STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0115
A19-0134

In the Matter of Issuance of Air Emissions
Permit No. 13700345-101 for
Polymet Mining, Inc.,
City of Hoyt Lakes,
St. Louis County, Minnesota.

Filed March 23, 2020
Remanded; motion to supplement granted and motion to strike denied
Rodenberg, Judge

Minnesota Pollution Control Agency

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Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and Jesson, Judge.

S Y L L A B U S

I. In a certiorari appeal challenging an agency decision to issue a permit, documents that were submitted to the agency after the close of the noticed public-comment period and that were not considered by the agency are not part of the record that must be submitted to this court by the agency. However, in evaluating a challenge to the agency's decision for failure to adequately consider an important aspect of the permitting decision, this court may consider documents and information that were submitted to the agency at any time before it issued its decision.

II. This court's authority under Minn. Stat. § 14.69 (2018) to remand an administrative case for further proceedings is not dependent on establishment of one of the six reasons for reversal of the agency's decision under that provision. This court may remand for further proceedings when the record submitted by the agency and the written agency decision are insufficient to facilitate judicial review.

O P I N I O N

RODENBERG, Judge

These two consolidated certiorari appeals are brought by relators Minnesota Center for Environmental Advocacy, et al.[1] (MCEA) and Fond du Lac Band of Lake Superior Chippewa (the band) to challenge a decision by respondent Minnesota Pollution Control

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[1] Counsel for MCEA also represent relators Center for Biological Diversity, Friends of the Boundary Waters Wilderness, and Sierra Club.

Agency (MPCA) granting an air-emissions permit to respondent PolyMet Mining, Inc., (PolyMet) for its NorthMet project. Relators assert that the MPCA failed to adequately consider whether PolyMet intends to operate within the limits of the permit for which it applied, or if, instead, it was seeking a "sham" permit. In support of their argument, relators rely on citations and documents that are not part of the administrative record that was submitted by the MPCA. We conclude that we may consider those documents in evaluating whether the MPCA failed to consider an important aspect of the permitting decision, and we therefore grant relators' motion to supplement the record and deny the MPCA's motion to strike portions of relators' brief and addendum. We further conclude that the MPCA's findings are insufficient to facilitate judicial review of the permitting decision. Accordingly, we remand to the MPCA for additional findings.

FACTS

If built, PolyMet's NorthMet project would be the first copper-nickel-PGE (platinum group elements) mine in Minnesota. We have extensively discussed the nature of the proposed project in several recent decisions in related matters. *See In re NorthMet Project Permit to Mine Application Dated Dec. 2017*, No. A18-1952, 2020 WL 130728, at *2-3 (Minn. App. Jan. 13, 2020) (*PTM Appeals*); *Minn. Ctr. for Envtl. Advocacy v. Minn. Dep't of Nat. Res.*, No. A18-1956, 2019 WL 3545839, at *1 (Minn. App. Aug. 5, 2019), *review denied* (Minn. Oct. 29, 2019); *In re Applications for a Supplemental Envtl. Impact Statement for Proposed NorthMet Project*, No. A18-1312, 2019 WL 2262780, at *1 (Minn. App. May 28, 2019) (*SEIS Appeals*), *review denied* (Minn. Aug. 20, 2019). The NorthMet project requires multiple permits from state and federal authorities and also triggered joint

federal-state environmental review, resulting in a final environmental-impact statement (FEIS) that the Minnesota Department of Natural Resources (DNR) determined adequate in March 2016.

Among the permits required for the NorthMet project is an air-emissions permit from the MPCA. PolyMet submitted an application for an air-emissions permit in August 2016 and a revised application in January 2018. PolyMet applied for what is known as a "synthetic minor permit" based on its requests for permit limitations on ore-processing, or "throughput," volumes. Specifically, PolyMet proposed to limit ore throughput to 32,000 tons per day (tpd) (11,680,000 tons per year (tpy)). As we explain further herein, requesting this throughput limit allowed PolyMet to avoid the requirements for "major source" permitting under the federal Clean Air Act.

The MPCA commenced a public notice and participation process on the air-emissions-permit application in January 2018. On January 5, 2018, the MPCA issued a public notice of two public meetings that were held on February 7 and 8, 2018, in Aurora and Duluth. And on January 31, 2018, the MPCA issued a public notice of its commissioner's preliminary determination and intent to issue the draft air-emissions permit. That public notice commenced a 45-day public-comment period that ran through March 16, 2018. During the public-comment period, the MPCA received 88 comments from government agencies, tribal parties (including the band), environmental groups (including MCEA), and individuals.

Ten days after the close of the public-comment period, on March 26, 2018, PolyMet filed with Canadian securities regulators a Form NI 43-101F1 Technical Report (the

Canadian technical report or Canadian report).[2] The 273-page report, which was prepared to provide expert study on the NorthMet project, included detailed discussion on many topics, including two topics that caused relators concern. First, the Canadian report identified a 10.3% internal rate of return (IRR)[3] for the NorthMet project at the planned ore throughput of 32,000 tpd. Second, the Canadian report discussed and provided preliminary economic assessments (PEAs) of two scenarios with higher ore throughputs of 59,000 and 118,000 tpd. For these increased throughputs, the Canadian report identified potential IRRs of 18.5% and 23.6%, respectively.

In June 2018, MCEA submitted to the DNR, with a copy to the MPCA commissioner, a petition for a supplemental environmental-impact statement (SEIS). MCEA argued that the Canadian technical report evidenced PolyMet's intent to build a larger project than that for which it was seeking permits, and that the report "makes plain that the PolyMet project is financially feasible only if the current proposal is the first phase of an expanded and/or accelerated project." MCEA argued that the Canadian technical report thus included "substantial new information" that required preparation of an SEIS. *See* Minn. R. 4410.3000, subp. 3(A) (2019). The DNR rejected this argument, reasoning that "the lower IRR in the technical report still supported the existence of a profitable

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[2] Relator PolyMet Mining, Inc., is a Minnesota corporation that is a wholly owned subsidiary of PolyMet Mining Corp., a publicly traded Canadian company.

[3] An IRR is "a discounted-cashflow method of evaluating a long-term project, used to determine the actual return on an investment." Bryan A. Garner, ed., *A Handbook of Business Law Terms* 491 (1999).

project, and thus there was no basis to conclude that the Project will be financially unable to cover the costs of reclamation and closure." *SEIS Appeals*, at *6.[4]

In October 2018, after making changes to the draft permit based on public comments, the MPCA provided a copy of the air-emissions-permit application, proposed permit, and technical support document to the United States Environmental Protection Agency (EPA). The EPA's review period ended on December 10, 2018, and the EPA did not submit any written comments or object to the proposed final permit.

Meanwhile, on November 1, 2018, the DNR had issued a permit to mine, dam-safety permits, and other permits for the NorthMet project.[5] On November 8, 2018, MCEA submitted a letter to the DNR and the MPCA requesting that they stay all permits for the NorthMet project pending resolution of the appeal from the DNR decision denying an SEIS. The MPCA denied the stay request as prematurely made before it had issued any permits.

On Thursday, December 13, 2018, MCEA submitted a letter to the MPCA commissioner, asserting that the MPCA had a duty to investigate whether "PolyMet is

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[4] On May 28, 2019, this court issued a decision affirming the DNR's decision, deferring to the DNR's judgment that expansions of the NorthMet mine were not sufficiently foreseeable to require an SEIS because "specific information on potential mining scenarios and mineable resources that would be needed for meaningful environmental review is lacking." *SEIS Appeals*, 2019 WL 2262780, at *7. The legal issue presented to the DNR in that case was different from the one presented to the MPCA in this case. This case does not involve a request for an SEIS. Thus, our holding in *SEIS Appeals* is not helpful here.

[5] On January 13, 2020, this court issued a decision reversing the DNR's decisions to issue the permit to mine and dam-safety permits, and remanding for the DNR to hold a contested-case hearing. *See PTM Appeals*, 2020 WL 130728, at *15.

about to be issued an Air Permit with a throughput limit that is significantly lower than the level at which PolyMet intends to operate its mine." MCEA asserted that the Canadian technical report evidenced PolyMet's intent to run the mine at a higher throughput in the near future, which would result in what the EPA has termed "sham permitting." MCEA therefore requested that the "MPCA withhold issuance of the final Air Permit until it has fully evaluated whether issuing a synthetic minor permit for this project is defensible."

Six calendar days later, on Wednesday, December 19, 2018, the MPCA commissioner sent a letter of reply to MCEA. The reply cited cautionary language from the Canadian technical report, and stated that the increased-throughput scenarios examined in the report were "speculative at best." The MPCA commissioner concluded: "Neither the Technical Report, nor PolyMet's submittals in support of the Air Permit, indicate any intent by PolyMet to circumvent major source permitting. For these reasons, the Technical Report does not provide a basis for withholding issuance of the final PolyMet Air Permit."

The next day, December 20, 2018, the MPCA issued the air-emissions permit to PolyMet for the NorthMet project.

MCEA and the band filed separate certiorari appeals, which this court consolidated. During the processing of the appeals, the parties have filed motions raising issues as to the appropriate scope of the record for this court's review.

ISSUES

I. Should the motions related to the record be granted?

II. Have relators established a basis for relief under Minn. Stat. § 14.69?

ANALYSIS

The air-emissions permit in this case is governed by the federal Clean Air Act, 42 U.S.C. §§ 7401-7671q (2012) (CAA). Under the CAA, the EPA promulgates national ambient air quality standards (NAAQS). 40 C.F.R. Pt. 50 (2019). Each state is responsible for developing its own state implementation plan to enforce the NAAQS within state borders. 42 U.S.C. § 7407(a); 40 C.F.R. § 52.1223 (2019). In Minnesota, the MPCA enforces the CAA, in part by issuing air-emissions permits. *See* 40 C.F.R. Pt. 70, App. A (2019); *see also* Minn. Stat. § 116.07, subds. 2(a), 4a(a) (2018) (authorizing MPCA to set air-pollution standards and issue air-emissions permits).

Under the New Source Review (NSR)/Prevention of Significant Deterioration (PSD) provisions of the CAA, 42 U.S.C. §§ 7470-7479, major sources[6] must obtain "a permit . . . setting forth emissions limitations" before construction on the facility can begin. 42 U.S.C. § 7475(a)(1).[7] A major source is any stationary source that emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant. 42 U.S.C. § 7479(1); 40 C.F.R. § 52.21(b)(1)(i)(a) (2019). Major sources are subject to "best available control technology" (BACT), which, "despite what the term implies, is not a particular type of technology." *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1011

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[6] The CAA itself uses the term "major emitting facility," while the regulations use the term "major stationary source." The terms are defined synonymously. The common vernacular is "major source," and we use that term here.

[7] PSD applies only to new major sources that are located in an area that is in attainment or unclassifiable with the NAAQS. 40 C.F.R. § 51.165(a)(2)(i) (2019). There is no dispute that the NorthMet project would be located in an area of attainment.

(8th Cir. 2010). "Rather, it is an 'emission limitation based on the maximum degree of reduction of each pollutant subject to regulation . . . which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable' for the facility in question." *Id.* (quoting 42 U.S.C. § 7479(3)).

Although not specifically defined by the CAA or federal regulations, a "synthetic minor source" has come to be understood as a source that "accepts limitations that restrict its potential to emit air pollutants to a level below the PSD threshold." *In re Shell Offshore, Inc.*, 15 E.A.D. 536, 2012 WL 1123876, at *12 (EAB. March 30, 2012). Synthetic-minor permits are issued to provide federally enforceable limits that avoid application of PSD requirements. Synthetic-minor permits are allowed under the CAA. Issues may arise, however, when an applicant seeks a synthetic-minor permit but does not actually intend to comply with the limits provided in that permit. In such a circumstance, the applicant is understood to have sought a "sham permit," which, according to the EPA, is not permitted under the CAA. *See* Memorandum from Terrell Hunt, Assoc. Enforcement Counsel, U.S. EPA, & John Seitz, Dir., Stationary Source Compliance Div., U.S. EPA, *Guidance on Limiting Potential to Emit in New Source Permitting* 12-13 (June 13, 1989), *available at* https://www3.epa.gov/airtoxics/pte/june13_89.pdf (EPA Guidance).

The MPCA's decision to issue PolyMet a synthetic-minor permit is subject to judicial review under Minn. Stat. § 14.69. Minn. Stat. § 115.05, subd. 11 (2018). Under that review provision,

> the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:
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> (a) in violation of constitutional provisions; or
> (b) in excess of the statutory authority or jurisdiction of the agency; or
> (c) made upon unlawful procedure; or
> (d) affected by other error of law; or
> (e) unsupported by substantial evidence in view of the entire record as submitted; or
> (f) arbitrary or capricious.

Minn. Stat. § 14.69.

Relators argue that the MPCA's decision to issue the permit is arbitrary and capricious and unsupported by substantial evidence. As a threshold matter, however, they assert that the MPCA failed to take a required "hard look" at whether PolyMet is engaged in sham permitting, and that this court should reverse or, at a minimum, remand on that basis. *See Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) (*CARD*) ("Our role when reviewing agency action is to determine whether the agency has taken a 'hard look' at the problems involved, and whether it has 'genuinely engaged in reasoned decision-making.'" (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977))). Respondents assert that the "hard look" standard does not apply to permitting decisions and that, in any event, the MPCA has taken the requisite hard look. In section II below, we address the appropriate application of the standard of review and whether relators have established a basis for this court to grant relief. But we first address, in section I, the motions submitted by the parties in relation to the record.

I.

In a certiorari appeal, the agency decision-maker is required to serve and file an itemized list of the contents of the record after the writ of certiorari is issued, and to submit the record itself at this court's request, which generally is made after a relator's brief is filed. *See* Minn. R. Civ. App. P. 115.04, subds. 3, 5. The record in a certiorari appeal is made up of documents submitted to the agency or considered by the agency in reaching its decision. *See* Minn. R. Civ. App. P. 110.01, 115.04; *see also Amdahl v. County of Filmore*, 258 N.W.2d 869, 874 (Minn. 1977) ("Certiorari is, by its nature, a review based solely upon the record."); *In re Block*, 727 N.W.2d 166, 177 (Minn. App. 2007) (granting motion to strike documents not considered by decision-maker). If the record submitted by an agency is inaccurate or incomplete, a party may seek correction or modification of the record under Minn. R. Civ. App. P. 110.05. But "[r]ule 110.05 is limited to correction of the record so that it accurately reflects anything of material value that was omitted from the record by error or accident or is misstated in it." *W. World Ins. Co. v. Anothen, Inc.*, 391 N.W.2d 70, 72 (Minn. App. 1986). "All other questions as to the form and content of the record shall be presented to the appellate court by motion." Minn. R. Civ. App. P. 110.05.

After the MPCA submitted the itemized list in this case, relators filed a motion to complete or supplement the administrative record,[8] seeking to include in the record two

[8] Although the issue has not regularly arisen before this court, the federal courts have distinguished between motions to *complete* the record and motions to *supplement* the record. *See Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1274 (D. Colo. 2010) (*CNE*) (explaining distinction using those terms); *see also The Cape Hatteras Access*

documents that MCEA had submitted to the MPCA after the close of the public-comment period: (1) the June 8, 2018 SEIS petition, and (2) the November 8, 2018 letter requesting a stay of all permits pending an appeal of the DNR's denial of the SEIS petition. Both the MPCA and PolyMet opposed the motion. A special term panel of this court issued an order denying the motion to *complete* the record with these documents, reasoning that documents submitted to the agency outside of the public-comment period were not part of the record on appeal. But the special term panel deferred to this merits panel the motion to *supplement* the record with the documents. The MPCA subsequently filed a motion to strike portions of relators' brief and addendum, arguing that they reference or contain citations and documents that are not part of the record. Relators oppose the motion.

Relators argue that all of the disputed citations and documents are properly before this court under the supreme court's decision in C*rystal Beach Bay Ass'n v. County of Koochiching*, 243 N.W.2d 40, 43 (Minn. 1976), and this court's decision in *White v. Minn. Dep't of Nat. Res.*, 567 N.W.2d 724, 735 (Minn. App. 1997).[9] In *Crystal Beach Bay*, the

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Pres. All. v. U.S. Dep't of Interior, 667 F. Supp. 2d 111, 113-14 (D.D.C. 2009) (drawing same distinction using terms "supplementation" and "consideration of extra-record evidence"). A motion to *complete* is based on the assertion that the agency has omitted from the record documents that it considered in reaching the challenged decision. *CNE*, 711 F. Supp. 2d at 1274. A motion to *supplement* the record seeks to add to the record documents that were not considered by the agency but are "necessary for the court to conduct a substantial inquiry." *Id.*

[9] Relators also argue that this court should take judicial notice of the information and documents. This court may take judicial notice of "adjudicative *facts*" that are "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Minn. R. Evid. 201(a)-(b) (emphasis added). Relators primarily ask for judicial notice of documents, rather than facts, and their

supreme court explained that, "[a]lthough an appellate court is ordinarily limited to a consideration of matters contained in the record before it, we think it has inherent power to look beyond the record where the orderly administration of justice commends it." 243 N.W.2d at 43. And in *White*, this court held that evidence outside the administrative record may be considered when, among other circumstances, "the agency failed to consider information relevant to making its decision." 567 N.W.2d at 735. This circumstance identified by *White* relates directly to our standard for determining whether an agency decision is arbitrary and capricious. *See CARD*, 713 N.W.2d at 832 (explaining that a decision is arbitrary and capricious when an agency "entirely failed to consider an important aspect of the problem").

We agree with relators that this court may consider the disputed citations and documents under *Crystal Beach Bay* and *White*. The crux of relators' arguments on appeal is that the MPCA failed to adequately consider information that was available to it and that the information not adequately considered demonstrates PolyMet's intent to exceed the throughput limits in the air-emissions permit. The disputed citations and documents contain that information. Thus, we may consider the disputed citations and documents as probative of whether the MPCA "failed to consider information relevant to making its decision," *White*, 567 N.W.2d at 735, or "entirely failed to consider an important aspect of the problem," *CARD*, 713 N.W.2d at 832, and because such consideration is "commend[ed]" by "the orderly administration of justice," *Crystal Beach Bay*, 243 N.W.2d

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characterization of those documents is disputed by the MPCA and PolyMet. We accordingly decline to take judicial notice.

at 43. For these reasons, we grant relators' motion to supplement the record, and we deny the MPCA's motion to strike portions of relators' brief and addendum.[10]

II.

Standard of Review

As we note above, this court may affirm or remand an agency decision, or we may reverse the decision if one of six statutory criteria are met, including that the agency's decision is arbitrary and capricious or that it is unsupported by substantial evidence. Minn. Stat. § 14.69. In setting forth the standard for reviewing agency decisions, both the Minnesota Supreme Court and this court have applied a "hard look" analysis borrowed from federal caselaw. *See, e.g.*, *CARD*, 713 N.W.2d at 831-32; *Cable Commc'ns Bd. v. Nor-W. Cable Commc'ns P'ship*, 356 N.W.2d 658, 669 (Minn. 1984); *Herbst*, 256 N.W.2d at 825 (quoting *Greater Bos. Tel. Corp. v. F.C.C.*, 444 F.2d 841, 851-52 (D.C. Cir. 1970)); *In re Reissuance of NPDES/SDS Permit to U.S. Steel Corp.*, 937 N.W.2d 770, 786-87 (Minn. App. 2019) (*U.S. Steel)*; *In re Enbridge Energy, Ltd. P'ship*, 930 N.W.2d 12, 22

[10] In this case, the late-filed information, as discussed in more detail below, was publicly available on March 26, 2018—well before the agency's December 20, 2018 decision—but the public-comment period had closed on March 16, 2018. We are therefore not presented here with a situation where the party advocating to supplement the agency record on appeal could have submitted the disputed information during the ordinary public-comment period. That the increased-throughput scenarios discussed below were publicly revealed in a filing with Canadian authorities just ten days after the close of the public-comment period here raises legitimate questions concerning the extent to which PolyMet was exploring operational options inconsistent with the synthetic-minor permit during the public-comment period for that very permit. In this scenario, and given the obvious and significant questions raised by the timing of the filing with Canadian authorities, the agency should have preserved and included the disputed citations and documents in the materials filed with this court on certiorari appeal even if, as it decided, the agency ultimately considered the disputed citations and documents not to be included in the decision-making record.

(Minn. App. 2019). Under that analysis, a court inquires whether there is a "combination of danger signals which suggest the agency has not taken a 'hard look' at the salient problems and the decision lacks articulated standards and reflective findings." *Cable Commc'ns Bd.*, 356 N.W.2d at 669 (quotation omitted). The analysis has been described both as an aspect of the arbitrary-and-capricious standard and as an aspect of the substantial-evidence standard. *Compare id.* (including "hard look" analysis in discussion of substantial-evidence standard), *with In re Application of Minn. Power for Auth. to Increase Rates for Elec. Serv.*, 838 N.W.2d 747, 766 (Minn. 2013) (Anderson, J., dissenting) (describing "hard look" analysis as part of the arbitrary-and-capricious standard under federal caselaw).

The MPCA and PolyMet argue that the "hard look" analysis applies only in the context of environmental-review decisions under the Minnesota Environmental Policy Act (MEPA) and that this court should not apply the analysis in this permitting case. We reject this argument for two reasons. First, although the "hard look" analysis is often applied in MEPA cases, its application has not been exclusive to those cases. *See, e.g.*, *In re A.D.*, 883 N.W.2d 251, 260 (Minn. 2016) (citing analysis in appeal from school's expulsion decision); *In re Reichmann Land & Cattle, LLP*, 867 N.W.2d 502, 512 (Minn. 2015) (applying analysis in appeal from agency order requiring relator to obtain NPDES/SDS permit); *Cable Commc'ns Bd.*, 356 N.W.2d at 669 (applying analysis in appeal from order granting cable franchise); *U.S. Steel*, 937 N.W.2d at 786-88 (applying analysis in appeal from decision to reissue NPDES/SDS permit). Second, MPCA's and PolyMet's arguments appear to be based on the mistaken premise that the "hard look" analysis is distinct from

the standards that appellate courts otherwise apply to administrative decisions. As we explain above, the "hard look" analysis has been treated as part of the familiar arbitrary-and-capricious and substantial-evidence standards.

Although we reject the MPCA's and PolyMet's arguments that we should not apply the "hard look" analysis, we emphasize that the "hard look" analysis is part of this court's standard of review—it does not create substantive obligations on the part of the MPCA. Under the "hard look" analysis, this court will inquire whether the MPCA took a "hard look at the salient problems." *Cable Commc'ns Bd.*, 356 N.W.2d at 669 (quotation omitted). But the scope of the "salient problems" will be determined by the substantive law governing the MPCA's decision.

Remand

Although we may reverse an agency decision only for one of the six reasons specified in Minn. Stat. § 14.69, our authority to remand does not require a determination that one of the six reasons is met. *See id.*; *see also A.D.*, 883 N.W.2d at 258 (explaining that, when an "agency's findings are insufficient, the case can be either remanded for additional findings *or* reversed for lacking substantial evidence supporting the decision" (emphasis added) (quotation omitted)). Instead, we may conclude that remand is appropriate "to permit further evidence to be taken or additional findings to be made in accordance with the applicable law." *Id.* at 258 (quotations omitted); *see also In re Restorff*, 932 N.W.2d 12, 18 (Minn. 2019) ("[W]e may remand the case for additional fact finding if the agency's findings are insufficient.").

"Whenever appellate review is sought, the reviewing court must decide whether the findings of fact below are sufficiently specific to permit it to exercise this function." *People for Envtl. Enlightenment & Responsibility (PEER), Inc. v. Minn. Envtl. Quality Council*, 266 N.W.2d 858, 871 (Minn. 1978). "[J]udicial review of decisionmaking is only possible if the agency states with clarity and completeness the facts and conclusions essential to its decision so that the reviewing court can determine whether the facts support the agency's action." *Id.* at 871. "An agency not only must identify the evidence on which it is relying, but also it must explain . . . how that evidence connects rationally with the agency's choice of action." *In re Expulsion of N.Y.B.*, 750 N.W.2d 318, 325-26 (Minn. App. 2008) (quotation omitted). In this case, we conclude that the MPCA's findings are insufficient to facilitate judicial review for the reasons that follow.

As we explain above, the MPCA issued the air-emissions permit in relation to its authority to enforce the CAA. Under rules adopted pursuant to that authority, eight conditions must be satisfied in order for the MPCA to issue an air-emissions permit. *See* Minn. R. 7007.1000, subp. 1 (2019). Of particular relevance here, the MPCA must "anticipate[] that the applicant will, with respect to the stationary source and activity to be permitted, comply with all conditions of the permit." *Id.*, subp. 1(G). This requirement is consistent with the EPA Guidance prohibiting sham permits. The rules conversely provide seven grounds for denying a permit, including if the conditions for granting the permit are not met and if "[a]n applicant has failed to disclose fully all facts relevant to the stationary source or activity to be permitted, or the applicant has knowingly submitted false or misleading information to the agency." Minn. R. 7007.1000, subp. 2(C).

Against this regulatory framework, and following a public-comment period that generated what MPCA itself characterizes as "extensive comments on technical and substantive issues," the MPCA on December 20, 2018, issued an eight-page decision that primarily recites procedural history. The decision reproduces the language of Minn. R. 7007.1000 governing the conditions that must be satisfied in order to grant a permit and the grounds on which a permit may be denied. But the MPCA's findings do not meaningfully engage with those requirements. Rather, the MPCA decision states, in a conclusory fashion, that the permit "meets the requirements of Minn. R. 7007.1000, subp. 1 and none of the justifications to deny permit issuance described in Minn. R. 7007.1000, subp. 2 exists."

Importantly, the MPCA issued these conclusory findings after questions were raised concerning PolyMet's intent to abide by the terms of the synthetic-minor permit. During the public-comment period, MCEA had noted that the crusher lines at the former LTVSMC plant had more throughput capacity than PolyMet claimed to intend to use, and it urged that strict production and monitoring conditions should be included in the permit. After the close of the public-comment period—but before MPCA issued the permit—MCEA submitted to the MPCA commissioner a copy of its petition for an SEIS, which included as exhibits the Canadian technical report and other documents reflecting statements by PolyMet concerning the potential for expansion of the NorthMet project. And on December 13, 2018, MCEA sent a letter to the MPCA commissioner expressly urging that the MPCA investigate whether PolyMet was seeking a sham permit. Notwithstanding these documented concerns, the MPCA's decision to grant the permit—issued just seven

days later—does not meaningfully address whether it "anticipates that [PolyMet] will . . . comply with all conditions of the permit," Minn. R. 7007.1000, subp. 1(G), and does not address in any fashion whether PolyMet is engaged in sham permitting.

This deficit was not remedied by the MPCA commissioner's short December 19, 2019 letter in response to the MCEA's December 13 letter raising concerns about sham permitting. That letter is deficient for the same reasons as the MPCA's formal findings in its December 20 decision. The letter acknowledges the increased-throughput scenarios analyzed in the Canadian technical report—which was commissioned by PolyMet and distributed to its investors and potential investors—but then the letter summarily dismisses those analyses as preliminary and speculative, and concludes, without further explanation, that "[n]either the Technical Report, nor PolyMet's submittals in support of the Air Permit, indicate any intent by PolyMet to circumvent major source permitting." Yet the Canadian technical report analyzes not only the current NorthMet project, but also discusses two scenarios that would involve throughput that would exceed the 32,000-tpd level needed to limit air emissions to synthetic-minor-permit levels. According to the Canadian technical report, the greater throughputs would increase profits and would allow the project to continue to operate profitably when metal prices are depressed. Put differently, the Canadian technical report raises questions concerning whether, if metal prices drop, the project can remain viable with the 32,000-tpd-throughput limitation that the synthetic-minor permit necessitates.

Even if speculative, PolyMet's explicit consideration of the potential for an expansion of the NorthMet project is probative of whether PolyMet can be expected to

comply with the terms of the synthetic-minor permit. All of the parties agree, and the federal regulations provide, that, if, subsequent to permit issuance, PolyMet decides to expand the NorthMet project such that it becomes a major source, PolyMet will be required to comply with PSD requirements—including BACT requirements—at that time. *See* 40 C.F.R. § 52.21(r)(4) (providing that, "[a]t such time that a particular source or modification becomes a major source," PSD requirements apply "as though construction had not yet commenced on the source or modification"). But if expansion is the *current* intent, the time to comply with PSD requirements is now. Of course, once a project is operating, expansion proposals may be viewed more favorably by regulators. If that is the true course being charted by PolyMet, then there is merit to relators' argument that the synthetic-minor permit is a sham. *See* EPA Guidance at 14-16 (providing guidance for determining when synthetic-minor permit is a sham permit). And we lack the reflective findings to review whether MPCA abused its discretion when it issued the synthetic-minor permit despite the sham-permitting questions that relators have raised. As discussed above, the agency did not transmit to this court all documents that it considered or was invited to consider. We are therefore not certain that we have all of the documents that the agency considered or may have considered.

In sum, without particularized findings, and without the agency having submitted everything it considered or may have considered, we are unable to determine if the MPCA's decision to grant a synthetic-minor permit for the NorthMet project was arbitrary and capricious or unsupported by substantial evidence. For this reason, we conclude that a remand to the MPCA for additional findings is warranted. *See Restorff*, 932 N.W.2d at

24-25 (remanding to agency for additional fact finding and revised decision because dispositive factual finding had not been made); *Expulsion of N.Y.B.*, 750 N.W.2d at 326 (remanding to school district because absence of particularized findings precluded court from determining whether district decision was "the product of reasoned decision-making").

D E C I S I O N

We grant the MCEA's motion to supplement, deny the MPCA's motion to strike, and—because the MPCA's findings in support of its decision to issue the air-permit are not sufficient to facilitate judicial review—remand to the MPCA for additional findings and a revised decision. On remand, the MPCA shall reopen the record to ensure the adequacy of the record and hold such further proceedings as it deems appropriate to develop those findings.

Remanded; motion to supplement granted and motion to strike denied.