STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Case Type: Mandamus
File No.: 62-CV-15-3827
Judge: John H. Guthmann

Northern Metals LLC,

Plaintiff,

vs.

John Linc Stine, in his official capacity as Commissioner of the Minnesota Pollution Control Agency and the Minnesota Pollution Control Agency,

Defendants,

and

State of Minnesota, acting by and through the Minnesota Pollution Control Agency,

Intervenor.

ORDER ENFORCING THE DECEMBER 21, 2015 STIPULATION AND ORDER AND GRANTING IN PART DEFENDANT'S MOTION FOR A TEMPORARY INJUNCTION

The above-entitled matter came before the Honorable John H. Guthmann, Judge of District Court, on June 9, 2016, at the Ramsey County Courthouse, St. Paul, Minnesota. At issue was defendant's motion for a temporary injunction and enforcement of the court's December 21, 2015 Order and plaintiff's motion to enforce the court's December 21, 2015 Order. Jack Y. Perry, Esq., and Jason R. Asmus, Esq., appeared on behalf of plaintiff. Ann E. Cohen, Esq., appeared on behalf of defendants and the intervenor (hereinafter "defendant"). Based upon all of the files, records, submissions and arguments of counsel herein, the court issues the following:

ORDER

1. The motions to enforce the Stipulation and Order are **GRANTED in part and DENIED in part** as follows:

    a. By no later than September 9, 2016 at 4:30 p.m., plaintiff shall submit to defendant a revised Test Plan for the shredder building that addresses defendant's objections to previous Test Plans. The Test Plan must also be consistent with the court's Memorandum of Law herein.

    b. By no later than September 16, 2016 at 4:30 p.m., defendant shall serve any objection to plaintiff's proposal in writing. If defendant objects, it must also articulate an alternate plan that it would accept.

    c. By no later than September 23, 2016 at 4:30 p.m., plaintiff shall accept the alternate plan in writing or request an informal telephone conference with the court to resolve any remaining dispute. Failure to respond in timely fashion constitutes plaintiff's acceptance of defendant's alternate plan.

2. Defendant's motion for a Temporary Injunction is **GRANTED in part and DENIED in part** as follows:

    a. The Shredder Building may remain in operation subject to the December 21, 2015 Stipulation and Order and paragraph 1 of this Order.

    b. Plaintiff is enjoined, effective September 2, 2016, from operating the Metals Recovery Plant and the attached Rain and Snow Shed (collectively referred to herein as "MRP") until it is established to the court's satisfaction that either:

i. defendant accepts an amended permit application and issues a permit that accounts for emissions from the MRP, or

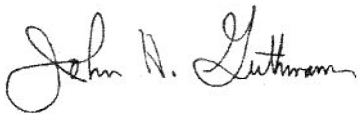
ii. While action is pending on an MRP permit, plaintiff improves the MRP and demonstrates through testing approved by defendant that the MRP does not cause or contribute to ambient air quality violations.

3. The court adopts the following Memorandum as part of this Order.

4. Nothing in the court's Order or Memorandum limits or prevents further stipulations or agreements between the parties or other available legal remedies.

Dated: August 29, 2016

BY THE COURT:



Guthmann, John (Judge)
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John H. Guthmann
Judge of District Court

M E M O R A N D U M

I. STATEMENT OF THE CASE AND FINDINGS OF FACT

Plaintiff filed an ex parte Verified Petition for Alternative Writ of Mandamus on June 15, 2015. Plaintiff amended its petition on June 23, 2015. The Amended Petition sought an order from this court requiring defendants John Linc Stine and the Minnesota Pollution Control Agency to close its Monitor Site 909 and an additional monitor site at 2710 Pacific Street. (Am. Pet. 25, ¶¶ 1-2.) The Amended Petition also requested a court order compelling these defendants to determine the sources of any measured air-quality exceedances by using "modeling." (*Id.*, at 25, ¶ 3.) Finally, the Amended Petition seeks

any other applicable equitable or injunctive relief along with "mandamus damages" pursuant to Minn. Stat. § 586.09 (2012). (*Id.* at 26, ¶¶ 4-5.)

After the court filed an Alternative Writ of Mandamus on June 25, 2015, defendant filed an Answer and Counterclaims on July 27, 2015.[1] Defendant amended both pleadings on August 13, 2015. Four counts are included in the Amended Counterclaims. The counterclaims allege that plaintiff: is causing or contributing to violations of state ambient air quality standards under Minn. R. 7009.0020-.0040 and the Minnesota Environmental Rights Act ("MERA"); is in violation of its permit; and, is operating a building that constitutes a public nuisance under Minn. Stat. § 115.071, subd. 4. (Am. Ans. and Countercl. 24-28.) Thereafter, plaintiff moved to dismiss defendant's counterclaims and defendant moved to dismiss the Alternative Writ of Mandamus. During the briefing and hearing process, plaintiff moved to enjoin defendant's administrative order requiring performance testing of the facility and the State of Minnesota moved to intervene.

The court heard all motions on October 26 and November 19, 2015. While the motions were under advisement, the parties reached a settlement agreement staying the litigation. The settlement included a protocol for testing emissions at plaintiff's shredder facility. The settlement did not address any other buildings on plaintiff's property. The parties filed the fully executed settlement agreement and the court adopted it as an Order. (Stipulation and Order, Dec. 21, 2015 (hereinafter cited as "Stip. and Order").)

[1] As the court explained in the memorandum accompanying the Alternative Writ of Mandamus, the Writ functioned as an Order to Show Cause. Once defendants filed their answer, the court processed the case like any other civil action. Minn. Stat. § 586.12 (2012). As such, issuance of the alternative writ does not mean that the plaintiff's legal position received the court's imprimatur.

A. The Stip. and Order and the Shredder Building.

The Stip. and Order requires plaintiff to have a third-party consultant evaluate the shredder facility and prepare a report before conducting any testing. (Stip. and Order at 4.) The consultant is to evaluate "pollution control equipment serving the metal shredder and cascade cleaning system" and "fugitive emissions issues associated with outdoor material handling that may be contributing to exceedances of ambient air quality standards." (*Id.*) Thereafter, plaintiff is required to submit a performance Test Plan to defendant with testing procedures in accordance with Minn. R. 7017 to determine if the facility complies with the permit terms. (*Id.* at 4-5.) The results of the test must "demonstrate that 100% of the emissions from the shredder and cascade cleaning system are captured and routed to control equipment." (*Id.* at 5.) If plaintiff's testing did not demonstrate "100% capture efficiency", then it must resubmit a permit application within 30 days "that recalculates the facility's potential to emit using *accurate capture efficiencies based on the hood systems in the shredder building*." (*Id.* at 7 (emphasis added).)

Under the Stip. and Order, defendant is not required to approve the Test Plan unless it satisfies Minn. R. 7017 and the terms of the Stip. and Order. (*Id.* at 5-6.) The Test Plan needs to include at least three one-hour-long test runs performed at "'worst case conditions' as defined in Minn. R. 7017.2005, subp. 8." (*Id.* at 6.) The Test Plan also needs to describe the "site-specific" engineering test that will "demonstrate that 100% of the emissions from the shredder and cascade cleaning system are captured and routed to the control equipment." (*Id.* at 5.)

Plaintiff submitted a Test Plan on February 15, 2016. (Severin Dec. ¶ 13, Ex. 3.) Defendant rejected the Test Plan three days later because the plan did not adequately test the capture rate of the capture systems; instead, it tested the ductwork after the capture systems collected the emissions. (*Id.* at ¶ 14, Ex. 4.) Defendant asked plaintiff to resubmit a test plan measuring the capture efficiency of the hoods, which constitute the emissions capture equipment in the shredder building. (*Id.* at ¶ 12, Ex. 2.)

On February 29, 2016, plaintiffs submitted a revised Test Plan. (Severin Dec. at ¶ 17.) Defendant rejected the plan. (*Id.* ¶¶ 18, 20.) In the revised Test Plan, plaintiff renamed the hoods "snorkels." (*Id.* at ¶ 17.) Plaintiff claimed the snorkels did not capture emissions from the shredder or cascade cleaning system; they mitigate "fugitive emissions" from the conveyor belts and drop points where materials enter and exit the shredder. (*Id.* at ¶ 16.) According to plaintiff, the cascade cleaning system and the shredder are totally enclosed by a cover, but the conveyor and drop points are not included in that "total enclosure." (*Id.*) The Test Plan still did not address the capture efficiency of the "snorkel." (*Id.*) The two sides attempted to meet with the engineering company that designed the facility, but did not agree on a Test Plan addressing defendant's concerns. (Kilgriff Dec. ¶¶ 16-17.) To date, defendant has not approved a Test Plan pursuant to the Stip. and Order. (*See* Asmus Aff. ¶¶ 40-42, May 26, 2016; Letter from Jason R. Asmus, plaintiff's attorney to Ann Cohen, defendant's attorney (Aug. 19, 2016) (with test plan) (filed with the court).)

B. <u>The Metal Recovery Plant and the Rain and Snow Shed</u>.

While the two sides worked on a Test Plan, defendant continued to monitor plaintiff's facility and recorded ambient air quality exceedances. (Sec. McMahon Dec. ¶

2.) On March 24, 2016, defendant inspected plaintiff's facility. During the inspection, defendant discovered that plaintiff was conducting scrap-metal recycling operations in the MRP. (Kilgriff Dec. ¶ 4.) The Rain and Snow Shed is attached to the main Metal Recovery Plant building and has an open front that is totally exposed to ambient air. (*Id.*) The separate Metal Recovery Plant building processes shredder residue. (*Id.* at ¶ 7.) It has several open garage doors that expose its emissions equipment to the ambient air. (*Id.* at ¶ 11.) The Metal Recovery Plant wall also has several large openings that accommodate conveyors accessing the structure. (*Id.* at ¶ 10.)

Inspectors noted piles of shedder dust in the MRP on the floor and equipment. (Kilgriff Dec. ¶ 13.) One inspector scooped a sample of the dust. (*Id.* at ¶ 14.) An analysis of the dust matched a sample of the pollutants captured in the ambient air surrounding the facility. (Sec. Fenlon Dec. ¶¶ 6-7.) This building is not listed as an emissions source in plaintiff's permit application. A 2015 email described the building as totally enclosed with "little to no potential for emissions," but also described it as an insignificant activity with the potential for daily fugitive emissions. (Kilgriff Dec. ¶ 4, Ex 1.) A permit applicant must list accurately its emissions sources. *See* Minn. R. 7007.0500, subp. 2; 7007.1300.

On March 29, 2016 and April 5, 2016, defendant requested certain information from plaintiff regarding the MRP. (Kilgriff Dec. ¶¶ 20, 28, Ex. 7.) After exchanging correspondence, defendant remained dissatisfied with plaintiff's responses. (Asmus Aff. ¶¶ 68-87, May 26, 2016.) In its May 6, 2016 communication to defendant, plaintiff defended its decision not to report MRP emissions. (*Id.* at ¶ 105, Ex. 54.) Defendant alleges that plaintiff did not provide the requested information for all of the equipment and

only gave emissions calculations for activities occurring outside of the building. (Kilgriff Dec. ¶ 30, Ex. 8.)

On May 18, 2016, defendant moved for an order enjoining plaintiff's operation of both the shredder building and the MRP until issuance of a new permit. (Mem. in Supp. of a Temp. Inj. and for Relief Under this Court's Dec. 21, 2015 Order.) Plaintiff opposed the motion and separately moved the court to enforce the December 21, 2015 Stipulation and Order. (NMLLC's Mot. for the Five-Part Enforcement of the Parties' Court-Approved Dec. 21, 2015 Stip. and Order at 31.) All motions were heard June 9, 2016.

II. THE TEST PLAN MUST MEASURE THE CAPTURE EFFICIENCY OF EMISSIONS INSIDE THE ENTIRE SHREDDER BUILDING

The shredder-building dispute centers on how to interpret the Stip. and Order. Any "disputes about the scope of the testing" may be resolved by this court. (Stip. and Order at 8.) Notwithstanding the express grant of judicial authority in the Stip. and Order, courts always have authority to interpret and enforce their own orders. *Ladwig v. Chatters*, 623 N.W.2d 266, 268 (Minn. Ct. App. 2001); *see Palmi v. Palmi*, 273 Minn. 97, 102, 140 N.W.2d 77, 81 (1966). Reviewing courts give great weight to a court's interpretation of its own order. *Palmi*, 273 Minn. at 104, 140 N.W.2d at 82. The court may consider the record as a whole and any parol evidence in its interpretation. *Mikoda v. Mikoda*, 413 N.W.2d 238, 242 (Minn. Ct. App.), *rev. denied* (Minn. 1987).

A. The Capture Efficiency of the Hood System Must Be Included as Part of the Capture System Testing in the Shredder Building.

Over the course of this litigation, the parties have never agreed on what constitutes a "total enclosure." Plaintiff argues that the shredder and cascade cleaning system are

totally enclosed by casings surrounding the units and the emissions are self-contained and directed through ductwork to the control equipment. (Hansel Aff. ¶¶ 56-67, Exs. M, O, May 26, 2016.) Essentially, plaintiff argues that the emissions units are also the total enclosure. (*Id.* at ¶¶ 52, 89.) Defendant maintains that the only structure that completely surrounds the shredder and the cascade cleaning system is the building, making it the only structure or system that could possibly be a total enclosure.

The Stip. and Order, the 2010 Permit, and the arguments of counsel use terminology that has a specific meaning in the context of pollution control statutes and rules. (Stip. and Order at 5-6, 8.) In fact, the Stip. and Order requires testing in conformity with applicable regulations and testing results must comply with the permit. (*Id.*) The regulations and permit are therefore critical to the interpretation of the Stip. and Order. As such, this court interprets the Stip. and Order in accordance with the 2010 Permit along with applicable statutes, regulations, and case law construing the statutes and regulations.

A "total enclosure" is "an enclosure that completely surrounds emissions from *an emissions unit* such that all emissions are captured and discharged through ductwork to control equipment." Minn. R. 7011.0060, subp. 5 (emphasis added). An "emissions unit" is "each activity that emits or has the potential to emit any air contaminant or pollutant," such as "equipment, machinery, [or a] device . . .." Minn. R. 7005.0100, subp. 10b. Here, the emissions units at issue—the only emissions units identified by either plaintiff or defendant—are the shredder and cascade cleaning system.

Defendant is correct—other than the entire interior of the shredder building there is nothing else that meets the total enclosure definition. In fact, plaintiff described the

shredding process as "completely housed in a large building" in the 2010 permit documents. (Hansel Aff. ¶ 55, May 26, 2016.) According to the drawings submitted in the pre-hearing Test Plan, the casings that plaintiff describes as the total enclosure do not "completely surround" the emissions units. There are openings at the top and bottom for a conveyor infeed and outfeed on both the shredder and cascade cleaning system. (Severin Aff. Exs. 2, 5.) Plaintiff admitted that the shredder casing has "openings" at the infeed and outfeed locations. (Severin Aff. Ex. 4, at 3.) Plaintiff's counsel acknowledged at the hearing that emissions could escape from those openings in the "process of coming in and going out." (Hearing Tr. 43-45, June 9, 2016.) The casings simply do not "completely surround" either the shredder or the cascade cleaning system.

Even if the court's interpretation of the regulations is erroneous, a decision on what constitutes a "total enclosure" is not necessary to resolve the instant dispute. The Stip. and Order was a compromise. The court interprets the Stip. and Order as requiring a demonstration that 100% of the emissions from the shredder and cascade cleaning system are captured without reference to whether the emissions are totally enclosed by anything. (Stip. and Order at 5, 7.) However, this begs the question: If the emissions from the shredder-building operation are not contained in a total enclosure, what mechanism is in place to capture the emissions and rout those emissions to control equipment?

To answer this question, the definition of several other phrases need consideration. "Capture efficiency" is "the percentage of emissions produced by a process that are captured by an enclosure and/or ductwork and transported to air pollution *control equipment*." Minn. R. 7011.0060, subp. 2 (emphasis added). "Control equipment" is "any

structure, work, equipment, machinery, device, apparatus, or other means for treatment of an air contaminant or combination thereof to prevent, abate, or control air pollution." Minn. R. 7005.0100, subp. 8 (cross-citing to Minn. Stat. § 116.06, subd. 3 (2014), which defines "Air contaminant treatment facility or treatment facility"). "Capture systems" are "equipment such as *hoods, ducts, fans*, and dampers used to capture particulate matter." Minn. R. 7011.1000, subp. 2 (emphasis added). A "hood" is a "shaped inlet to a pollution control system that does not totally surround emissions from an emissions unit, that is designed, used, and maintained to capture and discharge the air emissions through ductwork to *control equipment*." [2] Minn. R. 7011.0060, subp. 3e (emphasis added).

The use of these phrases in the Stip. and Order is important because they have specific meanings in the realm of environmental law. To start, the regulations make clear that "capture efficiency" refers to the percentage of emissions generated by plaintiff's entire shredder-building process that an enclosure and/or ductwork captures and then transports to the control equipment. In the shredder building, the shredder and cascade cleaning system generate emissions. The Stip. and Order unambiguously requires capturing 100% of those emissions. The hoods, casings, and ducts capture emissions and send the emissions through a cyclone to a scrubber and air filter system, where a fan directs the emissions out of a common stack. (Severin Dec. Ex.4, Fig. 1; Stip. and Order at 5.) To comply with the parties' settlement, the hoods, casings, and ducts comprising the capture

[2] The court finds no basis in law or rule for plaintiff's reference to the hoods as "snorkels." "Hood" is the term used in the statute, rules, permit application, Stip. and Order, and first Test Plan. Moreover, by using the phrase "such as", the rule contains a non-exclusive list of "capture systems." Minn. R. 7011.1000, subp. 2. Accordingly, plaintiff's decision to use the word "snorkel" to describe what used to be a "hood" changes nothing.

system must therefore capture 100% of the emissions generated by the shredder and cascade cleaning system and direct all of those emissions to control equipment. Here, the control equipment is the cyclone, scrubber, and air filter. Accordingly, a Test Plan complying with the Stip. and Order must test everything that captures any emissions generated by the shredder and cascade cleaning system, including the hoods, as they are part of the capture system.

Further, the Stip. and Order resolves any ambiguity about what and how the capture equipment must to be tested. The Stip. and Order directs plaintiff to recalculate the building's emissions "based on accurate capture efficiencies *based on the hood systems in the shredder building*" if the results of the testing showed lower than a "100% capture efficiency." (Stip. and Order at 7 (emphasis added).) The Stip. and Order therefore expressly directs plaintiff to measure the capture efficiency of emissions captured by the hoods. The Stip. and Order would be impossible to enforce if the Test Plan did not include testing the hood system's capture efficiency.

Plaintiff asserts that the hood is not designed to capture 100% of emissions and would fail a test that requires 100% capture efficiency. (Hearing Tr. 48, June 9, 2016.) Instead, plaintiff proposed a Test Plan establishing test sites in the ductwork immediately before the cyclone and in the common stack above the roofline. (Severin Aff. Ex. 2, Ex. 4, Fig. 1, Ex. 5.) By definition, a hood "does not totally surround emissions from an emissions unit" and cannot capture 100% of emissions from an emissions unit. Thus, if the hood system was the only capture equipment in the building, plaintiff would likely never pass a test requiring 100% capture efficiency.

However, the emissions captured by the hood are only part of the equation. Even though the casings are not total enclosures, they are part of the capture system. Therefore, the hood system is not the only capture equipment for the shredder and cascade cleaning system's emissions. Much of the shredder is encased and some emissions are directed by airflow through ductwork. Defendant admits that proper airflow combined with the hood system could have a capture efficiency comparable to that of a total enclosure. (MPCA Reply to NMLLC's Motion for the Five-Part Enforcement of the Parties' Court-Approved Dec. 21, 2015 Stip. and Order 6 fn. 4 (citing Severin Dec. ¶ 11).) Thus, even though 100% of the emissions from the shredder and cascade cleaning system must be captured, the hoods alone do not necessarily need to capture 100% of the emissions.

Plaintiff's proposed Test Plan would not test capture efficiency at all. Instead, it more closely correlates with "collection efficiency." Minn. R. 7011.0060, subp. 3. Collection efficiency refers to the "percentage of emissions entering the control equipment that are collected by the air pollution control equipment and thus removed from the exhaust stream." *Id.*, subp. 3. Plaintiff proposes testing the emissions immediately before "entering the air pollution control equipment" (the cyclone) just before entering the atmosphere. The control equipment is designed to treat what is captured, not capture what is emitted. Plaintiff's pre-hearing Test Plan proposes testing only post-capture emissions that are downstream of any capture points. Such a test therefore fails to measure capture efficiency as required by the Stip. and Order. Because plaintiff proposed testing "collection efficiency" instead of "capture efficiency", defendant was correct to reject both of plaintiff's pre-hearing Test Plans.

Furthermore, whether plaintiff can actually establish a 100% capture efficiency is irrelevant to interpretation of the Stip. and Order. The Stip. and Order calls for a 100% capture efficiency pursuant to plaintiff's representation that every emissions unit in the building operates at a 100% capture efficiency. (Suddard Aff. Ex. 2.) The Stip. and Order contemplates a scenario in which the shredder building test falls short of 100%. In such an event, plaintiff "shall submit, within 30 days, a permit application that recalculates the facility's potential to emit based on accurate capture efficiencies based on the hood systems in the shredder building." (Stip. and Order at 7.) The possibility of failing the test is not a basis to interpret the Stip. and Order in a way that disregards uncaptured emissions.

B. All of the Emissions Inside the Building Must Be Captured.

The second major debate between the parties focuses on whether there are "fugitive emissions" within the shredder building that should not count toward the required 100% capture efficiency. Plaintiff argues that any emissions not collected by the shredder and cascade cleaning system's casings are fugitive emissions allowed by the permit. (Hansel Aff. ¶¶ 56-67, Exs. M, O, May 26, 2016.) Further, plaintiff argues that the conveyors sending material to and from the shredder create fugitive emissions that cannot be collected and are not included in the "shredder and cascade cleaning system" language of the Stip. and Order. (Hearing Tr. 45, June 9, 2016.) To defendant, the idea that fugitive emissions may exist inside the shredder building is a "nonstarter." (*Id.* at 50.)

Plaintiff's position contradicts both the court's discussion in section II(A) above and Minnesota's regulatory framework. "Fugitive emissions" are "pollutant discharges that could not reasonably pass through a stack, chimney, or other functionally equivalent

opening." Minn. R. 7005.0100 subp. 11c. The Stip. and Order specifies the need for an independent consultant to evaluate "fugitive emissions issues associated with *outdoor* material handling." (Stip. and Order at 4 (emphasis added).) According to the permit application documents, fugitive emissions are "air emissions *outside* of your building . . . [and e]missions *inside* a building that do not pass through a stack are not fugitive emissions." (Suddard Aff., Ex. 1, at 2 (emphasis added).) Indoor emissions that do not pass through a stack "should be assigned to a building vent and reported as stack emissions on the . . . *Emissions Unit Description Form* (GI-05B) [permit application form]." (Suddard Aff., Ex. 1, at 2 (emphasis added).)

Further, the permit application requires permittees to list "fugitive emission sources." (*Id.*) It gives examples of fugitive emission sources, most of which refer exclusively to outdoor activities such as "Landfill", "Material Handling/Transfer/Storage", "Paved Road", "Piles", "Unpaved Roads", and "Vehicle Emissions." (*Id.*) Other examples arguably lend some ambiguity to the indoor-outdoor distinction, such as "Cooling Tower", "Equipment Leaks", and "Process Emissions." (*Id.*) The permit application instruction form states that emissions that are "vented through control equipment" are not considered fugitive emissions. (Suddard Aff., Ex. 1, at 2 (emphasis added).) It gives as an example of controlling fugitive emissions: "a water spray bar at the end of a conveyor used to *transfer material onto an outdoor storage pile*." (*Id.* (emphasis added).)

Plaintiff's characterization of "fugitive emissions" is incorrect. As made clear by the Stip. and Order, MPCA policy, permitting documents, and regulatory definition, the emissions inside the shredder building are not fugitive emissions. Though the list of

fugitive emissions examples may have certain ambiguities when read in isolation, the list immediately follows the definition that expressly limits "fugitive emissions" to emissions generated outdoors. (Suddard Aff. Ex. 1, at 2.) The actual definition precludes any claim that the examples render the application ambiguous. The conveyor drop points and loading points are indoors. (Severin Aff. Exs. 5.)

The very fact that a hood and ventilation system is in place to capture emissions at the infeed opening of the shredder shows that those emissions could "reasonably pass through a stack, chimney, or other functionally equivalent opening." Minn. R. 7005.0100 subp. 11c. In fact, plaintiff says it placed the hoods in strategic locations to capture what it now mischaracterizes as fugitive emissions from the conveyor drop points. Plaintiff's attempt to categorize the hoods as a means to control fugitive emissions fails because unlike the example of the water spray bar, the conveyor generates emissions entirely indoors. Further, plaintiff is obligated to report fugitive emissions sources and any control equipment designed to mitigate those emissions in its permit application. (Suddard Aff. Ex. 2.) It did not. Either way, plaintiff's attempt to characterize the emissions from the shredder or conveyor as fugitive emissions is without merit.

Whether from the shredder, conveyor, drop points, or anything else, any emissions generated inside the shredder building are not fugitive emissions and therefore must either be collected by the capture system or assigned to a vent and reported as stack emissions. Plaintiff failed to report any such emissions or assign them to a stack. The shredder and cascade cleaning system are the only emissions units disclosed in the 2010 permit application and plaintiff stated plainly that each emissions unit has a 100% capture

efficiency. (Suddard Aff. Ex. 2.) If plaintiff's permit application is accurate, there should be no emissions in or escaping from the building other than those going out the stack from the shredder and cascade cleaning system. Thus, "emissions from the shredder and cascade cleaning system" effectively means the same as "emissions from all equipment in the shredder building."[3] The only way the shredder building can comply with the Stip. and Order, which requires permit compliance, is if all of the emissions generated in the shredder building are collected by the capture system in the building.

C. Plaintiff is Not Protected from the Consequences of its Settlement by Equitable Estoppel or the Permit Shield.

Defendant is not equitably estopped from enforcing the permit terms or terms of the Stip. and Order. An equitable estoppel claim against the government requires a finding of four elements: (1) wrongful conduct from a government agent; (2) reasonable reliance thereon; (3) a unique expenditure in reliance thereon; and (4) a balance of the equities favors estoppel. *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 25 (Minn. 2011); *Brown v. Minnesota Dep't of Pub. Welfare*, 368 N.W.2d 906, 910 (Minn. 1985); *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 292 (Minn. 1980).

Plaintiff made no attempt to establish these elements, instead arguing a three-part standard from an unpublished Court of Appeals case. (NMLLC's Mot. for the Five-Part

[3] The Stip. and Order is designed to identify what emissions the shredder building is generating so the permit may be adjusted to account for those emissions. As the permit now stands, all emissions from the building must be captured. If testing shows this is not occurring, plaintiff has a chance to resubmit a permit application that accurately accounts for the emissions leaving the building. It can assign indoor emissions to a stack, it can report equipment along the outdoor conveyor points controlling fugitive emissions, and it may even report a capture efficiency at less than 100 percent. In any event, the first step is to test the capture efficiency so the parties know what the shredder building emits and where the emissions are going.

Enforcement of the Parties' Court-Approved Dec. 21, 2015 Stip. and Order 25 (citing *Schultz v. Minnesota Bd. of Psychology*, No. C9-99-818, 1999 WL 1101219, at *2 (Minn. Ct. App. Nov. 30, 1999).) The court in *Schultz* actually articulated substantially the same four-part test found in the Minnesota Supreme Court cases with slightly less forceful language. *Compare Schultz*, 1999 WL 1101219 at *2 (requiring "specific representations or inducements," reasonable reliance, harm if estoppel not granted, and careful weighing of equities and public interest) *with Sarpal*, 797 N.W.2d at 25 (standard described above). To the extent there is inconsistency between the tests, this court applies the Minnesota Supreme Court's articulation rather than an older and unpublished Court of Appeals case.

Plaintiff's equitable estoppel claim fails on the first two elements. First, it makes no showing of wrongdoing by any state agent regarding the permit requirements. Plaintiff did not allege, and the court sees no evidence of, any act committed by defendant that could amount to "wrongdoing." Second, defendant relied on plaintiff's representations regarding the building's emissions, not the other way around. Defendant accepted plaintiff's permit application based on the information plaintiff submitted. *See* Minn. R. 7007.0800.

Similarly, the "Permit Shield" does not protect plaintiff. As defendant repeatedly iterated, the test results will show compliance with both the permit and statutes, compliance with neither, or compliance with one of the two. If the test shows non-compliance, plaintiff must get compliant. The permit shield protects plaintiff from sanctions if the facility is compliant with the permit and not the statutes, but the permit still requires amendment to become compliant with the statute. *See* Minn. R. 7009.0030, 7009.0040. There is no scenario under which plaintiff may breach ambient air quality standards. The Stip. and

Order prescribed the required testing and the consequences of the test results. Plaintiff is bound by the agreement it reached even if it finds the test results disappointing.

The Stip. and Order fully addresses the shredder-building dispute. The parties must follow a protocol to test the capture efficiency within the shredder building and then act based upon the test results. Any disputes regarding the Stip. and Order must be resolved by the court. (Stip. and Order at 8.)

The Stip. and Order contains defendant's remedy should the shredder building achieve less than the agreed upon 100% capture efficiency. Plaintiff agreed that if it does not meet a 100% capture efficiency, it "shall submit, within 30 days, a permit application that recalculates the facility's potential to emit based on accurate capture efficiencies based on the hood systems in the shredder building." (Stip. and Order at 7.) Defendant is not barred from seeking other relief from the court if plaintiff cannot demonstrate a 100% capture efficiency. (Stip. and Order 7-8.) However, relief is available only after the completion of testing. (*See id.* (Stip. and Order does not prevent defendant from alleging rule and permit violations if plaintiff "cannot demonstrate that it is in compliance with the permit terms").)

Just as plaintiff cannot circumvent its testing obligation by submitting inadequate Test Plans, defendant cannot avoid an agreed-to testing process by seeking to enjoin operation of the shredder building before testing is conducted. The testing dispute is now resolved after long-overdue motion practice that was anticipated by the Stip. and Order. Accordingly, as to the shredder building, the court sees no present basis to impose injunctive relief on the parties when simple enforcement of the Stip. and Order fulfills both

the intent of the settling parties and the court's interpretation of the parties' intent. Therefore, the court denies defendant's motion for an injunction as it relates to the shredder building.[4] Such a motion is legally authorized but, at best, premature.

III. PLAINTIFF MUST CEASE OPERATION OF THE METALS RECOVERY PLANT AND THE ATTACHED RAIN AND SNOW SHED UNTIL IT RECEIVES A NEW PERMIT OR IT IMPROVES THE BUILDING TO ADAQUATELY REDUCE EMISSIONS.

The only relief requested concerning the MRP was for a temporary injunction ceasing its operation until the parties resolve their permit dispute. The Stip. and Order plainly refers only to the shredder building. Therefore, it cannot resolve the MRP issues. Before reaching the merits of defendant's motion, the court must consider two preliminary issues. First, because the pleadings make no express mention of MRP emissions, the court must address its subject-matter jurisdiction. Second, the court must decide which standard for injunctive relief applies—*Dahlberg* or *Wadena*.

A. The Court Has Jurisdiction to Issue an Injunction Affecting the MRP.

The Stip. and Order stayed all proceedings in connection with the underlying litigation until completion of the testing. (Stip. and Order at 8.) However, the Stip. and Order also states that this court "shall retain jurisdiction over the Parties with regard to this Order, as well as any . . . other proceeding related to the claims and counterclaims before

[4] As discussed at the motion hearing, the court is not pleased that the parties came to the court for relief so long after reaching an impasse on the test protocol. The Stip. and Order included a provision allowing the parties to "apply to this Court, by motion, for an order resolving disputes about the scope of this testing." (Stip. and Order at 8.) Of course, the provision did not foreclose utilization of an informal court conference. Minn. R. Gen. Prac. 115. Moreover, there was no justification for the parties to let their dispute fester for months before utilizing the dispute-resolution process provided for in the Stip. and Order. Having sat on their rights so long, neither party may use its own delay as a wedge to claim increased harm as a means of obtaining injunctive relief or other more sweeping remedies.

this Court." (*Id.*) Therefore, this court may issue an injunction to cease operation of the MRP if the MRP is related to the claims and counterclaims. Plaintiff concedes that the "shredder operation" is "the subject of and thus 'related to the . . . counterclaims before this court.'" (NMLLC's Mot. for the Five-Part Enforcement of the Parties' Court-Approved Dec. 21, 2015 Stip. and Order 14 (citing Stip. and Order).) The court agrees.

Defendant's answer and counterclaims use sufficiently broad language to include emissions from plaintiff's entire facility, not just the shredder building. The facts section refers to pollutants leaving the "property line," emissions leaving the "facility," and dust leaving the "site." (Am. Ans. and Countercl. at 10, 19-20.) Defendant explains that it bracketed the entire facility with pollution monitoring stations, and measured exceedances from the entire facility. (*Id.* at 20, 23.) Any emissions from the MRP are necessarily part of whatever emissions leave the facility, the property line, and the site. From the very beginning of this suit, defendant measured emissions from the MRP even though defendant did not know to differentiate MRP emissions from shredder building emissions.

Further, language in the counterclaims is sufficiently broad to cover the entire facility. Count I alleges plaintiff and its facility is in violation of Minnesota statutes. (*Id.* at 24-25.) Count III alleges that dust from the "shredder operation" is a public nuisance. (*Id.* at 26-27.) Count IV alleges that "petitioner's emissions" are in violation of the Minnesota Environmental Rights Act. (*Id.* at 27-28.) Finally, the prayer for relief requests plaintiff "cease causing and contributing to ambient air violations" and is not limited to the shredder building. (*Id.* at 28.) Only Count II limits the claim to the shredder building, because Count II alleges a permit violation and the only building in the permit was the

shredder building. (*Id.* at 25-26.) Therefore, the MRP is within the scope of defendant's counterclaims and this court has jurisdiction to issue an injunction affecting the MRP.

B. The Standard for Injunctive Relief is the Three-Part *Wadena* Test.

Typically, motions for injunctive relief must follow the procedure contained in Rule 65 of the Minnesota Rules of Civil Procedure and the cases interpreting the rule. The party seeking an injunction must demonstrate that there is no adequate legal remedy and that the injunction is necessary to prevent irreparable harm. *Cherne Industrial, Inc., v. Grounds & Associates, Inc.*, 278 N.W.2d 81, 92 (Minn. 1979). Once there is a finding of irreparable harm, the court then weighs five factors to determine the propriety of granting a motion for injunctive relief. *E.g., Dahlberg Brothers, Inc. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965). These factors are known as the "*Dahlberg* Factors." *State by Ulland v. International Ass'n. of Entrepreneurs*, 527 N.W.2d 133, 136 (Minn. Ct. App.), *rev. denied* (Minn. Apr. 18, 1995). The applicant for injunctive relief has the burden of proving all five *Dahlberg* Factors. *North Central Public Service Co. v. Village of Circle Pines*, 302 Minn. 53, 60, 224 N.W.2d 741, 746 (1974).

However, when injunctive relief is authorized by statute, the *Dahlberg* Factors do not apply. *Wadena Implement Co. v. Deere & Co.*, 480 N.W.2d 383, 389 (Minn. Ct. App.), *rev. denied* (Minn. 1992). Instead, a moving party is entitled to an injunction if the "prerequisites" for relief are established and an injunction would fulfill the purposes behind the statute. *Id.* However, the *Dahlberg* Factors govern if a party legitimately disputes that it is subject to the statutes the other party seeks to enforce. *Pac. Equip. & Irr., Inc. v. Toro Co.*, 519 N.W.2d 911, 918 (Minn. Ct. App.), *rev. denied* (Minn. 1994); *State By Ulland*,

527 N.W.2d at 137. The threshold issue is whether defendant has statutory authority to request an injunction from this court. The court holds that is does.

In Minnesota, a broad network of statutes and rules govern defendant's authority to regulate air pollution. Minnesota Statutes section 116 authorizes administrative rules defining defendant's authority. Minnesota Rules 7000.0075 recognizes that defendant's regulatory powers derive from section 116. Minnesota Statutes section 115.071 allows government agencies to seek an "injunction, action to compel performance, or other appropriate action" in order to enforce "rules, standards, orders, stipulation agreements, . . . and permits" adopted or issued *under section 116*. *Id.*, subd. 1 (emphasis added).

Furthermore, Minnesota Statutes section 115.071 states that any violation of "rules, standards, stipulation agreements, . . . or permits *specified in this chapter and chapter 116* shall constitute a public nuisance and may be enjoined . . .." *Id.*, subd. 4 (emphasis added).

The statutory language is clear and direct: defendant has express authority to seek an injunction to enforce the permits it issues, stipulation agreements it enters into, and the rules and regulations it enforces. Section 116 establishes defendant's general authority to act. Section 115.071 gives defendant specific authority to enjoin regulated parties pursuant to its section 116 regulatory actions. Plaintiff's attempt to differentiate the instant case from *Wadena* based on the use of the word "may" and the phrase "as provided by law" in section 115.071 is unpersuasive. (NMLLC's Mem. of Law in Opp. to MPCA's Temp. Inj. Mot. 10.) The term "may" makes injunctive relief an enforcement option for defendant. "As provided by law" merely acknowledges that defendant cannot get an injunction automatically just by making a motion. Defendant must provide sufficient proof to meet

the threshold for entitlement to an injunction by satisfying the *Wadena* elements.[5]

Plaintiff does not and cannot challenge the applicability of the laws defendant seeks to enforce. The rules at issue herein govern the permitting and reporting processes and state pollution control measures. Minnesota statutes, rules, and the permit bind plaintiff, defendant alleges a violation of these measures, and section 115.071 authorizes motions to enjoin permit or rule violations. Accordingly, the *Dahlberg* Factors are inapplicable and *Wadena* applies.

Under a *Wadena* analysis, defendant need not prove irreparable harm. In *State ex rel. Hatch v. Cross Country Bank, Inc.*, the Minnesota Court of Appeals ruled that in cases in which a government agency has statutory authority to seek an injunction, "the legislature has obviated a showing of irreparable harm and inadequate legal remedy." 703 N.W.2d 562, 573 (Minn. Ct. App. 2005). Those two considerations apply to the "equitable remedy of injunctive relief," not "injunctive relief imposed as a specifically authorized statutory remedy." *Id.; see also Buetow v. A.L.S. Enterprises, Inc.*, 650 F.3d 1178, 1184 (8th Cir. 2011) (interpreting *Cross Country Bank* to allow Attorney General, but not private citizens, to seek injunction without finding irreparable harm). Therefore, contrary to plaintiff's position, defendant need not demonstrate irreparable harm.

[5] It should be noted that many of the *Dahlberg* Factors do not fit the present situation and the ones that do favor defendant. The initial prerequisite of irreparable harm to the moving party and the factor requiring a balance of the harms operate differently when the actual harm to be avoided is to the environment and public health, not the moving party. Demonstrating the likelihood of success on the merits is problematic when defendant has its own regulatory procedures in which it has a different likelihood of success. An injunction would place plaintiff back into the regulator/regulated party relationship that pre-existed litigation. There would be little to no administrative burden on the court because defendant is a regulatory body capable of enforcing Minnesota rules. Finally, public policy favors clean air in residential areas.

C. Defendant Meets the Pre-Requisites for Injunctive Relief.

To prevail in its motion for injunctive relief, defendant must establish the "pre-requisites for a remedy." *Wadena*, 480 N.W.2d at 389. The *Wadena* court did not explain what a party must do in order to establish the "pre-requisites for a remedy." *See id*. However, Minnesota appellate courts later clarified that the moving party must show that the nonmoving party "has violated or is about to violate" the laws it seeks to enforce. *State By Ulland*, 527 N.W.2d at 137; *see Cross Country Bank, Inc.*, 703 N.W.2d at 573. It is not necessary to demonstrate a current or ongoing violation. *Cross Country Bank, Inc.*, 703 N.W.2d at 574. The record must show a "likely success on the merits" to justify a finding that the pre-requisites have been met. *See id.* Here, the court finds that plaintiff "has violated or is about to violate" Minnesota's ambient air quality standards and the reporting rules surrounding its permit application. Either of these violations establish the "pre-requisite for a remedy."

1. Failure to report an emissions source in the permit and continuing violation of the permit.

Defendant alleges plaintiff failed to report the MRP emissions during the permitting process in violation of Minn. R. 7007.0500, subp. 2. Further, defendant argues continued operation of an unpermitted building violates Minn. R. 7007.0150, subp. 2. Plaintiff argues it did not have an obligation to report the emissions because they qualified as "insignificant activities" under Minn. R. 7007.1300 subp. 2, item D. The court finds that plaintiff violated Minn. R. 7007.0500, subp. 2 by not reporting emissions from its MRP operation.

Plaintiff's permit application must list emissions units, emissions points, and control equipment. Minn. R. 7007.0500, subp. 2. Some "insignificant activities" must be reported in the permitting process. *Id.*; Minn. R. 7007.1300, subps. 1, 3. However, the rules exempt certain "insignificant activities" from the reporting requirement. Minn. R. 7007.1300, subp. 2. The specific "insignificant activities" exemption raised by plaintiff is the "processing operations" exemption. *Id.* at subp. 2, item D; (*see* Asmus Aff. Ex. 55). Under this item, equipment that produces particulate matter less than ten microns inside of a building is exempt from reporting requirements if its emissions are "vented inside of the building 100 percent of the time and does not use air filtering systems used to control indoor air emissions." Minn. R. 7007.1300, subp. 2, item D.

The operations in the MRP obviously do not fit the description of an "insignificant activity not needed to be listed."[6] Plaintiff therefore violated Minn. R. 7007.0500. The record contains unrebutted evidence that emissions are escaping the MRP and that MRP emissions are not vented indoors 100% of the time. According to defendant's submissions, there are several large open doors where emissions are visibly escaping. Even by plaintiff's account, there are large openings in the MRP. It is inconceivable that the emissions from any activity in the MRP structures are vented indoors 100% of the time, as the reporting exemption rule requires. Accordingly, plaintiff was required to report its indoor MRP emissions as part of the permitting process. Plaintiff failed to report the emissions and, as

[6] This court has limited information on the size of the particulate matter inside the MRP and the air filtration systems controlling indoor air emissions. Neither party offered evidence of the size of particulate matter within the MRP. However, since plaintiff claims the benefit of the exemption, it falls upon plaintiff to demonstrate that it meets both exemption prerequisites. Particulate size matters only if plaintiff meets the 100% indoor venting requirement, which it does not.

a result, it is operating buildings for which it does not have a permit in violation of Minnesota rules.[7]

Next, a permittee "shall provide a calculation of emissions" from any insignificant activity required to be listed when requested by the MPCA. Minn. R. 7007.0500, subp. 2(C)(2). The agency "shall request such calculation if it finds that the emissions from those activities, in addition to other emissions from the stationary source" would make the facility subject to different pollution control requirements. *Id.*

The use of "shall" in the rules indicates that defendant was required to ask for those calculations when it discovered the emissions from the MRP. It has no choice. Similarly, plaintiff was required to submit the information when requested by defendant. It, too, had no choice according to the rules. Defendant made its requests on March 29, 2016 and April 5, 2016. Plaintiff failed to respond fully to defendant's request, which constituted a violation of the reporting requirements contained in the rules.

The rules are not academic. The rule anticipates a scenario in which emissions calculations forming the premise of a permit might be inaccurate. Such an inaccuracy could undermine the foundation for issuing the permit. This scenario likely explains why the rules do not just authorize, but require defendant to seek new calculations when it discovers that an emissions source previously categorized as insignificant may actually be "significant." Defendant asked for MRP calculations and plaintiff submitted incomplete

[7] As already discussed earlier in this Order, plaintiff cannot argue that MRP emissions are "fugitive emissions" because they originate from an indoor source.

information. Defendant is entitled to these calculations in order to satisfy its obligation under the rules.

2. <u>Violation of the ambient air quality standards</u>.

Defendant alleges that the MRP's emissions are causing or contributing to exceedances of Minnesota's ambient air quality standards in violation of Minn. R. 7009.0080. Plaintiff argues that without performing the tests pursuant to the Stip. and Order, there is no evidence to support the allegation.

Plaintiff's argument misses the point. The testing described in the Stip. and Order only applies to the shredder building and never applied to the MRP. Therefore, the court's Order to test the shredder building cannot provide any relevant information regarding the emissions from the separate MRP structures. Defendant, however, provided unrebutted evidence that emissions from the MRP violate Minnesota ambient air quality standards.

Defendant has measured exceedances of minimum air quality standards in the area of plaintiff's facility. (Sec. McMahon Dec. ¶ 2.) Defendant placed testing equipment around plaintiff's facility, which measured air quality worsening after air passed over plaintiff's facility. (*Id.* at ¶ 6.) The quality of the ambient air worsens during the facility's operating hours. (*Id.* at ¶ 3.) An inspection of the MRP revealed that it has many large doors that are consistently open during operation. (Kilgriff Dec. ¶ 10.) A trained inspector observed the smoke generated from the facility and concluded it exceeded the 20% opacity limit. (Severin Dec. ¶¶ 3, 6.) Defendant tested a sample of the dust particles accumulating in the MRP and discovered it matched exactly the particulate matter captured in the ambient air surrounding the facility. (Sec. Fenlon Dec. ¶¶ 6-7, Exs. 1, 2.) Based on

defendant's unrebutted evidence, it is highly likely that particulate matter accumulating in large quantities inside of the unreported MRP are escaping through the many large open doors and are causing or contributing to the violation of ambient air quality standards.

Defendant demonstrated to the court's satisfaction that plaintiff violated or is about to violate the applicable rules by failing to comply with the requirement to provide emissions calculations of activities in the MRP, operating a building for which it does not have a permit, and operating a building that is causing or contributing to ambient air quality violations. Therefore, defendant established the second element of the *Wadena* test.

D. An Injunction Will Further the Policy Behind the Statutes So Long As Plaintiff Continues to Contribute to Violations of Ambient Air Quality Standards.

The final *Wadena* element is that the proposed injunction must further the purposes of the statute. *Wadena*, 480 N.W.2d at 389. "[P]ublic-policy considerations favoring issuance of an injunction is sufficient to meet this factor of the *Wadena* analysis." *Cross Country Bank, Inc.*, 703 N.W.2d at 574 n.6. The Minnesota legislature created defendant to "achieve a reasonable degree of purity of water, air and land resources of the state consistent with the maximum enjoyment and use thereof in furtherance of the welfare of the people of the state." Minn. Stat. § 116.01. As a result, defendant has amassed "technical expertise" regarding air pollution. *Minnesota Ctr. for Envtl. Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457, 465 (Minn. 2002); *see also* 25 Minn. Prac., Real Estate Law § 9:2 (2015 ed.) (stating the MPCA "enjoys the most comprehensive environmental authority of any state agency").

However, the purpose of the statute is not necessarily furthered by issuing an injunction for any violation of a statute. *See State by Ulland*, 527 N.W.2d at 137. In *State by Ulland*, the Commissioner of Commerce sought an injunction to enforce a cease and desist order to prevent two organizations from "conducting insurance business in violation of Minn. Stat. §§ 60A.01, 60K.02, 72A.41, 79.56" that it issued "pursuant to Minn. Stat. § 45.027, subd. 5 (Supp. 1993)." *Id.* at 134-35. The purpose of section 45.027, subdivision 5 was to "provide the Commissioner the power to enforce the laws he is charged with administering." *Id.* at 137. The court concluded that "this purpose assumes that the party enjoined has violated or is about to violate those laws," which was not established in that case. *Id.* Ultimately, the court ruled that *Wadena* test did not support injunctive relief because the "crux" of the parties' dispute was whether the statute the Commissioner sought to enforce even applied to the case. *Id.*

The Commissioner's power to issue a cease and desist order in *State by Ulland* is comparable to the permit-reporting requirements in the instant case. Both are a method of enforcing a greater network of rules and regulations. The Commissioner established a failure to comply with its enforcement method, but not a substantive violation of the laws it must enforce. Accordingly, only curing substantive violations by injunction furthers the purpose behind the statute. The mere failure to comport with reporting requirements without actually contributing to violations of ambient air quality standards is like failing to obey a cease and desist order but otherwise following insurance laws. Pursuant to *State by Ulland*, this court is not convinced that the purpose behind the statute requires shutting down an unpermitted building that otherwise poses no harm to the environment. Defendant

has the authority to pursue the permit dispute by stipulation or by its own quasi-judicial administrative process if defendant wants the MRP covered by a permit regardless of its contribution to ambient air quality violations. Minn. Stat. § 115.05, subd. 11.

Here, however, defendant established both a substantive violation of air quality standards and a violation of the principle method it employs to enforce those standards. As such, defendant established all three *Wadena* elements and it is entitled to the requested injunction. For now, plaintiff must cease the operation of the MRP. Either party may apply for the injunction to end upon completion of either of the following two events.[8] First, plaintiff may obtain a permit amendment that allows operations in the MRP. Second, plaintiff may demonstrate through actual testing approved by defendant that the MRP does not cause or contribute to ambient air quality violations. Plaintiff represented to this court that it is in the process of improving the MRP to control its emissions. If the improvements successfully limit the emissions of the MRP so that the facility does not cause or contribute to violations of ambient air quality standards, an injunction would no longer further the limited purpose for its imposition.

E. A Temporary Injunction Does Not Violate Plaintiff's Right to Due Process.

Finally, plaintiff argues that a temporary injunction is an inappropriate remedy because it would effectively be a permanent injunction beyond the scope of defendant's request for relief and it would violate plaintiff's due process rights. (NMLLC's Mem. of Law in Opp. to MPCA's Temp. Inj. Mot. 2-4.) Neither of these arguments has merit.

[8] Of course, this Order does not preclude the parties from entering a negotiated resolution that would end the need for an injunction.

1. The injunction is sufficiently narrow and temporary.

The injunction imposed by the court is consistent with the relief requested in the Amended Answer and Counterclaim. Defendant alleged the metal shredder operation is a public nuisance under Minn. Stat. § 115.071, subd. 4, and requested that plaintiff cease causing and contributing to violations of ambient air quality standards. (Am. Ans. and Countercl. 27-28.) The injunction closes part of a facility that is causing or contributing to violations of ambient air quality standards pursuant to defendant's authority to request injunctive relief under Minn. Stat. § 115.071, subd. 4. Even if plaintiff is correct and defendant's remedies are limited to the specific relief requested in its counterclaim, plaintiff's argument still fails because the requested injunction falls squarely within the relief requested in the counterclaim. Accordingly, the court's injunction is both pled-for relief and tailored narrowly to address the harm for which the legislature authorized an injunction remedy. *Cf. State v. Gartenberg*, 488 N.W.2d 496, 499 (Minn. Ct. App. 1992) (overturning a district court's order forcing brokers to escrow damages when the statute only authorized an injunction prohibiting violation of the applicable statutes).

Plaintiff also cites *Yager v. Thompson*, 352 N.W.2d 71 (Minn. Ct. App. 1984) and *Miller v. Foley*, 317 N.W.2d 710 (Minn. 1982), to argue that a temporary injunction should only be granted to preserve the status quo until an adjudication on the merits and that the requested injunction would go beyond preserving the status quo. However, the cited cases applied the *Dahlberg* Factors using the court's inherent equitable power and not the standards applicable to statutorily authorized *Wadena* injunctions. *See Cross Country*

Bank, 703 N.W.2d at 573 (noting difference between equitable and statutory injunction). The difference is important because the two types of injunctions serve different purposes.

When contemplating imposition of a statutory injunction, courts are guided by the statute being enforced rather than the law applicable to equitable injunctions. *See City of Duluth v. 120 E. Superior St., Duluth, Minnesota*, No. A13-0027, 2013 WL 5022523, at *3 (Minn. Ct. App. Sept. 16, 2013) (discussing the purpose of the public nuisance law the moving party sought to enforce). Thus, when addressing a motion for a statutorily authorized injunction, the final prong of the *Wadena* test directs the court to consider whether an injunction would further the purpose of the statute. *Cross Country Bank*, 703 N.W.2d at 573. The *Wadena* test obviates the need for other considerations. *See id*. (courts issuing a *Wadena* injunction need not consider irreparable harm or the existence of an adequate legal remedy); *see also Peterson v. United Parcel Serv., Inc.*, No. A13-2378, 2014 WL 4672393, at *7 (Minn. Ct. App. Sept. 22, 2014) (applicable injunction statute required a lesser showing than *Dahlberg* would have required), *rev. denied* (Minn. Dec. 16, 2014).

Here, the injunction applies only to the MRP, including the attached Rain and Snow Shed, and is limited to the extent necessary to enforce ambient air quality standards. Unlike the district court's order in *Gartenberg*, the Order issued herein is limited to relief contemplated by the statutes and regulations the injunction enforces. *See* Minn. Stat. § 115.071, subd. 4. The purpose of the injunction conforms with the purpose of the statute, which is to protect the quality of Minnesota's air.

The injunction granted by this court is temporary. It ends when plaintiff demonstrates that the MRP is not causing or contributing to ambient air quality violations

or when defendant approves a new permit. This court has no jurisdiction or authority over any decision made by defendant through its regulatory authority in an administrative process independent from the present court proceeding. Defendant's decision in its regulatory capacity has no bearing on this court's Order. If defendant revokes the permit in an administrative proceeding, then *that* decision may be permanent, not *this* decision.

2. Plaintiff has enjoyed sufficient procedural safeguards.

The due-process cases cited by plaintiff all apply to instances of permanent deprivations of property. (NMLLC's Mem. of Law in Opp. to MPCA's Temp. Inj. Mot. 6-10.) As discussed above, this is a temporary injunction. A party received sufficient process in a temporary injunction proceeding when "given a fair opportunity to oppose the motion and to prepare for such opposition." *Citizens State Bank of Clara City v. Wallace*, 477 N.W.2d 741, 743 (Minn. Ct. App. 1991) (ruling that two days' notice before a hearing violated due process). A temporary injunction requires notice to the nonmoving party. Minn. R. Civ. P. 65.02; *see Dwyer v. Monday Media, Inc.*, No. C4-92-721, 1992 WL 203270, at *2 (Minn. Ct. App. Aug. 25, 1992).

Plaintiff received notice of the hearing, a fair opportunity to respond, and sufficient time to prepare. Plaintiff filed a detailed response to defendant's motion, filed its own motion, and argued both motions orally. Plaintiff's submissions filled a bankers' box. Plaintiff cannot seriously argue that it did not have an adequate opportunity to be heard.

There are other procedural safeguards in place, which are outside of this court's jurisdiction, if defendant permanently revokes the permit in the administrative process. Plaintiff may request a contested case hearing before the MPCA. If it disagrees with the

results of the case hearing, it can ultimately appeal to the Court of Appeals. Minn. Stat. § 115.05, subd. 11 (2014). The Court of Appeals has exclusive jurisdiction to review such a decision. *See City of Corcoran v. Headwaters Rural Util. Ass'n, Inc.*, No. A05-695, 2005 WL 3739289, at *2 (Minn. Ct. App. Feb. 7, 2006), (citing *Tischer v. Hous. & Redevelopment Auth. of Cambridge*, 693 N.W.2d 426, 428 (Minn. 2005)), *rev. denied* (Minn. Apr. 18, 2006). At this point, any issues regarding due process in the separate administrative proceeding are either not ripe for this court's review or are beyond this court's jurisdiction.

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