judicial review. (a) In awarding fees and expenses under subdivision 1 to a prevailing party in an action for judicial review of a contested case under sections 14.63 to 14.68, the court shall include in that award fees and expenses to the extent authorized in section 15.472.

(b) Fees and expenses awarded under this subdivision maybe paid in accordance with section 15.473, subdivision 2.

APPENDIX B

AWARDS OF EXPENSES AND ATTORNEYS FEES IN CONTESTED CASE PROCEEDINGS BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS UNDER THE MINNESOTA EQUAL ACCESS TO JUSTICE ACT

Minnesota Rule pt. 1400.8401 EXPENSES AND ATTORNEY FEES.

Subpart 1. [Repealed, 26 SR 391]

Subp. 2. [Repealed, 26 SR 391]

Subp. 3 **Application.** A party seeking an award of expenses and attorney's fees shall submit to the judge an application that shows:

A. an itemization of the amount of fees and expenses sought. This shall include full documentation of fees and expenses, including an affidavit from each attorney, agent, or expert witness representing or appearing on behalf of the applicant stating the actual time expended and the rate at which fees have been computed and describing the specific services preformed.

The affidavit shall itemize in detail the services performed by the date, number of hours per date, and the services performed during those hours. In order to establish the hourly rate ,the affidavit shall state the hourly rate which is billed and paid by the majority of clients for similar services during the relevant time periods.

The documentation shall also include a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided;

B. a statement that explains with specificity how or why the position of the state agency was not substantially justified;

C. if the claim for attorney's fees exceeds $125 per hour, a statement of facts showing that the excess award qualifies under Minnesota Statutes, section 15.471, subdivision 5, paragraph (c); and

D. a proof of service showing that the state agency and all other parties have been served, either personally or by first class mail, with a copy of the application.

The application must be signed and sworn to by the party and the attorney or other agent or representative submitting the application on behalf of the party, showing the addresses and phone numbers of all persons signing the application.

Subp. 4. **Response or objection to application.** The state agency or any other party any respond or object to all or any part o the application for expenses and fees. A response or objection must be sworn to and filed with the judge within 14 days following the service of the application and must show:

A. the name, address, and phone number of the party and the person submitting the response or objection on behalf of the party;

B. in detail any objections to the award requested and identify the facts relied on to support the objection. If the response or objection is based on any alleged facts not already reflected in the record of the proceeding, the response or objection shall include either a supporting affidavit or affidavits or request for further proceedings under subpart 5b; and

C. a proof of service showing that all other parties have been served, either personally or by first class mail, with a copy of the response or objection.

Subp. 5 [Repealed, 11 S 1385]

Subp. 5a. **Settlement**. A prevailing party and the agency may agree on a proposed settlement of an award before final action on the application. If a settlement occurs, a stipulation for settlement shall be filed with the judge together with a proposed order which shall be prepared for the judge's signature. Upon receipt of a stipulation for settlement and proposed order, the judge shall issue an order, serve all parties and the chief administrative law judge with a copy, and send the original to the agency for inclusion with the record of the contested case which gave rise to the application.

Subp. 5b. **Extensions of time and further proceedings.**

A. The judge may, on motion and for good cause shown, grant extension of time, other than for filing an application for fees and expenses, after final disposition in the contested case.

B. Ordinarily, the determination of an award will be made on the basis of the written record of the underlying contested case and the filings required or permitted by this part. However, on the judge's own motion or on the motion of any party to the underlying contested case, further filings or other action can be required or permitted, such as an informal conference, oral argument, additional written submissions, or an evidentiary hearing. Any further action shall be allowed only when necessary for a full and fir resolution of the issues arising from the application and shall take place on the first date available on the judge's calendar which is also agreeable to all parties. A motion for further filings or other action shall specifically identify the information sought on the disputed issues and shall explain why the further filings or other action are necessary to resolve the issues.

C. In the event that an evidentiary hearing is required or permitted by the judge, the hearing and any related filings or other action required or permitted shall be conducted under parts 1400.8505 to 1400.8612.

Subp. 6 [Repealed, 26 SR 391]

Subp. 7. **Decision of the administrative law judge.** Within 30 days following the close of the record in the proceeding for the award of expenses and attorney's fees, the administrative law judge shall issue a written order which shall also contain findings and conclusions on each of the following which are relevant to the decision:

A. the applicant's status as a prevailing party;

B. the applicant's qualification as a party under Minnesota Statues, section 15.471, subdivision 6;

C. whether the agency's position as a party of the proceeding was substantially justified;

D. whether special circumstances make an award unjust;

E. whether the applicant during the course of the proceeding engaged in conduct that unduly and unreasonably protracted the final resolution of the matter in controversy; and

F. the amounts, if any, awarded for fees and other expenses, explaining any difference between the amount requested and the amount awarded.

The order shall be served on all parties and the state agency. The original order and the rest of the record of the proceedings shall be filed with the state agency at the time the order is served.

APPENDIX C

State of Minnesota v. Rollies Sales & Service Inc., Dale Walsh and Roland A. Walsh, D.C. File No. C2-95-296 (7th Jud. Dist. Minn. 12/30/98)

DISTRICT COURT
DOUGLAS COUNTY
FILED
Dec. 3, 1998

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF DOUGLAS | SEVENTH JUDICIAL DISTRICT

State of Minnesota, by its Attorney General Hubert H. Humphrey III, and its Minnesota Pollution Control Agency, Plaintiff, vs. Rollies Sales & Service Inc., Dale Walsh and Roland A. Walsh, Defendants.	**AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** **PENALTY PHASE** File No. C2-95-296

The penalty phase of the above-entitled matter came before the Honorable Paul L. Ballard, Judge of District Court, on the second and third day of February, 1998. Pursuant to the defendants' post-penalty trial phase motions for amended findings and a new trial and subsequent post-trial motions, the above-entitled matter came before the Honorable Paul L. Ballard, on July 20, 1998, at the Douglas County Courthouse, Alexandria, Minnesota.

Having considered the arguments of counsel, the written memoranda of counsel, all the documents and files herein, and the relevant law, the Court now makes the following:

FINDINGS OF FACT

1. The State's complaint charged the Defendants, Rollies Sales & Service, Inc., (Hereinafter Rollies Inc.) Dale Walsh and Roland Walsh with nine environmental regulation violations.

2. The Defendant, Rollies Inc., was the prevailing party on the following four of the nine alleged violations: 1) operation of a hazardous waste storage facility without a permit, 2) discharge of pollutants to the unsaturated zone, 3) failure to store liquids on a curbed, impermeable surface and 4) failure to submit accurate information about quantities of hazardous waste generated.

3. The State was the prevailing party against Rollies Inc., on five of the nine alleged violations. Rollies Inc., is liable to the State of Minnesota for the following violations of Minnesota statutes and rules relating to the management of hazardous waste and the prevention of water pollution in the amount stated:

A. FAILURE TO EVALUATE HAZARDOUS WASTE: Minn. R. 7045.0214, subp. 1. Rollies violated this rule by failing to evaluate the waste of the sludge/settling pots and of the paints and thinners to determine if those materials were hazardous; penalty - $500.00.

B. FAILURE TO LABEL HAZARDOUS WASTE CONTAINERS: Minn. R. 7045.0292, subp. 5, items C and H. Rollies' failure to label hazardous waste containers of the sludge/settling pots and the paint and thinner containers violated this rule; penalty - $500.00.

C. FAILURE TO PERFORM AND DOCUMENT INSPECTIONS OF HAZARDOUS WASTE CONTAINERS: Minn. R. 7045.0292, subp. 5, item B. Rollies violated this rule by failing to inspect hazardous waste containers and areas where containers were stored and to keep a written record of the dates and findings of the inspections; penalty - $200.00.

D. FAILURE TO MEET EMERGENCY PREPAREDNESS REQUIREMENTS: Minn. R. 7045.0292, subp. 5, items I and J. Rollies violated this rule by failing to take actions designed to keep the company and local authorities properly prepared in case of an emergency at Rollies' facility; penalty - $200.00.

E. UNLAWFUL TRANSPORTATION OF HAZARDOUS WASTE: Minn. R. 7045.0371. Rollies violated this rule by transporting hazardous waste without complying with the requirements of this rule. Violations included failure to have a hazardous waste transporter license and failure to have a manifest when transporting hazardous waste; penalty - $2000.00.

4. The State failed to show that Rollies Inc., demonstrated an intentional disregard or plain indifference to the law with respect to the above violations. This Court finds that none of the acts were "willful" violations of Federal or State Statutes or Rules.

5. The five violations by Rollies Inc., were minor. There was limited potential to harm the environment from these violations and no actual harm to the environment occurred as a result of these violations. There were no prior violations by Rollies Inc., and its non-compliance was of a short duration.

6. Rollies invested $500,000.00 into its petroleum recycling operations branch of its business, which Rollies Inc., abandoned as a result of this action by the State.

7. Defendant, Rollies Inc., incurred no economic benefit from its non-compliance.

8. No special circumstances exist in this case that compel an upward or downward adjustment to the assigned civil penalty.

9. Rollies Inc., did not convince the Court that the State's position against it, was not substantially justified. Therefore, Rollies Inc., is not entitled to an award of fees and/or expenses pursuant to the Minnesota Equal Access to Justice Act. *Minn.Stat.* Section 15.472. (Hereinafter MEAJA.)

10. The defendant, Dale Walsh was the prevailing party against the plaintiff on all nine (9) violations. The defendant, Roland Walsh was also the prevailing party against the plaintiff on all nine (9) violations. The central issue in the plaintiff's claim against each of the individual defendants was that they were personally liable for the alleged violations. The Court concluded that neither Dale nor Roland Walsh were individually liable. (See Conclusion of Law, Liability Phase, Paragraph # 3.)

11. Each individual defendant, Dale and Roland Walsh, convinced the Court that the state's position against him was not substantially justified. The state's position against both Dale and Roland Walsh did not have a reasonable basis in law and fact before and during the litigation. *Minn.Stat,* Section 15.471, subd. 8.

12. Neither an increase in the cost of living or other special factor is present is this case to justify an increase in the hourly rate of $100.00 provided in Minnesota Statute Section 15.471 subd. 5 (c).

13. The defendants' attorneys and staff have charged the defendants $146,428.10 in fees to defend this case. Fees charged to the defendants by the firm of Strusinski and Associates were at a rate of $95.00 per hour. Fees charged to the defendants by Thomas Fabel, of the firm, Lindquist and Vennum, were at the rate of $185.00 per hour. Fees charged to the defendants by Joseph Maternowski, David Larson, Donna Strusinski, Richard Leighton, Jaymes Littlejohn and Lee Henderson of the firm, Hessian & McKasy,

P.A. were at a rate of $130.00 per hour. Fees charged to the defendants by L. Marshall Smith of Hessian & McKasy, were at a rate of $125.00/130.00 per hour. Fees charged to the defendants by John J. Choi of Hessian & McKasy were at a rate of $100.00/110.00 per hour. All other fees charged to the defendants were at a rate of $100.00 per hour or less.

14. This case became a "civil action" on or about February 10th, 1995, when the Defendants' counsel acknowledged service. The Court recognizes February 7, 1995 as the date the case became a "civil action" for purposes of determining an appropriate award under the Minnesota Equal Access to Justice Act. *Minn.Stat.* Section 15.472 (a).

15. The defendant, Rollies Inc., incurred $4978.59 in expenses eligible under MEAJA. Three thousand eight hundred seventy-three dollars and forty-eight cents, $3873.48, of the expenses benefited both Rollies Inc., and the individual defendants; one-half, $1936.74, benefited Rollies and one-half, $1936.74, benefited the individual defendants. One thousand one hundred five dollars and eleven cents, $1105.11, of the expenses solely benefited the individual defendants, Dale and Roland Walsh:

16. No special circumstances exist that make an award of fees and expenses under MEAJA unjust.

Based on the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. Rollies is liable to the State of Minnesota in the amount of $3400.00 for violating five environmental rules and regulations.

2. The defendant, Rollies Inc., is not entitled to any portion of its fees or Expenses pursuant to the Minnesota Equal Access to Justice Act. *Minn.Stat.* Section 14.572.

3. The defendant, Dale Walsh, is entitled to a fee award pursuant to MEAJA in the amount of $31,469.16.

4. The defendant, Roland Walsh, is entitled to a fee award pursuant to MEAJA in the amount of $31,469.16.

5. The defendant, Rollies Inc., is entitled to receive $3,041.85 for expenses it incurred that benefited the individual defendants, Dale and Roland Walsh.

Based on the foregoing Findings of Fact and Conclusions of Law, the Court HEREBY issues the following:

ORDER

1. Rollies Inc., is **HEREBY ORDERED** to pay the following civil penalty to the State of Minnesota: $3400.00.

2. The Minnesota Pollution Control Agency and the Office of the Attorney General are **HEREBY ORDERED** to pay the fees of the defendant, Dale Walsh, in the amount of $31,469.16 payable directly to Dale Walsh.

3. The Minnesota Pollution Control Agency and the Office of the Attorney General are **HEREBY ORDERED** to pay the fees of the defendant, Roland Walsh, in the amount of $31,469.16 payable directly to Roland Walsh.

4. The Minnesota Pollution Control Agency and the Office of the Attorney General are **HEREBY ORDERED** to pay the expenses of the defendants, Dale and Roland Walsh, in the amount of $3,041.85 directly to the defendant, Rollies Inc.

5. The State's motion to strike the defendants' motion for a new trial is **HEREBY GRANTED**. The Court Administrator shall strike the motion from the court record.

6. The State's motion to strike the affidavits of Dale Walsh and Joseph Maternowski submitted by the defendants with their motions for amended findings and for a new trial is **HEREBY GRANTED**. The Court Administrator shall strike the-above stated affidavits from the court record.

7. The state's motions to strike affidavits submitted after the motion for amended findings was filed or in response to this Court's request are **HEREBY DENIED.**

8. All parties are **HEREBY ORDERED** to bear their own remaining costs and disbursements.

9. The State's request for the Court to stay the enforcement of the judgment herein, pursuant to Minn. R. Civ.P. 62, until resolution of the State's appeal of this Court's ruling, is **HEREBY GRANTED**.

10. All other motions submitted to this Court are **HEREBY DENIED.**

11. The attached memorandum in incorporated into this **ORDER** as though fully set forth herein.

12. The Defendant's motion for amended findings is **HEREBY GRANTED** as set forth herein.

Dated this 30th day of December, 1998

Paul L. Ballard
Judge of District Court

LET JUDGMENT BE ENTERED ACCORDINGLY.

Upon this 30th day of December, 1998

Paul L. Ballard
Judge of District Court

JUDGMENT

The foregoing **Findings of Fact, Conclusions of Law and Order** constitute the **JUDGMENT** of this Court.

Upon this 30th day of December, 1998.

_____
Phyllis L. Haarstad
Douglas County Court Administrator

COURT SEAL

_____
By:
Deputy

MEMORANDUM FOR POST-PENALTY PHASE TRIAL MOTIONS

This memorandum is incorporated into the Court's Amended Findings of Fact, Conclusions of Law and Order penalty phase as though fully set forth therein. Its purpose is to explain how the Minnesota Equal Access to Justice Act applied in this case.

Both the plaintiff and the defendants have made several submissions to the Court regarding the appropriateness of an award to the defendants pursuant to the Minnesota Equal Access to Justice Act. *Minn.Stat.* Section 15.472, hereinafter MEAJA. In the Defendants' "Supplemental Memorandum Addressing The Amount Of Attorneys' Fees To Be Awarded To Defendants Dale and Roland Walsh", filed October 2, 1998, on pages 4-5, the defendants set forth the fees charged and expenses incurred throughout the eight (8) phases of this case. On pages 10-11 of the same document the defendants set forth the rates charged for the work performed on this case. The Court used that document, along with the "Plaintiff's Memorandum Of Law Concerning MEAJA Award To Defendants Dale And Roland Walsh", as guidelines in determining an appropriate amount to award under MEAJA.

MEAJA is a limited waiver of sovereign immunity. Therefore, Courts should strictly construe its language. City of Mankato v. Mahoney, 542 N.W.2d 689, 693 (Minn.App. 1996). In determining whether an award pursuant to MEAJA was appropriate in this case, the Court narrowly construed the statute and made its findings accordingly.

The Court determined that Rollies Sales and Service, Inc., (hereinafter Rollies Inc.) is not entitled to an award pursuant to the above-cited statute because it failed to show that the state's position against it was not substantially justified. The defendants then filed a motion for amended findings requesting the Court to find that the individual defendants, Dale and Roland Walsh, are entitled to an award pursuant to MEAJA.

Upon further review, the Court determined that each individual defendant, Dale and Roland Walsh are entitled to an award pursuant to MEAJA. Both thresholds of the statute have been met. Each individual defendant was the prevailing party against the state on all nine (9) alleged violations and each individual defendant has shown to the Court that the state's position against him was not substantially justified.

"Substantially Justified"

MEAJA requires the state's position to be substantially justified. The statute defines "substantially justified" as having a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation. *Minn.Stat.* Section 15.471 subd. 8. The following discussion demonstrates that the state's position against both Dale and Roland Walsh was not substantially justified.

The state based its position against both Dale and Roland Walsh on the "Responsible Corporate Officer Doctrine", hereinafter the doctrine. Minnesota has adopted the following three-part test. In re: Dougherty, 482 N.W.2d 485 (Minn. Ct. App.1982):

1. The individual must be in a position of responsibility which allows the person to influence corporate policies or activities,

2. There must be a nexus between the individual's position and the violation,

3. The individual's actions or inactions must facilitate the violations. Id. at 490.

While both individual defendants satisfied the first prong of the three part test above, the facts show that neither Dale nor Roland Walsh satisfied the second or third prongs of the doctrine before or during the litigation.

Dale Walsh

On the date of the June 4, 1992 inspection, Dale Walsh was the president of Rollies. As such, he was in a position to influence corporate policy and the first prong of the doctrine is met. However, it is the Court's finding that although Dale Walsh was President of Rollies Inc., at the time of the June 4, 1992 inspection, there is no nexus between his position and the violations and prong two was not met. Furthermore, Dale Walsh's actions or inactions did not facilitate the violations and prong 3 is not met.

Roland Walsh

Although Roland Walsh was not an officer at Rollies Inc., at the time of the June 4, 1992 inspection, the Court finds that he maintained a position of influence over corporate policy.

However, there was no nexus between his position and the violations and his actions or inactions did not facilitate the violations.

Bruce Store

In February, 1990, Rollies Inc., hired Bruce Store as the Director of Environmental Services to ensure compliance with all environmental regulations. In 1991 Bruce Store identified himself as the *responsible person* at Rollies Inc., regarding environmental compliance on the Annual Report. This information was available to the plaintiff prior to the June, 1992 inspection.

In addition, Bruce Store was the person from Rollies Inc., who toured the facilities with the MPCA representative on June 4, 1992 and Bruce Store, was the main person who addressed the issues in the notice received by Rollies Inc. Neither Dale nor Roland Walsh was involved in that process.

It is the Court's opinion that Bruce Store, not Dale or Roland Walsh, was the person responsible for the violations at Rollies Inc. However, the plaintiff never named Bruce Store individually as a defendant.

Fees v. Expenses under MEAJA

MEAJA requires that the prevailing party be *charged* fees to be awarded them. However, MEAJA requires the prevailing party to actually *incur* expenses to be awarded them. As set forth below, the Court determined that the individual defendants, Dale and Roland Walsh are entitled to receive an award of fees payable directly to them. However, the expenses charged by their attorneys are to be payable to Rollies Inc., not the individual defendants because the individual defendants did not *incur* the expenses as required by the statute. *Minn.Stat.* Section 15.471 subd. 4.

Calculation of fee award pursuant to MEAJA:

The Minnesota Equal Access to Justice Act defines "fees" as the reasonable attorney fees or reasonable fees charged by a person not an attorney who is authorized by law or rule to represent the party and may include reasonable charges by the party, the party's employee, or agent. *Minn.Stat. Section 15.471, subd 5.* Attorney fees may not be awarded in excess of $100

per hour unless the court . . .determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee. *Minn.Stat. Section 15.471, subd. 5 (c).*

The Court determined, based upon the evidence before it, that a fee higher than $100 per hour was not justified in this case. Unlike expenses (see below), fees need only be charged, not actually incurred by the party being awarded them.[1]

The Court also determined that the individual defendants were not entitled to receive fees charged or expenses incurred prior to the case becoming a "contested case" or "civil action" pursuant to MEAJA. *Minn.Stat. Section 15.472 (a).*[2] This case does not fit within the definition of a "contested case" as defined by the statute. Id. MEAJA does not define "civil action". However, an "action" is defined by *Black's Law Dictionary,* as a suit brought in a court. *Blacks Law Dictionary,* Sixth Edition, p. 28 (1990). This case became a civil action on or about February 10th, 1995 when the Defendants' counsel acknowledged service. For purposes of an award of fees and expenses pursuant to MEAJA, the Court is using the beginning of phase two, (2), the "Preliminary Litigation" phase, or February 7, 1995, as the time when this case became a "civil action". (See Defendants Supplemental Memorandum filed October 2, 1998, pp. 4-5.)

The plaintiff argued that pursuant to Minn.R.Civ. Pro. 52.02, any award under MEAJA is limited by the files, exhibits and minutes of the court. However, it is the holding of this Court, that to limit the MEAJA award in this case would be contrary to logic. In the instant case, the central issue of the motion for amended findings is the amount of fees and expenses to be awarded to the individual defendants. It makes little, if any, sense to limit the fees and expenses that may be awarded to the defendants as they continue to incur fees and expenses in defending their case against the plaintiff's non-substantially justified positions.

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[1] This also differs from the Federal Equal Access to Justice Act, which requires the prevailing party to incur fees and expenses before being entitled to an award under that section. *United States Code Annotated, Title 28, Sections 2255-2460, 2412 (d)(1)(A).*

[2] The Minnesota Equal Access to Justice Act requires that expenses be incurred "in the litigation." *Minn.Stat. Section 15.471, subd. 4.* This is in contrast to the Federal Equal Access to Justice Act, which provides for an award of fees and other expenses of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the *preparation* of the party's case. *28 USCA 2412 (d) (1)(C) (2) (A).*

The Court calculated the award of fees under the Minnesota Equal Access to Justice Act as follows:

Step 1: The Court reduced the *fees* charged by the defendants' attorneys to the $100 per hour maximum allowed in MEAJA. This reduced the total of the fees actually charged, $146,428.10, to $120,145.00 for work performed on this case from the initial negotiations between the defendants and the Minnesota Pollution Control Agency through the post-penalty phase motions, or from 3/94 through 9/14/98. (See Defendants Supplemental Memorandum addressing the amount of attorneys' fees to be awarded to defendants Dale and Roland Walsh, pp. 10-11, filed October 2, 1998.)

Step 2: The Court then added the total amount of eligible MEAJA *expenses* for the same time period, $5,909.35, to the reduced amount from step 1 for a total of $126,054.35. (See Defendants Supplemental Memorandum filed October 2, 1998, p 5.)

Step 3: The Court then subtracted the *fees charged and the expenses incurred* prior to the case becoming a "contested case" as defined by the MEAJA statute or a "civil action" as defined by Blacks Law Dictionary, which were $9013.43. (See the Plaintiff's Memorandum of Law Concerning MEAJA Award To Defendants Dale and Roland Walsh, page 16, filed October 5, 1998.) This left the Court with $117,040.92, the amount of fees and expenses charged after the case came within the definition of "civil action" through the post penalty phase trial motions, or phases two (2) through eight (8). (See Defendants Supplemental Memorandum filed October 2, 1998, p. 5.)

Step 4: The Court then subtracted the amount of MEAJA eligible expenses for that time period, $5790.42, to obtain the amount of MEAJA eligible fees for the time period beginning when the case became a "civil action" through the post-penalty phase trial motions, or $111,250.50. (See Defendants Supplemental Memorandum filed October 2, 1998, p. 5.) This left the Court with the amount of eligible MEAJA fees.

Step 5: The Court then calculated the amount of fees actually charged for phases two (2) through eight (8), or $137,050.50. The Court next calculated the amount of fees actually charged that benefited both Rollies Inc., and the individual defendants, Dale and Roland Walsh, for phases

two (2) through eight (8) or $85,351.50. Then the Court calculated the amount of fees actually charged that benefited the individual defendants, Dale and Roland Walsh only, for phases two (2) through (8), or $35,699.00. (See Defendants Supplemental Memorandum filed October 2, 1998, p. 5.)

Step 6: Using the numbers from step 5, the Court calculated the percentage of actual fees charged during phases 2-8 that benefited both, Rollies Inc., and the individual defendants, Dale and Roland Walsh, 62.3%, as well as the percentage of fees that benefited only the individual defendants, Dale and Roland Walsh, 26%.

Step 7: The Court then applied those percentages to the amount of fees eligible under MEAJA, pursuant to the $100/hr. limitation calculated in step 4. The Court determined that $69,309.06 of the eligible fees under MEAJA benefited both Rollies Inc., and the individual defendants, Dale and Roland Walsh and that $28,925.13 of the eligible fees under MEAJA benefited the individual defendants, Dale and Roland Walsh, only.

Step 8: The Court then awarded one-half of the $69,309.06, $34,654.53, to the individual defendants to share equally, or $17, 327.27 each. It is the Court's opinion that one-half of those fees benefited Rollies Inc., and the Court determined that Rollies Inc., is not entitled to an award of fees or expenses under MEAJA. The Court also awarded each individual defendant one-half of the $28,925.13 or $14,462.57, for a total of $31,789.84 in fees for each individual defendant.

Step 9: The Court then subtracted one-half of the $532.60, or $266.30, of the 10-31-95 discount granted by the defendants attorneys that benefited the individuals only, as well as one-half of one-half of the $217.52, or $54.38, that benefited both Rollies Inc., and the individual defendants, Dale and Roland Walsh. (See Defendants' supplemental memorandum filed October 2, 1998, p. 5.) This left each individual defendant with a MEAJA fee award of $31,469.16.

Calculation of <u>expense</u> award pursuant to MEAJA:

The Court determined that each individual defendant is entitled to one-half of the MEAJA eligible expenses that solely benefited the individual defendants and one-half of one-

half of the MEAJA eligible expenses that benefited both Rollies Inc., and the individual defendants.

However, MEAJA defines "expenses" as the costs *incurred by* a party in the litigation. *Minn.Stat. Section 15.471 subd. 4.* Pursuant to Minn.Stat. Section 302A.521 (1996), Rollies Inc., is required to indemnify Dale and Roland Walsh for . . . attorneys fees and expenses incurred in connection with the lawsuit. Therefore, in this case, the individual defendants have not actually *incurred* any expenses. To avoid a windfall by the individual defendants, the Court has ordered that the award of expenses incurred by Rollies Inc., that benefited both Rollies Inc., and the individual defendants, Dale and Roland Walsh, as well as the expenses that expenses incurred by Rollies Inc., that solely benefited the individual defendants be payable to Rollies Inc., rather than to the individual defendants.

The eligible MEAJA expenses that benefited both Rollies Inc., and the individual defendants for phases two (2) through (8) are $3,873.48. One half of that amount, $1,936.74, is to be paid to Rollies Inc., for expenses it incurred on behalf of the individual defendants, Dale and Roland Walsh. Since the award is being made payable to Rollies Inc., there is no need to further divide the one-half into payments for each individual defendant. Furthermore, Rollies Inc., is awarded the $1,105.11 of eligible MEAJA expenses that solely benefited the individual defendants during phases two (2) through eight (8). In sum, the defendant, Rollies Inc., is awarded $3,041.85 for expenses it incurred that benefited the individual defendants, Dale and Roland Walsh.

Dated this 30th day of December, 1998

PLB

APPENDIX D

Alfred O. Schumann v. Sheryl Corrigan, Commissioner, Minnesota Pollution Control Agency, D.C. File No. C9-02-1632 (3rd Jud. Dist. Minn. 4/29/04)

STATE OF MINNESOTA **IN DISTRICT COURT**

COUNTY OF OLMSTED **THIRD JUDICIAL DISTRICT**

D.C. C9-02-1632

FILED
APR 29 2004
COURT ADMINISTRATOR
Olmstead County, MN

Alfred O. Schumann and David M. Griffin of Winona Excavating Company,

Petitioners,

vs.

Sheryl Corrigan, Commissioner, Minnesota Pollution Control Agency,

Respondent.

AMENDED ORDER
ORDER FOR JUDGMENT AND JUDGMENT

This matter came before the Court pursuant to notice on January 15, 2004, Lawrence T. Collins, District Judge, presiding for hearing on Petitioners' Motion for Attorneys' Fees and Costs to be allowed under the Minnesota Equal Access to Justice Act (MEAJA) following from the Order herein dated October 20, 2003. Petitioners appeared by their attorneys Moss & Barnett, P.A., Minneapolis, in the person of Joseph G. Maternowski, Esq. Respondent appeared by Minnesota Attorney General, St. Paul, in the person of Paul Merwin, Assistant Attorney General, with Eldon G. Kaul, Assistant Attorney General, in attendance. Arguments were heard, leave of time was granted for limited post-hearing submissions, and the matter has since been submitted for decision.

Upon the entire file and records herein, the Court having had the benefits of the pertinent submissions supporting and opposing the motion, having considered the arguments of counsel, and being otherwise fully advised in the premises, makes these

FINDINGS AND CONCLUSIONS

1. Petitioners are prevailing parties under the MEAJA. The relief prayed for by Petitioners was granted by the Order herein dated October 20, 2003. Alfred O. Schumann, at all material times, was the sole proprietor of an unincorporated business having less than 500 employees and $7,000,000.00 in annual revenue, and David M. Griffin, at all material times, was an officer and shareholder of Winona Excavating Company, a Minnesota corporation having less than 500 employees and $7,000,000.00 in annual revenue.

2. Alfred O. Schumann and David M. Griffin of Winona Excavating Company cooperated in the defense of the Minnesota Pollution Control Agency's (MPCA) case for their collective benefit, and Mr. Schumann personally paid for all of the attorneys' fees and expenses incurred defending the case.

3. As previously found and expressed by this Court, the MPCA acted from the inception without sufficient basis taking and persisting in positions adverse to Petitioners without substantial justification. At least elemental investigation, simple calculations, and enlistment of scientific-based support—none of which was done here—would have spared Petitioners from the attorneys' fees and expenses they have unnecessarily incurred.

4. The MPCA's position did not have a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation, and, therefore, was not substantially justified.

5. The MPCA's argument that a National Pollution Discharge Elimination System (NPDES) permit is required for all construction that disturbs more than five acres, regardless of whether there is a discharge into the "waters of the state" would not be viewed by the reasonable person as having a reasonable basis in fact or law. To the extent the MPCA is arguing that this is a new rule, the rule was not promulgated pursuant to the required rulemaking and therefore did not have a reasonable basis in law and fact.

6. The MPCA's argument that the Environmental Protection Agency (EPA) requires an NPDES permit for all construction activity that exceeds a certain threshold regardless of whether there is a discharge into a water position did not have a reasonable basis in law and fact.

7. To the extent that the MPCA has argued that the definition of "waters of the state" is different and more inclusive than that of "waters of the United States," the MPCA has never presented any evidence or argument that groundwater or an isolated wetland was impacted in this case, and the Court finds that there was no showing that "waters of the state" are implicated. The MPCA's position did not have a reasonable basis in law and fact.

8. The MPCA's reliance upon the federal court decision examining the federal storm water program—Environmental Defense Center, Inc. v. U.S. E.P.A., 344 F.3d 832 (9th Cir. 2003)—for its position did not have a reasonable basis in law and fact.

9. Petitioners did not engage in conduct that unduly and unreasonably protracted the final resolution of the matter in controversy. Petitioners' submissions are not inadmissible under the Minnesota Rules of Evidence for the purposes submitted.

10. There are no special circumstances that make an award unjust.

11. The McGhie & Betts Surveys, Pond Proposals, Studies and Presentation was part of this litigation and was a reasonable cost under Minn. Stat. § 15.471, subd. 4(5).

12. The purchase and repurchase of Lot 7 was at the direct request of the MPCA, was part of this litigation, and was a reasonable cost under Minn. Stat. § 15.471, subd. 4(5).

13. The Liesch Associates Hydrological Study and Analysis was part of this litigation and was a reasonable cost under Minn. Stat. § 15.471, subd. 4(5).

14. The analysis of Thomas Larson was part of this litigation and was a reasonable cost under Minn. Stat. § 15.471, subd. 4(5).

15. The Petitioners were billed $117,157.27 as attorney fees incurred for the benefit of the Petitioners in this litigation. All of the legal work was necessary for the proper representation of

the Petitioners in this litigation, and there was no duplicative work. Factual and legal issues herein are closely interrelated, although Administrative Penalty Orders (APOs) did not issue until March, 2002, as of September, 2000, Petitioners recognized the seriousness of the threats to their business interests and personal integrity posed by the Letter of Warning, and they were reasonably motivated to engage competent specialized legal counsel and to enlist experts to assist in their defense. There is no statutory limitation on when the attorney fees must be incurred.

16. There are no Minnesota EAJA cases that discuss how the cost of living adjustment in Minn. Stat. § 15.471, subd. 5(c), is to be computed, but federal EAJA cases are instructive and have used the change in the Consumer Price Index—All Urban Consumers (CPI) from the date the statutory hourly fee was enacted. Based on CPI data from the U.S. Department of Labor, the CPI for the first half of year 2000 was 168.2 and the CPI for the first half of year 2001 was 175.3, which is a 4.22% increase in the cost of living. Thus, increasing the $125.00 base rate in § 15.471, subd, 5(c), by 4.22% results in a base rate of $130.27 for work performed in 2001. Likewise, the CPl for the first half of year 2000 was 168.2 and the CPI for the first half of year 2002 was 179.3, which is a 6.6% increase in the cost of living and an increase of the base rate to $133.25 for work performed in 2002. The CPI for the first half of year 2000 was 168.2 and the CPI for the first half of year 2003 was 181.7, which is an 8.0% increase in the cost of living and an increase of the base rate to $135.00 for work performed in 2003 and the beginning of 2004. Petitioners are entitled to such reasonable cost of living adjustments.

17. As stated above, Petitioners were billed attorney fees of $117,157.27. The billing records reflect approximately 663 hours reasonably devoted to this case. This litigation required attorneys with sufficient knowledge, skill and familiarity in environmental law, the MPCA and the subject site. Petitioners' attorneys have demonstrated and documented their collective expertise and efficiency. There are competent counsel and sufficiently substantial law firms locally and within the "market area" who, supported by experts such as those engaged and relied upon by Petitioners'

attorneys are capable of achieving the results obtained. Minnesota Statutes section 15.471, subd. 5(c), limiting the hourly rate for award of attorney fees in such case, should be reasonably strictly construed. Here, in addition to cost of living increases, there is no "special factor" warranting a statutory award of fees in excess of $125.00 per hour. Thus, the award in this case should be calculated as follows:

YEAR	HOURS BILLED	RATE ALLOWED	AMOUNT
2000	22	$125.00	$2,750.00
2001	12	$130.00	$1,560.00
2002	104	$133.00	$13,832.00
2003-04	525	$135.00	$70,875.00
		TOTAL	**$89,017.00**

In addition thereto, Petitioners should be awarded reimbursement of expenses incurred in the amount of $22,508.99.

NOW, THEREFORE, in accordance with the Order herein dated October 20, 2003, paragraphs 1 and 2, and following from the foregoing Findings and Conclusions,

IT IS ORDERED THAT:

1. The Administrative Penalty Orders (APOs) issued by the Commissioner and the Minnesota Pollution Control Agency (MPCA) and the subject of this matter must be, and hereby are, RESCINDED.

2. After Mr. Schumann submits a Notice of Termination to the MPCA, the MPCA shall close the permit, and shall seek no further requirement or take any future action with respect to Petitioners and the issues raised in this proceeding with respect to Margie's Addition and Wayne Addition.

3. Petitioner Alfred O. Schumann is entitled to awards of $89,017.00, as and for attorney fees, and $22,508.99, as reimbursement for expenses incurred.

IT IS FURTHER ORDERED THAT:

4. The Memorandum attached to the Order dated October 20, 2003, is incorporated herein by reference.

Upon all of the foregoing, the Court makes this

ORDER FOR JUDGMENT

LET JUDGMENT BE ENTERED ACCORDINGLY, in favor of Petitioners against Respondent, together with costs and disbursements, thirty (30) days from the date hereof.

Dated this 26th day of April, 2004.

Lawrence T. Collinsh
District Judge

MEMORANDUM

FACTS AND BACKGROUND

The undisputed facts, procedural history, and applicable standards were fairly summarized by Petitioners at the outset of the hearing.

APPLICABLE LAW: THE CLEAN WATER ACT'S PERMIT REQUIREMENT

The Clean Water Act (CWA) was "a bold and sweeping legislative initiative," United States v. Commonwealth of P.R., 721 F.2d 832; 834 (1st Cir. 1983), enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant" into navigable waters from any point source without a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1311(a); Milwaukee v. Illinois, 451 U.S. 304, 310-11 (1987) (holding that it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit).[3] A NPDES permit may be issued by an authorized State agency. Hiebenthal v. Meduri Farms, 242 F.Supp.2d 885, 887 (D.Or.2002) (citations omitted). In addition, the CWA requires States to adopt water quality standards that protect against degradation of the physical, chemical, or biological attributes of the states' waters. 33 U.S.C. §§ 1251(a); 1313(d)(4)(B); 40 C.F.R. § 131.12 (1995).

Under Minnesota Rule 7001.1030, Subpart 1: "no person may discharge a pollutant from a point source into the waters of the state without obtaining a National Pollutant Discharge

[3] The most important component of the CWA is the requirement that a National Pollution Discharge Elimination System (NPDES) permit be obtained. Commonwealth of P.R., 721 F.2d at 834; 33 U.S.C § 1342 (1994). The Act's requirement that all discharges covered by the statute must have an appropriate permit "is unconditional and absolute." Kitlutsisti v. Arco Alaska, Inc., 592 F.Supp. 832, 839 (D.Alaska 1984), *appeal dismissed, opinion vacated* 782 F.2d 800 (9th Cir.1986). Although the statute contains numerous exceptions that allow the discharge of many pollutants, see generally Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1994), *pet. for cert. filed*, No. 93-1839, 62 U.S.L.W. 3794 (May 18, 1994), there must first be compliance with the regulatory program of the Act including application for a permit. Id.

Elimination System permit from the agency." Minnesota Rule 7001.1035, requires a NPDES permit for "*Storm Water*" discharge if:

> *A. a person is performing industrial or construction activity as defined under Code of Federal Regulations, title 40, section 122.26(b)(14)(i–xi) [Storm water discharges applicable to state programs]; (*emphasis added)
> B. the commissioner determines that the discharge may cause or contribute to a violation of an applicable state or federal water quality rule or regulation. In making this determination, the commissioner shall consider factors including size of discharge, quantity and nature of discharge, and location of discharge to waters of the state;
> C. a water quality management plan adopted pursuant to section 208 of the Clean Water Act, United States Code, title 33, section 1288, recommends that pollution control requirements be applied to the discharge; or
> D. the discharge is from a large or medium municipal separate storm sewer system.

ANALYSIS

1. Was a pollutant discharged into navigable waters from a point of source requiring a NPDES permit before commencing construction on the Wayne or Margie's Additions?

A. Pollutant; discharge thereof

The term "discharge of a pollutant" is broadly defined as "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12)(A). The definition of a "pollutant" includes "dredged spoil, solid waste, ... sewage, garbage, ... biological material, .. heat, ... sand, ... and agricultural waste:" 33 U.S.C. § 1362(6). In the present case, storm water (as a carrier of sand and other sediment) is the pollutant at issue. Storm water is a pollutant carrier, and therefore is appropriately regulated under the CWA. See generally, Environmental Defense Center, Inc. v. U.S. E.P.A., 319 F.3d 398 (C.A. 9th Cir. 2003) *opinion vacated and superseded by* 344 F.3d 832 (9th Cir. 2003) (identifying the EPA's regulation of "storm water" and its concern to protect water quality). Thus, a pollutant is being discharged. This is not in dispute, but nor is it dispositive in this case. The Minnesota Pollution Control Agency (MPCA) must show that the storm water was carried from a point of source to navigable waters to justify

its conclusion that Petitioners were required to obtain a NPDES permit before developing either Addition.

The MPCA claims, in essence, the storm water carried the sand into navigable waters. *See* Schumann/Winona Excavating APO at pg. 2 (sand [a defined pollutant] was discharged at the storm sewer outlets into back yards and along the edge of the school property). This event is not in dispute. However, the MPCA then becomes misguided because, somehow, the MPCA hypothesizes from this event that the storm water diversion allows storm water to always run off into navigable waters from a point of source (the ends of storm sewer culverts), from the time the two additions were built. Essentially, the MPCA reached a conclusion that a NPDES permit was required from an isolated event, and ignores the sequence of events undisputed in the record.

Petitioners claim this event resulted from the pumping out the temporary sediment pond constructed on Wayne Addition; contending it was a one-time event. The MPCA has not disputed Petitioner's justification; moreover, the MPCA has no scientific or otherwise persuasive evidence that the storm water diversion from either Addition repeatedly leads to the sewer outlets, or, that it reaches navigable waters. Rather, it appears undisputed that the storm water from the areas of the Additions is diverted into open fields that do not reach navigable waters.

A survey of the case law that defines navigable waters and points of source, and application of the facts from the record is necessary.

B. Navigable Waters and Point of Source

"Navigable waters" is defined as "the waters of the United States." 33 U.S.C. §1362(7). EPA's expanded definition of "waters of the United States" does not make it clear that the CWA covers any kind of underground waters. However, under the EPA's definition of "waters of the United States," water treatment systems, including treatment ponds or lagoons, are, ***not waters*** of

the United States if they are "manmade bodies of water which neither were created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States." 40 C.F.R. § 122.2.

The record is clear on how the storm water is diverted. From Margie's Addition the storm water is discharged easterly onto a grass covered area of several residential lots lying within Margie's Subdivision. Immediately easterly of Margie's addition is a 80-acre parcel of tillable farm land, grass covered athletic fields arid swales owned by the Dover-Eyota consolidated school system. From Wayne Addition, which was entirely re-graded, with 6 acres sloped so that the storm water would flow westerly; the remainder of the storm water runoff from Wayne Addition flowed easterly, linked to the storm water and sediment controls of Margie's Addition. See Affidavit of Alfred O. Schumann at ¶¶ 2, 5.

Based on the undisputed record, the storm water diversion is not by definition navigable water, nor is channeled through a point of source to reach navigable waters. Diffuse runoff, such. as rainwater that is not channeled through a point source,[4] is considered non-point source pollution and is not subject to federal regulation. Oregon Natural Desert Ass'n v. Dombeck, 172 F.3d 1092, 1095-97 (9th Cir.1998)(recognizing that all of the sections cross-referenced in 33 U.S.C.A. § 1341 relate to the regulation of point sources). The CWA distinguishes and treats point and non-point source pollution separately. See generally, Oregon Natural Resources Council v. United States Forest Service, 834 F.2d 842 (C.A.9 Or. 1987); Natural Resources Defense Council v. EPA, 915 F.2d 1314, 1316 n. 3 (CWA does not penalize non-point source polluters).

[4] Storm sewers are established "point sources" subject to NPDES permitting requirements under Clean Water Act. See Environmental Defense Center, Inc. v. U_S. E.P.A., 319 F.3d 398, 406 (D.C. 9th Cir. 2003) (citing Natural Res. Def. Council v. Costle, 568 F.2d 1369, 1379 (D.C.Cir.1977) ("holding unlawful EPA's exemption of storm water discharges from NPDES permitting requirements").

The affidavits the MPCA offered does not address whether the runoff Petitioners created is navigable water, nor does its argument in its brief. "[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997). "[T]he party resisting summary judgment must do more than rest on mere averments." ld.

Arguably, the storm water diversion that Petitioners created (a manmade body of water) could constitute a "point source" from which the pollutants flow into navigable waters. See e.g., United States v. Oxford Royal Mushroom Prods., Inc., 487 F.Supp. 852,. 854 (E.D.Pa.1980) (discharge resulting from spraying overabundance of water onto surface of an irrigation field which, in turn, ran off into a nearby stream through a break in a berm around the field may constitute discharge from a point source). However, there would then have to be shown an identifiable connection between the point source and a run off of a pollutant into a navigable water way. Scientific evidence is clearly the appropriate method to prove the connection. See e.g., Higbee v, Starr, 598 F.Supp. 323, 330 (D.C.Ark 1984)(the proof required in water pollution cases, is data developed by testing water sources, and such data should be thorough, should be based on scientifically acceptable methodology, and should be in readable form). A party is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the claim asserted. Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995).

Here, the MPCA has not put into the record any scientific evidence, or other evidence, regarding whether the storm water from either Margie's or Wayne Additions finds its way into a

navigable waterway. Intuitively that does not seem likely, and indeed may not be possible, inasmuch as the City of Eyota has no storm water infrastructure for the Wayne and Margie's developments tied to their storm sewers. See Affidavit of David Morrison at 12. Moreover, David Morrison testified that he was not sure whether the storm water diverted actually runs off into navigable waters. See Supplemental Affidavit of Anthony A. Dorland, Exhibit A, July 1, 2003, Deposition of David Morrison, pp. 102-104. When asked where the nearest waterway is located, Morrison testified that it would be about a quarter mile from the school property or more. Id. Finally, Morrison testified that no studies have been completed to test whether the storm water being diverted actually reaches that water way. Id.

Although proximate cause generally is a question of fact for the jury, "where reasonable minds can arrive at only one conclusion," proximate cause becomes a question of law and may be disposed of by summary judgment. Anderson, 539 N.W.2d at 402; Paidar v. Hughes, 615 N.W.2d 276, 281 (Minn. 2000) (quotation omitted). A genuine issue for trial must be established by substantial evidence. Murphy v. Country House, Inc., 307 Minn. 344, 351, 240 N.W.2d 507, 512 (1976). Here, the MPCA has not made a record sufficient to create a genuine issue for trial. Testimony of the MPCA's witness falls short of supporting the conclusion that an NPDES permit was required. Instead, the record supports Petitioners' conclusion that they were not required to obtain an NPDES permit as a condition of developing either Addition.

2. **Did the construction of Margie's addition disturb five acres of land requiring Petitioners to obtain a NPDES permit before commencing construction?**

Margie's total area is approximately eight acres. See Affidavit of David Morrison at ¶ 6. This fact is not in dispute. Code of Federal Regulations, title 40, section 122.26(b)(14)(x) states a NPDES permit is required if:

> Construction activity including clearing, grading and excavation, ***except operations that result in the disturbance of less than five acres of total land area.*** Construction activity

> also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more.

"Since October 1, 1992, when the NPDES permit system took effect, NPDES permits have been required for storm water discharges from 'construction activity.'" Na Mamo O'Aha'ino v. Galiher, 28 F.Supp.2d 1258, 1261 (D.Haw. 1998). "Construction, as described in 40 C.F.R. § 122.26(b)(14)(x) ... is a point source activity..." Id.

The evidence in the record must be viewed in a light most favorable to the nonmoving party. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted). When no genuine issue of material fact exists where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, summary judgment is appropriate. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Petitioners assert 5 acres of land on Margie's Addition were not disturbed. See Schumann Affidavit at ¶ 3. Schumann states that the lots are mainly flat and only a small patch adjoining Glen Street required surface leveling or grading. Some natural vegetation remained undisturbed on the east side of the lots abutting the school farm field. He also states he was responsible for developing the streets and the construction of three homes in Margie's Addition. Id. Exhibit E, attached to Petitioners' Petition is a letter from McGhie & Betts, Inc., a land survey firm. The letter states that approximately 3.5 total acres were disturbed during street and utility construction in Margie's Subdivision.

The MPCA did not do any formal calculation of the Margie Addition to learn how many acres were disturbed. David Morrison testified at his deposition that he does not have any evidence that 5 acres or more were disturbed. See Supplemental Affidavit of Anthony A. Dorland, Exhibit B, July 1, 2003, Deposition of David Morrison, pp. 38-40. In his affidavit,

David Morrison simply concludes that by looking at the present condition of Margie's Addition, five acres or more must have been disturbed.[5]

The MPCA has not offered substantial evidence sufficient to create a genuine issue for trial. The MPCA has rested on mere averments and assumptions based on observations made by David Morrison. A genuine issue for trial must be established by substantial evidence. Murphy v. Country. House, Inc., 307 Minn. 344, 351, 240 N.W.2d 507, 512 (1976). On the other hand, Petitioners offered evidence from their land surveyor to support their contention that less than five acres were disturbed. See Galiher, 28 F.Supp.2d at 1262 (adopting calculations of the disturbed land conducted by plaintiffs' expert), and this has not been refuted.

"A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." Minn.R.Civ.P. 56.03; Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted).

3. Was Alfred Schumann required to build a wet basin on Wayne Addition pursuant to the general permit issued by the MPCA?

The general permit issued to Petitioners by the MPCA required him to develop permanent erosion and sediment controls. Affidavit of David Morrison, Exhibit A: Permit at App. B (a) entitled Sediment Control states:

> Where a project's ultimate development replaces surface vegetation with one or more acres of cumulative surface and all runoff has not been accounted for in a local unit of government's existing storm water plan or practice, the runoff shall be discharged to a wet sedimentation basin prior to entering waters of the state.

[5] The MPCA conceded at the hearing that David Morrison did not scale or otherwise calculate how many acres were actually disturbed. Moreover, as was argued, "in some ways[it] is a rough calculation...".

Petitioners contend the City of Eyota has a local plan or practice to account for storm water runoff, they complied with it, and that the city did account for the runoff by approving submitting their plan pursuant to Eyota City Code, Article 5, 5.1 (1). See Exhibit b, Affidavit of Alfred Schumann. Petitioners note Eyota's code requires that the city council approve or disapprove a subdivision plan, taking into account land that is unsuitable due to flooding, improper drainage, or other soil-related problems, with endorsements from the city's engineers before approving any submitted subdivision plan.

Petitioners contend that the MPCA failed to review the plan the city approved, and have made an unfounded decision to penalize them based solely on a citizen's complaint (the sand going onto that person's property from Petitioners' one-time pumping out the temporary pond). Petitioners argue that had the MPCA taken a step further than to simply call the Mayor of Eyota (who may have told Morrison his City doesn't have a plan) they would have discovered the plan or practice, and that the City had allowed the runoff to the cornfield long for a time before the Additions were developed.

Further, Petitioners contend that had the land been unsuitable for development the city would not have approved their plan. Moreover, the drainage system was constructed in such a way as to not cause additional soil erosion or sedimentation after construction in accordance with the local practice. Based on their compliance with the local plan and the City's approval in accordance to the local practice, they were not required to construct a wet sedimentation basin; therefore, the penalty is without merit. Finally, Petitioners persist in the contention that there is absolutely no showing that the storm water runoff reaches navigable waters.

The MPCA contends that the City of Eyota does not have a storm water plan or practice that addresses sediment control to protect water quality. It says the mayor told Morrison that the

City of Eyota does not have a storm water plan or practice to achieve sediment control. Morrison confirmed what the Mayor told him by determining that the city has no control structures designed to control sediment.

The MPCA also contends that Petitioners reliance on the local ordinance is misplaced because the building requirements that the city requires of developers do not amount to the city having a storm water plan or practice of sediment control. The MPCA acknowledges that Section 5.2 (5) addresses soil protection and drainage, but asserts that this provision is limited to measures taken during construction (temporary sediment controls) and does not deal with permanent sediment controls. The only attention the Eyota subdivision Ordinance gives permanent storm water controls is in section 5.4, which deals with drainage and storm sewers, not sedimentation controls. Thus, to the satisfaction of the MPCA, the City of Eyota has not adopted a storm water plan or practice. Further, it argues that Schumann did not attempt to do anything to comply with the terms of the permit because he admits that he did not read it.

In essence, the last sentence in the permit section quoted above states that the wet sedimentation basin is required if the water will ultimately enter navigable waters. The last clause reads, "...the runoff shall be discharged to a wet sedimentation basin prior to **entering waters of the state**." (emphasis added). As has been concluded already, there is no showing that "waters of the state" are implicated and that is dispositive of the issue. Even though there is a genuine issue of fact as to whether the City of Eyota has a qualified local plan or practice for storm water discharges, it is immaterial given the dispositive void of showing in this case implicating any waterway.

4. Is the statute of limitations a bar to the MPCA penalty on petitioners for failure to obtain an NPDES permit for Margie's Addition?

Minnesota Statutes, section §541.075 governs the statute of limitations regarding the issuance of the APO in connection with Margie's Addition. The statute states that an action must be commenced within three years of the date the violation was discovered or reasonably should have been discovered. Id.

Petitioners claim is that the MPCA was aware, as early as May 1995, that construction was taking place on Margie's Addition from their application for a permit for a Sanitary Sewer Permit, from a public hearing on Margie's Addition, and publication of that hearing. Petitioners claim this notice is binding on all persons having an interest in the plat. No authority has been cited to show the MPCA would be bound. Petitioners argue had the MPCA been duly diligent they would have discovered the alleged violation.

The MPCA asserts the APOs were issued well within the statute of limitations, because they did not have reason to know about the violations prior to Morrison's inspection of August 2002. The MPCA argues the construction storm permit program is designed as a self-regulated program. If the regulated parties do not enter into the process then the MPCA has no way of knowing construction is going on. The MPCA argues that receiving a Sanitary Sewer extension permit application for Margie's Addition does not automatically make the MPCA aware of Petitioners failure to obtain a NPDPS permit. The permit application is reviewed for the limited purpose of ensuring the integrity, and updating the permit coverage, of the disposal system itself, and tells nothing about whether the Petitioners obtained or not obtained a storm water permit. The review of a single unrelated permit application cannot put the MPCA on notice of the Petitioners failure to obtain an application for storm water.

Petitioners argue in support of their statute of limitations defense that the MPCA should have exercised due diligence to discover Petitioners failure to obtain a permit for Margie's Addition. This argument is not compelling. On this defense, Petitioners would not presently be entitled to judgment as a matter of law.

5. **Are Petitioners entitled to attorneys fees pursuant to Minnesota Equal Justice Act, Minn. Stat. §15.471-473?**

Petitioners request attorney fees to be awarded under the Minnesota Equal Access to Justice Act (MEAJA)[6] asserting that the MPCA had no factual or legal basis to issue any of the APOs. The MPCA opposes any such award, contending that it was substantially justified in issuing the APOs.

The MEAJA provides in relevant part: "If a prevailing party other than the state, in a civil action or contested case proceeding ... brought by or against the state, shows that the position of the state was not substantially justified, the court ... shall award fees and other expenses to the party unless special circumstances make an award unjust." Minn. Stat. § 15.472(a). See also Donovan Contracting v. Minnesota, 469 N.W.2d 718 (Minn. App. 1991). The standard under the MEAJA is that a litigant is entitled to attorney fees and expenses where the government's litigating position is not "substantially justified." The act defines "substantially justified" to mean that the state's position had a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation or contested case proceeding. § 15.471, subd. 8. The MEAJA places the burden of proof on the party seeking fees, while the EAJA imposes upon the government the burden of proving that its actions were substantially justified. See Donovan, 469 N.W.2d at 720.

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[6] The Act is modeled on the federal Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 (1988). Provisions of the EAJA pertinent here have been adopted with approval of the Minnesota Court of Appeals. Donovan Contracting v. Minnesota, 469 N.W.2d 718 (Minn. App. 1991).

In this case the MPCA acted without sufficient basis. At least elemental investigation, simple calculations, and enlistment of scientific-based support - none of which was done here - would have spared Petitioners from the attorney's fees and expenses they have unnecessarily incurred. They are entitled to reimbursement subject to their proofs at hearing.

LTC