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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

THE TOWN OF FLORENCE, et al., *Plaintiffs/Appellants*,

v.

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY, et al.,
Defendants/Appellees.

No. 1 CA-CV 19-0122
FILED 5-7-2020

Appeal from the Superior Court in Maricopa County
No. LC2017-000466-001
The Honorable Patricia A. Starr, Judge

JURISDICTION ACCEPTED; RELIEF DENIED

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MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Randall M. Howe and Judge Diane M. Johnsen[1] joined.

T H U M M A, Judge:

¶1 This case involves a temporary Aquifer Protection Permit (APP) for copper mining on what an Arizona Department of Environmental Quality (ADEQ) expert described as "probably the most monitored 20 acres I've seen in the APP program."

¶2 Appellants the Town of Florence and real estate developer SWVP-GTIS MR, LLC challenge the APP issued to Florence Copper Inc. (FCI). ADEQ issued the APP after two lengthy administrative proceedings, including the filing and granting of what is referred to as a "significant amendment" to the original application. The Arizona Water Quality Appeals Board (Board) upheld that decision and the superior court affirmed. This timely appeal followed. Because Appellants have failed to show the Board's decision was arbitrary, capricious or otherwise in error, it is affirmed.

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[1] Judge Johnsen was a sitting member of this court when the matter was assigned to this panel of the court. She retired effective February 28, 2020. In accordance with the authority granted by Article 6, Section 3, of the Arizona Constitution and pursuant to A.R.S. § 12-145, the Chief Justice of the Arizona Supreme Court has designated Judge Johnsen as a judge pro tempore in the Court of Appeals, Division One, for the purpose of participating in the resolution of cases assigned to this panel during her term in office.

FACTS AND PROCEDURAL HISTORY

¶3 In 2012, FCI filed an application with ADEQ for an APP to operate a two-year production test facility (PTF) intended to lead to a commercial in-situ copper recovery mine. The site involved is a small portion of several thousand acres of land annexed into Florence in 2003 and is north of the Gila River, southwest of Poston Butte. FCI proposed to inject a diluted acidic liquid (called a lixiviant) into an underground ore-bearing area through injection wells. The lixiviant will dissolve and suspend the copper. The lixiviant, including the suspended copper, is then pumped to the surface through recovery wells. The copper is then removed from the lixiviant and processed. By contrast to open-pit mining, ADEQ notes in-situ mining "causes minimal disturbance and no residual pit scarring of the land's surface." The purpose of the PTF is to evaluate the efficacy and commercial viability of in-situ mining on the site.

¶4 In 2013, following review and public comment, ADEQ issued the requested APP. Appellants challenged that issuance with the Board, which referred the matter for a hearing and recommendation by an Office of Administrative Hearings Administrative Law Judge (ALJ). After 34 days of evidentiary hearings, the ALJ issued a nearly 150-page decision in 2014, recommending that the Board revoke the APP given several issues. Later that year, the Board issued its final decision largely adopting the ALJ's recommendation and remanding for ADEQ to address several issues. No party sought judicial review of this 2014 Decision.

¶5 FCI then submitted the application for a significant amendment in a new matter addressing issues noted in the 2014 Decision. In 2016, after additional proceedings including public comment and a hearing, ADEQ approved the significant amendment and issued the APP. Appellants appealed that decision to the Board. The Board received additional evidence and legal and technical arguments. In 2017, the Board denied the appeal and upheld the APP issued as a result of the significant amendment.

¶6 Appellants then filed a complaint in superior court seeking review of the Board's 2017 Decision. *See* Ariz. Rev. Stat. (A.R.S.) § 12-905(A) (2020) ("Jurisdiction to review final administrative decisions is vested in the superior court.").[2] After briefing, the superior court affirmed, finding the 2017 Decision was supported by substantial evidence and was not contrary

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[2] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

to law, arbitrary, capricious or an abuse of discretion. Appellants now timely seek review by this court.

DISCUSSION

I. Appellate Jurisdiction.

¶7 This court has an independent obligation to ensure that it has appellate jurisdiction. *Robinson v. Kay*, 225 Ariz. 191, 192 ¶ 4 (App. 2010). The superior court's decision challenged here states it is a final judgment pursuant to Arizona Rule of Civil Procedure 54(c), meaning "no further matters remain[ed] pending." *See also Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420, 425 ¶ 1 (App. 2016). After entering that decision, however, at the request of ADEQ and FCI, the superior court awarded attorneys' fees. As a result, the decision appealed from was not a Rule 54(c) final judgment.

¶8 This court's appellate jurisdiction over a superior court's order reviewing an administrative decision is defined by A.R.S. § 12-913. Section 12-913 "authorizes appellate jurisdiction for 'final' decisions, orders, judgments or decrees issued by the superior court," meaning such rulings must comply with Rule 54(b) or 54(c) to be appealable. *Brumett*, 240 Ariz. at 431 ¶ 23. Because the order appealed from fails to comply with Rule 54(b) or 54(c), and because Appellants did not amend or supplement their notice of appeal after the court awarded fees, this court lacks appellate jurisdiction under A.R.S. § 12-913.

¶9 If appellate jurisdiction is lacking but a timely notice of appeal was filed, this court has discretion to exercise special action jurisdiction. *See State v. Bayardi*, 230 Ariz. 195, 197-98 ¶ 7 (App. 2010); *see also* A.R.S. § 12-120.21(A)(4); Ariz. R.P. Spec. Act. 1(a). Here, Appellants timely sought review by this court and the parties have fully briefed and argued the issues addressed by the superior court. *See Dabrowski v. Bartlett*, 246 Ariz. 504, 512 ¶ 15 (App. 2019). Moreover, the purported Rule 54(c) judgment that Appellants sought to appeal was issued during a two-year period (January 1, 2018 to January 1, 2020) when compliance with Rule 54 was uncertain for matters governed by the Arizona Rules of Procedure for Judicial Review of Administrative Decisions (JRAD).[3] The parties also would now lack "an

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[3] Before January 1, 2018, JRAD stated the Arizona Rules of Civil Procedure applied unless otherwise specified, meaning compliance with Rule 54 was required to invoke appellate jurisdiction. *See Brumett*, 240 Ariz. at 431 ¶ 23.

equally plain, speedy, and adequate remedy by appeal." Ariz. R.P. Spec. Act. 1(a). Accordingly, in the exercise of its discretion, this court sua sponte accepts special action jurisdiction. *See, e.g.*, *Dabrowski*, 246 Ariz. at 512 ¶ 15; *Bayardi*, 230 Ariz. at 197-98 ¶ 7.

¶10 Turning to the merits, Appellants argue: (1) under the law of the case, the 2014 Decision was binding in the subsequent proceedings and precludes findings in the 2017 Decision and (2) the 2017 Decision approving an alert level for electrical conductivity monitoring was arbitrary and capricious. This court addresses these arguments in turn.

II. The 2014 Decision is Not the Law of the Case for the 2017 Decision.

¶11 Appellants argue the 2014 Decision governed all subsequent proceedings under a law of the case theory, an issue this court reviews de novo. *Kadish v. Ariz. State Land Dep't*, 177 Ariz. 322, 326-27 (App. 1993). Law of the case is the practice by which a decision-maker refuses to reopen questions "previously decided in the same case," *id.* at 327, "provided the facts, issues and evidence are substantially the same as those upon which the first decision rested," *Dancing Sunshines Lounge v. Industrial Com'n of Ariz.*, 149 Ariz. 480, 482 (1986). For two reasons, the law of the case does not apply here.

¶12 First, the law of the case applies only to "questions previously decided in the *same* case." *Kadish*, 177 Ariz. at 327 (emphasis added); *accord State v. Whelan*, 208 Ariz. 168, 171 ¶ 10 (App. 2004) (refusing to apply law of the case where, even though the "facts in each prosecution were identical and the charges were the same, there were two separate actions"). Here, the proceedings leading to the 2014 Decision (No. 12-005-WQAB) and the subsequent proceedings leading to the 2017 Decision (No. 16-002-WQAB) were in two different matters. For this reason, the law of the case does not apply.

Amendments to JRAD effective January 1, 2018, however, reversed that presumption, stating instead that the Arizona Rules of Civil Procedure "do not apply to" JRAD proceedings "except as provided" in JRAD, and JRAD did not require compliance with Rule 54. JRAD 1(b) (2018). Amendments to JRAD effective January 1, 2020 now expressly require compliance with Rule 54 to invoke appellate jurisdiction. JRAD 13(b) (2020). The superior court order from which Appellants filed their notice of appeal issued in late 2018, when JRAD did not expressly require compliance with Rule 54 to invoke appellate jurisdiction.

¶13 Second, the law of the case requires that "the facts, issues and evidence are substantially the same as those upon which the first decision rested." *Dancing Sunshines Lounge*, 149 Ariz. at 482. Here, the facts, legal issues and evidence involved in the two matters differed, at times substantially.

¶14 In the proceedings leading to the 2014 Decision, the ALJ concluded the APP did not comply with applicable law in several respects. The 2014 Decision adopted, almost completely, the ALJ's conclusions noting various issues to be addressed on remand. Two of those issues are implicated here: (1) the location of the Point of Compliance (POC) wells and (2) the fluid electrical conductivity monitoring. The subsequent record, which is now before the court, is substantially different from the record leading up to the 2014 Decision.

¶15 At the time of the 2014 Decision, the Pollution Management Area (PMA) in the APP was 120 acres. This PMA included (and surrounded) the in-situ injection and recovery PTF well field along with the process water impoundment and run-off pond and substantial additional land. This 120-acre PMA was nearly 55 times larger than the 2.2-acre PTF well field. The APP also showed four existing POC wells more than 900 feet from the nearest PTF injection well and contemplated two new POC wells more than 730 feet away from the nearest PTF injection well.

¶16 The APP also depended on a cone of depression, meaning the recovery wells would pump at a rate greater than the injection wells, thereby containing hazardous substances. The APP, however, "did not mention any specific cone of depression to explain or justify the PMA." Nor did it obligate FCI to ensure pumping at a rate sufficient to maintain any particular cone of depression. The APP also lacked any meaningful monitoring of hazardous substances that might escape the recovery wells.

¶17 Subsequent to the 2014 Decision, FCI sought to remedy the issues identified in the 2014 Decision through its application for a significant amendment. As relevant here, and as approved by ADEQ, the significant amendment identified two separate PMAs, together encompassing 39 acres, approximately a third of the size of the original single 120-acre PMA. The western PMA is circular and encompasses about 30 acres that include the PTF injection and recovery well field. Along with retaining the four existing POC wells listed in the original proposal, the significant amendment moved the two new POC wells about 60 feet so that they will be at the boundary of the well field PMA, approximately 500 feet from the PTF injection and recovery wells.

¶18 The significant amendment added a host of Best Available Demonstrated Control Technology (BADCT) monitoring measures, including seven supplemental monitoring wells located at fault locations in the well field PMA, to be sampled for an expanded list of analytes, with specified associated contingency actions. The significant amendment also included "bulk" electrical conductivity monitoring, which uses 28 sensors to detect any migration with specified alert levels; "fluid" electrical conductivity monitoring; expanded aquifer pump testing and other pre-operational requirements; expanded groundwater elevation monitoring; and maintenance of a "BADCT cone of depression" to the edge of the well field PMA.

¶19 Because of these and other changes in the facts, legal issues and evidence, the amended application the Board reviewed in 2017 was substantially different from the original application the Board reviewed in 2014. Given these substantial changes, the law of the case did not mean the Board was bound by the 2014 Decision when considering the issues in proceedings leading up to the 2017 Decision. *See Dancing Sunshines Lounges*, 149 Ariz. at 483 (law of the case "is not applied when . . . there has been a change in the essential facts or issues" or "there has been a substantial change of evidence").

III. Appellants Have Not Shown the 2017 Decision Was Contrary to Law, Not Supported by Substantial Evidence or Arbitrary, Capricious or an Abuse of Discretion.

¶20 "The court shall affirm the agency action unless the court concludes that the agency's action is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion." A.R.S. § 12-910(E). This court independently reviews the record to determine if the evidence supports the agency decision by a preponderance of the evidence. *Parsons v. Ariz. Dep't of Health Servs.*, 242 Ariz. 320, 322 ¶ 10 (App. 2017). The evidence is viewed in a light most favorable to upholding the agency decision, recognizing this court is "not bound by the agency's or the superior court's legal conclusions or statutory interpretation." *Id*. The court applies these standards in addressing Appellants' arguments that (1) the POC wells were not properly located and (2) the fluid electrical conductivity monitoring levels are improper.

A. Location of the POC Wells.

¶21 The POC "is the point at which compliance must be determined for . . . the aquifer water quality standards" and, unless an exception applies, the POC "is the limit of the" PMA. A.R.S. § 49-244(1). The PMA, in turn,

> is the limit projected in the horizontal plane of the area on which pollutants are or will be placed. The [PMA] includes horizontal space taken up by any liner, dike or *other barrier* designed to contain pollutants in the facility. If the facility contains more than one discharging activity, the pollutant management area is described by an imaginary line circumscribing the several discharging activities.

Id. (emphasis added).

¶22 An exception allows ADEQ to approve an alternative POC if the alternative POC "will allow installation and operation of the monitoring facilities that are substantially less costly." *Id.* § 49-244(2)(b). Any request for approval under this exception must be supported "by an analysis of the volume and characteristics of the pollutants that may be discharged and the ability of the vadose zone [the area from the ground surface to the water table] to attenuate the particular pollutants that may be discharged." *Id.* Such an alternative POC can be no farther from the PMA boundary "than is necessary . . . and in no event shall it be so located as to result in an increased threat to an existing or reasonably foreseeable drinking water source." *Id.* In addition, an alternative POC for a hazardous substance "shall never be further downgradient than" the property boundary, any point of a drinking water source or 750 feet "from the edge of the" PMA. *Id.* § 49-244(2)(b)(i), (iii).

¶23 After considering the substantial amendment and the additional material submitted (including the revised PMA, the specific location for the two new POC wells as well as the supplemental monitoring wells), the 2017 Decision found the revised PMA and POC wells met these requirements. The 2017 Decision found the well field PMA was based on modeling with a sound technical basis and that the cone of depression mandated by the APP would properly serve as a barrier for the PMA and is the presumptive BADCT for the PTF. The 2017 Decision also found the location of the two new POC wells on the revised PMA boundary satisfied

A.R.S. § 49-244 and that FCI otherwise made the required showing allowing ADEQ to properly approve the APP after the substantial amendment.

¶24 Appellants claim that the location of the four alternative POC wells "is unreasonable and unjustified." The APP approved by ADEQ following the substantial amendment, however, moves the location of the two new POC wells to the boundary of the well field PMA, within 500 feet of the injection and recovery wells, and adds seven supplemental monitoring wells within that PMA. Importantly, ADEQ also added requirements that FCI demonstrate it is maintaining a 500-foot cone of depression "barrier" that corresponds with the well field PMA before injection of the lixiviant. Appellants' argument on appeal does not address these significant changes contained in the substantial amendment that led to the 2017 Decision.

¶25 Instead, Appellants argue that monitoring using the four existing POC wells "could not trigger a non-compliance finding for at least ten years" given the distance of those wells from the PTF well field. This argument does not address the placement of the two new POC wells on the PMA boundary in the significant amendment. But more significantly, this argument does not account for the mandated 500-foot cone of depression or the seven supplemental monitoring wells within that PMA, also specified in the significant amendment. This argument also does not account for the electrical conductivity monitors discussed in more detail below.

¶26 In their reply brief on appeal, Appellants argue that none of the essential facts regarding the POC well placement have changed. This argument is based on the distance of the existing POC wells from the PTF well field, which remains essentially unchanged between the 2014 and 2017 Decisions. Appellants also argue the 2014 Decision found the PMA was "'approximately 200 feet from the boundary of the PTF well field,' which 'is too far,'" adding that 500 feet also is "too far."[4] Appellants' arguments, however, ignore several critical issues.

[4]Appellants cite Figure 8 of their opening brief filed with the superior court as supporting this argument. As noted by ADEQ, however, the superior court struck Figure 8, meaning it is not a part of the record before this court. *See Nat'l Adver. Co. v. Ariz. Dep't of Transp.*, 126 Ariz. 542, 545 (App. 1980) ("Our review is limited to the record on appeal.").

¶27 First, contrary to Appellant's argument here, *nowhere* does the 2014 Decision state a PMA 200 feet from the PTF well field was "too far." And nowhere, in nearly 150 pages of the recommended decision leading to the 2014 Decision, did the ALJ make such a finding.[5]

¶28 Second, in the record leading to the 2014 Decision, the two new POC wells were to be installed at unspecified locations about 500 feet beyond the PMA, while the four existing POC wells were 700 feet beyond the PMA boundary. But by the time of the 2017 Decision, with the revised well field PMA, the two new POC wells are on the PMA boundary, as required by A.R.S. § 49-244. The four existing POC wells are about 350 feet from the new well field PMA boundary.

¶29 Third, the 2014 Decision found a PMA of 200 acres was so large (in light of the 2.2.-acre PTF and the cone of depression) that it would improperly render superfluous the Section 49-244(1) requirement that the PMA "is the limit projected in the horizontal plane of the area on which pollutants are or will be placed." However, in the proceedings leading to the 2017 Decision, the well field PMA was reduced to just 30 acres.

¶30 On this record, Appellants have not shown the 2017 Decision was contrary to law, not supported by substantial evidence, arbitrary, capricious or an abuse of discretion in considering the location of the POC wells. To the contrary, the record shows the decision was supported by substantial evidence. Accordingly, Appellants have not shown the location of the POC wells approved in the 2017 Decision was erroneous.

B. Fluid Electrical Conductivity Levels.

¶31 Appellants contend the 2017 Decision erred in finding that the alert level set for the fluid electrical conductivity monitoring was proper. The 2014 Decision directed further consideration of the issue of monitoring to detect "short-circuit" migration of fluid into a lateral unit of the subsurface beyond the reach of the recovery wells. The significant amendment proposed fluid electrical conductivity monitoring to detect

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[5]This argument appears to have, as its source, a finding in the 2014 Decision that the northwest boundary line of the original 120-acre PMA was "approximately 200 feet from the boundary of the PTF well field." The 2014 Decision, however, did not find 200 feet was "too far" from the PTF well field. Nor do Appellants provide any support for this argument with "appropriate references to the portions of the record on which the appellant relies." Ariz. R. Civ. App. P. 13(a)(7)(A).

such migration. Fluid electrical conductivity "is a measurement of the ability of a fluid to conduct electricity." Fluid electrical conductivity monitoring is "similar to a magnetic resonance imagining ('MRI') machine and produces real-time, real-world results that will demonstrate if there has been any horizontal or vertical migration of fluid."

¶32 Under the significant amendment, as one FCI expert testified, the alert level for fluid electrical conductivity monitoring will trigger "when the fluid electrical conductivity [in the observation wells] is equal to or greater than the injection well fluid electrical conductivity, which would indicate a failure to maintain capture of the injected lixiviant." FCI is required to compare the fluid electrical conductivity levels in the observation wells and the injection wells daily. If the fluid electrical conductivity levels at the observation wells are equal to or greater than at the injection wells, FCI must undertake specified contingency actions.

¶33 Appellants argue an alert should be triggered, instead, if fluid electrical conductivity "rises significantly above background . . . levels," which would be significantly lower than at the injection wells. Appellants argue that, because the acid concentration of the lixiviant will never rise above the concentration at the injection wells, it was an error to set the fluid electrical conductivity alert level equal to or greater than that found in the injection wells. According to ADEQ and FCI, however, the fluid electrical conductivity of water is directly proportional to the amount of dissolved material (including both acid and metal, like copper) in the water. As FCI's expert explained in an affidavit filed after the significant amendment,

> When added to water, acid dissociates into its component ions, thereby increasing the conductivity of the water. The dissociated acid interacts with solid mineral material in the formation, dissolving it into solution, which further increases the electrical conductivity of the water. . . . At the PTF, the [total dissolved solids]/conductivity values measured will include components of both dissociated acid and dissolved mineral material.

ADEQ's expert agreed, testifying that fluid electrical conductivity is a measurement of the acid and the amount of other dissolved materials in the water:

> When the lixiviant is injected at the injection well, it will begin to dissolve the materials, the minerals in the – in the rock which causes some of the acid to be lost, dissociate. So those two things, the dissolved minerals and the acid dissociating, is what would be measured by the [fluid electrical conductivity monitoring].

The purpose of the fluid electrical conductivity monitoring is to determine whether the lixiviant has traveled beyond the recovery wells (horizontal excursion). As the ADEQ witness explained, for the lixiviant to travel to an observation well, which are to be installed downgradient of the recovery wells, the lixiviant "will have been dissolving some of the minerals" along the way, so when the fluid electrical conductivity level is higher in the observation wells than in the injection wells, "we know that there's been something that hasn't gone right."

¶34 Appellants do not refute this evidence. On this record, Appellants have not shown the fluid electrical conductivity alert level adopted in the 2017 Decision was arbitrary, capricious or otherwise improper.

IV. Attorneys' Fees on Appeal.

¶35 Appellants, ADEQ and FCI all request attorneys' fees and costs on appeal on a variety of grounds. Because they are not the successful parties on appeal, Appellants' request under A.R.S. §§ 12-341, 12-348, 12-2030 and 41-1001.01(A)(1) is denied. ADEQ seeks an award of attorneys' fees and costs under A.R.S. §§ 12-341 and 12-348.01, while FCI seeks an award of attorneys' fees and costs under A.R.S. §§ 12-341, 12-342, 12-348, 12-348.01, 12-349, 12-912, 12-2030 and 41-1001.01(A)(1). As the successful parties on appeal, FCI and ADEQ are awarded their (1) reasonable attorneys' fees pursuant to A.R.S. §§ 12-348 and 12-348.01, respectively, and (2) taxable costs on appeal pursuant to A.R.S. § 12-341, all contingent upon their compliance with Ariz. R. Civ. App. P. 21.

CONCLUSION

¶36 Accepting special action jurisdiction, the Board's 2017 Decision, as affirmed by the superior court, is affirmed. Accordingly, relief is denied.

AMY M. WOOD • Clerk of the Court
FILED: AA