STATE OF MICHIGAN

COURT OF APPEALS

COMMONWEALTH POWER COMPANY, Plaintiff-Appellee,	UNPUBLISHED March 21, 2000
v	Nos. 204399; 210844 Ingham Circuit Court
DEPARTMENT OF NATURAL RESOURCES, Defendant-Appellant.	LC No. 95-080191-AA

Before: Hoekstra, P.J., and McDonald and Meter, JJ.

PER CURIAM.

In Docket No. 204399, defendant appeals by leave from a circuit court ruling in which the court held that defendant could not deny plaintiff a water quality certificate for failing to complete a fish entrainment and mortality study[1] relating to its operation of a hydroelectric power plant. In Docket No. 210844, defendant appeals by leave from a further circuit court ruling in which the court granted plaintiff costs and attorney fees for defendant's allegedly vexatious behavior in requiring the fish study and denying the certificate. We affirm in Docket No. 204399 and reverse and remand in Docket No. 210844.

Under the federal Clean Water Act, 33 USC 1251 *et seq*., plaintiff, as a entity that planned to discharge water into a Michigan river, was required to obtain a water quality certificate from Michigan before it could obtain a federal license to operate its hydroelectric facility. See 33 USC 1341. Such a state water quality certificate is commonly referred to as a "§ 401 certificate."

Plaintiff sought a § 401 certificate from defendant in April 1994. Ultimately, defendant denied plaintiff's request for a certificate based solely on plaintiff's failure to complete a fish entrainment and mortality study. On appeal, the circuit court reversed this denial and imposed sanctions on defendant, concluding that defendant had no legal authority to order plaintiff to complete such a costly study as a prerequisite to obtaining a § 401 permit.

Defendant argues that it had the authority to order the fish study under administrative rules granting it the authority to protect rivers for warmwater fish and for the migration of anadromous salmonoids such as trout and salmon. Defendant believes that under the United States Supreme Court's

decision in *PUD No 1 of Jefferson County v Washington Dep't of Ecology*, 511 US 700; 114 S Ct 1900; 128 L Ed 2d 716 (1994), such "protected uses" of rivers granted defendant broad authority to impose specific obligations, such as the fish study, on those seeking a § 401 certificate.

Plaintiff contends that because no administrative rule relating to fish entrainment and mortality studies existed, defendant had no authority to order such a study. Plaintiff further argues that defendant erred by failing to adopt any administrative rules specifically addressing the requirements for a § 401 certificate. The implication of this argument is that defendant had no authority to deny a § 401 certificate on *any* basis, since it had promulgated no rules relating to the requirements for such a certificate.

The circuit court's standard of review was whether the agency's decision was arbitrary and capricious, in violation of a statute, in excess of the statutory authority or jurisdiction granted to the agency, or made upon unlawful procedures causing material prejudice. *Brandon School District v Michigan Education Special Services Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1991). Moreover, the agency's decision must have been authorized by law and supported by competent, material, and substantial evidence on the whole record. *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 72; 592 NW2d 724 (1998); Const 1963, art 6, § 28. We, in turn, review the circuit court's decision to determine if the court applied correct legal principles and to determine if the court misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). In other words, we review the circuit court's decision for clear error. *Id*. at 234-235.

We first reject plaintiff's contention that the instant appeal is moot because defendant issued plaintiff a § 401 certificate in June 1997, after the circuit court's orders. Indeed, plaintiff cites no authority for the proposition that a § 401 certificate, after issuance, cannot be rescinded. Moreover, the Supreme Court of South Carolina has suggested that certification under § 401 is not final until the appeals process in the issuing state is complete. See *Triska v Dep't of Health & Environmental Control*, 355 SE2d 531, 533-534 (SC, 1987).

We also reject plaintiff's argument that in order to process § 401 permits, defendant must adopt rules specifically indicating what will be evaluated in an application for a § 401 certificate. Indeed, the water quality standards promulgated by defendant, see 1979 AC R 323.1041-323.1116 and 1994 AACS R 323.1041-323.1117, and any other state laws relating to water quality suffice to give § 401 applicants notice regarding what will be required before a certificate will be issued. See generally *Washington Dep't of Ecology v PUD No 1 of Jefferson County*, 849 P2d 646 (Wash, 1993), aff'd 511 US 700 (1994); see also *PUD No 1, supra* at 711-714.

The relevant question is whether the water quality standards, or any other Michigan law relating to water quality, authorized defendant to order the fish entrainment and mortality study. As noted earlier, defendant contends that because the Michigan water quality standards indicate that rivers shall be protected for the use of fish and fish migration, it had the authority to order the study. This argument finds some support in *PUD No 1, supra*. In that case, the United States Supreme Court indicated that the State of Washington Department of Ecology could condition the issuance of a § 401 certificate on

the maintenance of a particular stream flow level. See *PUD No I, supra* at 714-723. The Court concluded that the Department of Ecology could impose such a condition because it related to a designated use of the river in question – use as a fish habitat – as delineated in the state's water quality standards.[2] *Id*. at 713-718; see also *Washington Dep't of Ecology, supra* at 650. The Court concluded that the water quality standards evaluated in the context of a § 401 application did not have to consist solely of numerical criteria, but could encompass protected uses. *PUD No 1, supra* at 716-718. Accordingly, the Court held that a minimum stream flow requirement, imposed to protect the use of the river as a fish habitat, was a proper prerequisite for a § 401 certificate. *Id*. at 716-718, 723.

At first blush, it appears that defendant's imposition of the fish study requirement was authorized under *PUD No 1, supra*. The problem, however, is that defendant, in ordering the fish studies, was not *imposing a requirement that it knew would be necessary to protect fish in the river*. In the Washington case, the Department of Ecology had determined, on its own, that a particular stream flow level was necessary to maintain the fish species contained in the river in question. See *Washington Dep't of Ecology, supra* at 650, and *PUD No 1, supra* at 709. Accordingly, it ordered that the company seeking the § 401 permit comply with these stream flow levels so as to protect the fish living in the river. See *PUD No 1, supra* at 709. In the instant case, by contrast, defendant did not order that plaintiff comply with certain conditions to ensure that fish kill in the river would be low. Instead, it simply wanted plaintiff to conduct an *exploratory study* regarding the number of fish killed. In contrast to the situation in *PUD No 1, supra*, defendant did not know or did not express what level of fish kill was acceptable or what type of protective measures were necessary to maintain the proper "use" of the particular river for particular species of fish. Accordingly, we do not believe that the circuit court clearly erred in determining that defendant exceeded the bounds of its authority in ordering plaintiff to conduct the fish studies.

Defendant next argues that the circuit court erred by imposing sanctions on defendant for its allegedly frivolous actions. Defendant argues that the circuit court erroneously relied on MCR 2.114(F) and MCR 2.625(A)(2) in imposing sanctions, since those court rules did not apply to this administrative appeal.[3] Whether the trial court erred in relying on these court rules in this regard is a question of law. This Court reviews questions of law de novo. *In re Rupert*, 205 Mich App 474, 479; 517 NW2d 794 (1994).

We agree that MCR 2.114(F) and MCR 2.625(A)(2) were improper bases on which to impose sanctions for vexatious proceedings in this case. We agree with defendant that since this case constituted an appeal to the circuit court under MCL 600.631; MSA 27A.631, the applicable sanctions provision, instead, was MCR 7.101(P).[4] See 7.104(A). Moreover, sanctions under MCR 2.114(F) and MCR 2.625(A)(2) were unwarranted in this case, since those rules allow for sanctions only in the case of a frivolous *claim or defense*. Here, contrary to the circuit court's ruling, defendant's defense had at least arguable legal merit under *PUD No 1, supra*.

MCR 7.101(P), however, is broader in scope than MCR 2.114(F). MCR 7.101(P)(1)(b) provides for sanctions if:

> a pleading, motion, *argument*, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court. [Emphasis added.]

In light of some of the questionable legal arguments raised by defendant in the circuit court (e.g., defendant's reliance on the Dam Safety Act, MCL 324.31501 *et seq.*; MSA 13A.31501 *et seq*.), we conclude that although the circuit's erroneous imposition of sanctions under MCR 2.114(F) and MCR 2.625(A)(2) must be reversed, a remand to the circuit court is necessary so that the court can determine whether sanctions under MCR 7.101(P) are appropriate. The circuit court must also determine whether prevailing-party costs under MCR 7.101(O) are appropriate.

Docket No. 204399 is affirmed. Docket No. 210844 is reversed and remanded. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Gary R. McDonald
/s/ Patrick M. Meter

[1] Fish entrainment and mortality refers to damages caused to fish that are caught in the turbines of a hydroelectric power plant.

[2] As plaintiff notes, Washington had a statute, RWC 90.54.020(3)(a), mandating that certain base flows in rivers be maintained for the preservation of fish. The Washington Supreme Court indicated that this statute provided a basis for imposing a stream flow requirement on a § 401 applicant. See *Washington Dep't of Ecology*, *supra* at 651-653. However, this statute was merely an *alternative* basis for imposing the stream flow requirement. The Washington Supreme Court, as well as the United States Supreme Court, held that the stream flow requirement was independently warranted under the state's water quality standards. *Id*. at 653; *PUD No 1*, *supra* at 713-718, 723.

[3] Plaintiff argues that it is unclear whether the circuit court relied solely on MCR 2.114(F) and 2.625(A)(2) in assessing sanctions. The circuit court's order, however, makes clear that it did rely solely on those court rules in assessing sanctions.

[4] MCR 7.101(P)(2) explicitly provides for sanctions in the case of vexatious proceedings in an appeal to the circuit court. In light of this clear language, we reject defendant's argument that sanctions were unavailable in this case.