This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1156

In the Matter of: Gedney Foods Company.

Filed April 25, 2022
Affirmed
Connolly, Judge

Minnesota Pollution Control Agency

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Considered and decided by Slieter, Presiding Judge; Connolly, Judge; and Cleary, Judge.*

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Relator challenges the order of respondent the Minnesota Pollution Control Agency (the MPCA) that relator must close three impoundment ponds, arguing that the order exceeds the MPCA's authority, is not supported by substantial evidence, and is arbitrary and capricious because its requirements are infeasible and unreasonable. Relator also challenges the MPCA's order denying relator's request for a contested-case hearing,

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

arguing that the denial is contrary to law, unsupported by substantial evidence and arbitrary and capricious because there are disputed material facts regarding the feasibility and the business impact of the order's requirements. Because both the MPCA's orders are reasonable and supported by substantial evidence, we affirm.

FACTS

Relator Gedney Food Company was authorized to discharge the process wastewater, contact cooling water, and clean-up water from its pickle factory to three onsite treatment surface impoundment ponds in 1957. The ponds lie in the floodplain of the Minnesota River.

The MPCA periodically inspected the ponds, observed that relator was not complying with the conditions of its permit to discharge, and issued a Notice of Violation (NOV) in 2014 and another in 2018. The 2018 NOV required relator to submit a Pond Compliance Feasibility Study to address bringing its ponds into compliance with the permit conditions. No study was submitted.

In 2019, unauthorized releases of wastewater occurred, and the ponds flooded. In May, the MPCA informed relator at a meeting that it "[did] not want any wastewater ponds in any flood plain of any river in the state" and that other options would have to be found. In August, relator informed the MPCA that it was closing its facility and would vacate it by the end of the month. The MPCA then requested the closure plan required by the permit and provided relator with its guidance on closure, which gave a two-year timeline for closing the ponds and removing the waste. Relator submitted an incomplete closure plan,

saying that the volume of solids in the ponds could not be determined until summer 2020. In February 2020, the MPCA sent relator a list of the options for closure.

In July 2020, the MPCA requested an update on relator's plan for the final discharge of the ponds; in August, the MPCA requested the results of the pond sample tests and the date for the final discharge. In September and October, the MPCA again requested an update on the pond sample results and the timeline for the final discharge. Relator replied that its consultant would develop a closure plan by November 16, 2020. The final discharge of the ponds was completed on November 14, 2020.

In December, the MPCA requested an update on the quantity of solids remaining in the ponds and on the closure plan. In January 2021, relator submitted a report on the volume of the solids and on the results of sample tests, which indicated that the amounts of nitrogen and sodium in the solids remaining in the ponds posed significant risks to groundwater, surface water, and aquatic life.

In February 2021, relator and the MPCA met to discuss a closure plan. The MPCA provided the list of options it sent in February 2020, asked again for a closure plan, and denied relator's request for a 16-week extension for the plan, saying it wanted the plan by March 1, 2021.

In May 2021, the MPCA met with relator and received the test results of additional samples. Based on these results, the MPCA rejected relator's proposal to apply the solids to land as industrial byproducts, noting that "[l]eaving the material in place or across the site would significantly exceed nitrogen and sodium land application limits." The MPCA also identified a landfill four miles from the ponds that could accept all the solids.

In June 2021, relator's consultant met with two contractors and received their estimates on the cost of removing the solids: one was $1,225,000; the other between $1,200,000 and $1,500,000. Relator filed a motion for reconsideration and requested a contested-case hearing.

In August, the MPCA issued the two orders challenged in this appeal. One order required a final closure plan by August 23, 2021, and extended the deadline for beginning of removal of solids to October 1, 2021, with one-third of the removal to be completed by December 1, 2021, another third complete by January 1, 2022, and the final third by February 1, 2022. The second order denied relator's motion for reconsideration and request for a contested-case hearing. On August 23, relator submitted a closure plan that involved bagging the high-nitrogen pond solids for one year, bagging the low-nitrogen pond solids during the next year, and removing the bagged solids over the following three years; it said this plan was within its financial capability.[1]

In September 2021, relator filed this certiorari appeal to challenge the August 2021 orders.

DECISION

"Under Minn. Stat. § 14.69 [2020], we may affirm, remand, or reverse an agency decision if the agency's findings of fact are unsupported by substantial evidence, arbitrary

[1] The MPCA claims that the plan was withdrawn in a letter relator sent to the MPCA stating that "all decommissioning proposals . . . are hereby withdrawn." But relator argues in its brief that this plan is "a reasonable and effective alternative to complete removal of all pond solids from the site" and does not say it was withdrawn.

or capricious, or affected by an error of law." *In re NorthMet Project Permit To Mine Application*, 959 N.W.2d 731, 749 (Minn. 2021) (quotations and citations omitted). An agency's order is presumptively valid because of the agency's expertise, and courts give substantial deference to agency decisions. *Id.* at 745.

1. Order for a Final Closure Plan and Deadlines

Relator argues that the MPCA's order (A) exceeded its statutory authority, (B) was unsupported by substantial evidence, and (C) was arbitrary and capricious.

A. Statutory Authority for the Order

Relator argues that "the MPCA has exceeded its statutory authority because it has failed to give due consideration to [relator's] financial condition and the impact of the ordered [c]losure [p]lan on [its] financial condition"; "by failing to consider factors giving rise to the necessity of decommissioning the ponds"; and "by imposing an onerous [c]losure [p]lan of complete removal of all pond solids from a remote, difficult to access site under an abbreviated timeline at a cost of $2 million."

The statutory authority on which relator relies is Minn. Stat. § 116.07 (2020):

> In exercising all its powers [the MPCA] shall give due consideration to the establishment, maintenance, operation and expansion of business, commerce, trade, industry, traffic, and other economic factors and other material matters affecting the feasibility and practicability of any proposed action . . . and shall take or provide for such action as may be reasonable, feasible, and practical under the circumstances.

"[S]tate agencies and courts are required by statute to consider both the economic impact and the environmental impact in rendering decisions dealing with environmental matters." *Rsrv. Mining Co. v. Herbst*, 256 N.W.2d 808, 841 (Minn. 1977). Relator also relies on

Rsrv. Mining for the proposition that the legislature imposed a duty on the MPCA "to weigh the importance of [economic factors] against the impairment of the environment," *id.* at 828, to argue that the MPCA breached this duty by ordering removal of the solids by February 2022 instead of adopting relator's proposal to bag and remove them over a five-year period.

Due consideration of a party's economic circumstances within the meaning of Minn. Stat. § 116.07 does not equate to permitting that party to use whatever method of disposing of materials it has decided is within its financial capability, particularly when the party already had almost two years (September 2019 to August 2021) to provide and execute a closure plan for removing the materials and had accomplished nothing during that time. The MPCA's August 9, 2021, order did not exceed its statutory authority.

B. Substantial Evidence for Order's Reasonableness and Feasibility

> [A] substantial-evidence analysis requires us to determine whether the agency has adequately explained how it derived its conclusion and whether that conclusion is reasonable on the basis of the record. This principle is rooted in the deference we show to matters that are properly within an agency's particular expertise. Our guiding principle is that if the ruling by the agency decision-maker is supported by substantial evidence, it must be affirmed.

NorthMet, 959 N.W.2d at 749 (quotations and citations omitted). The MPCA found that the order was "both reasonable and achievable" and affirmed it. Relator argues that the order was unreasonable and lacked support by substantial evidence because the MPCA required adherence to a strict timeline and refused to consider reasonable alternatives.

i. Adherence to a Strict Timeline

The MPCA points out that relator "has had over 800 days and counting since it [shut down] its operations to come up with a plan to remove its waste," and that, although the MPCA Guidance says removing all biosolids takes two years, relator "has not removed ***any*** biosolids" since closing its facility more than two years ago in September 2019. One of the estimates relator received said that the work would take 10 to 12 weeks and that it could possibly be done in the winter, which might be preferable.

The MPCA states that relator "today has no plan to remove its waste and has not removed any waste." Relator does not deny this. The MPCA's order specifying dates for the removal of the biowaste is not unreasonable or unsupported by evidence. In any event, all the dates the MPCA mandated have passed without any of the material having been removed.

ii. The MPCA's alleged refusal to consider alternatives

Relator argues that the MPCA failed to consider the six alternatives it identified:

> Onsite phytoremediation[2] to reduce solid[] nitrogen
> Further drying or treatment of the solids onsite
> Use of the site for wetland creation or landscape enhancement
> Land application onsite,
> Leave solids in some or all ponds and
> Fill and regrade the ponds in place.

The MPCA correctly notes that four of these—leaving the solids in place, filling the ponds, leaving the solids to dry, or using them for landscape--are prohibited under Minn. R.

[2] Phytoremediation is "[t]he planting of trees, grasses or other vegetation to remove or neutralize contaminants, as in polluted soil or water." *The American Heritage Dictionary of the English Language* 1332 (5th ed. 2018).

7035.1600 (prohibiting disposing of waste in a floodplain, wetland, or within 300 feet of a stream) because the ponds are in a wetland next to the Minnesota River.

As to the other two alternatives, land application onsite and phytoremediation, the MPCA found:

> 47. By the time of the parties' May 2021 meeting, [relator] had only begun to initially analyze its most recent sampling results. In contrast, the MPCA walked [relator] through its detailed analysis of the recent sampling results, compared them with the results from eight months before, and showed why phytoremediation and land application were not appropriate given the results. The MPCA provided [relator] with its spreadsheet tabulating the results of each contaminant and showed that even if the sludge were distributed across the entire site, it would significantly exceed nitrogen and sodium land application limits and pose significant risks to groundwater, surface water, and aquatic life.
> 48. Similarly, because of the significantly high levels of contaminants, phytoremediation would not be able to remove sufficient contamination and the same concerns would remain. Moreover, since the wastewater treatment ponds are in a floodplain, the water table is near the surface and the soil conditions are poor for phytoremediation, especially given the presence of fats and grease in [relator]'s waste which impedes phytoremediation.
> 49. In sum, [relator] has had two years to attempt to investigate an "innovative solution" and develop a [c]losure [p]lan consistent with Minnesota law, but failed to do so. (Letter at 3). . . . [F]inally ordering [relator] to use a well-understood and effective remedy, removal, is appropriate and fully supported by the record.

Relator's objection to the removal plan set out by the MPCA is that its timeline is not "financially feasible." But given the amount of time relator has already had and its failure to make any progress so far, it is not unreasonable for the MPCA to reject alternatives to removal of the biowaste.

C. Arbitrary and Capricious

An agency's decision is arbitrary and capricious if it relies on factors the legislator did not intend it to consider, fails to consider an important aspect of the problem, provides an explanation that runs counter to the evidence, or "is so implausible that it could not be explained as a difference in view or the result of the agency's expertise." *In re Review of 2005 Ann. Automatic Adjustment of Charges for all Elec. & Gas Utils*., 768 N.W.2d 112, 118 (Minn. 2009) (citation omitted) (*In re Review*). Relator argues that the order was arbitrary and capricious because relator was entitled to rely on the MPCA's "decades-long practice" of permitting it to discharge wastewater into the ponds and because the MPCA did not consider "the feasibility and logistical difficulties" of compliance with its order.

i. Reliance

Relator argues that, having once permitted a practice later determined to be damaging to the environment, MPCA did not have the right to make that determination and prohibit the practice by telling relator it would no longer permit "any wastewater ponds in any flood plain of any river in the state," thereby forcing relator to remove its operations from the state. Relator relies on *In re Review*, 768 N.W.2d at 120 ("[A]n agency must generally conform to its prior norms and decisions, or to the extent that departs from [them, it] must set forth a reasoned analysis for the departure that is not arbitrary and capricious."). But *In Re Review* is distinguishable: it did not concern a departure resulting from a determination that a practice was damaging to the environment but rather from a determination that the financial burden resulting from a utility's allowance of unrecovered costs to accumulate for five years was not excessive. *Id*. at 122. *In re Review* also quoted

and adopted language from *McHenry v. Bond*, 668 Fed. 2d 1185, 1192 (11th Cir. 1982): "An administrative agency concerned with furtherance of the public interest is not bound to rigid adherence to precedent." The MPCA's decision to stop permitting wastewater ponds in flood plains for the good of the environment was not arbitrary and capricious.

ii. Feasibility and Logistical Difficulties of Compliance

Relator argues that, although the MPCA knew relator had "a history of not being able to adequately access the [p]onds due to winter conditions or flooding of the access road," the "MPCA's order is premised upon its refusal to take into account the logistical and feasibility difficulties of accessing the terrain [of the ponds] in the timeframe provided." MPCA notes that (1) it "issued its order in June [2021] so that [relator] could complete the work and take advantage of the warm summer months," (2) "[o]n reconsideration, . . . [the MPCA] extended its order to allow [relator] to conduct the work over the winter" and (3) "one of [relator's] own estimates states definitively 'this work could be completed in the winter.'" MPCA also "considered [relator's] comments and request for reconsideration" and "amended its [o]rder accordingly to extend the closure deadline by several months to allow for winter removal at a lower cost." In any event, the work has not yet begun and presumably will not begin during the appellate process, so relator will not be complying with the December and January deadlines to which it objects.

There is no basis to reverse the MPCA's amended order.

2. Motion for Reconsideration and Request for a Contested-Case Hearing

A contested-case hearing is granted if: (1) the commissioner finds that there is a material issue of fact, (2) the commissioner has jurisdiction to make a determination on

that issue, and (3) holding a contested-case hearing would allow the introduction of information that would aid the commissioner in making a final decision. Minn. R. 7000.1900, subp. 1. Agencies have broad discretion to determine whether a contested-case hearing would aid the agency in making its decision, and courts defer to that discretion; petitioners have the burden of showing their entitlement to a contested-case hearing. *NorthMet*, 959 N.W.2d at 745.

Here, the commissioner's jurisdiction is not disputed. Relator argues that there are disputed issues of material fact as to the business impact of complying with the order and as to the feasibility of implementing it, and that a hearing would aid the commissioner in making a final decision on these issues.

A. Fact issues concerning the business impact of compliance

The MPCA argues that relator failed to meet its burden of identifying any witnesses it would call at a hearing regarding its finances and any specific facts regarding its finances for MPCA to consider. The MPCA's view that the burden was on relator to provide the specific financial information, not on the MPCA to request specific financial information, is supported by case law.

> [Petitioners] failed to provide [MPCA] or this court with any specific expert's names or with any indication of what specific *new facts* an expert might testify to at a contested case hearing. We agree with the MPCA that petitioners have not raised any fact issues which could be resolved in a contested case hearing . . . . [P]etitioners have the burden of demonstrating the existence of material facts that would aid [MPCA] before they are entitled to a contested case hearing. They have not done so.

In re Solid Waste Permit for the NSP Red Wing Ash Disposal Facility, 421 N.W.2d 398, 404 (Minn. App. 1988). The MPCA says the same is true here: relator's references to its "limited resources" in the petition were not the specific financial information that would have entitled relator to a contested-case hearing. Moreover, as the MPCA notes, information from two years ago as to relator's financial status would not help the MPCA decide whether relator is able to comply with its order now, so the third criterion for a contested-case hearing was not met.

Relator argues that "the MPCA had been put on notice of [relator's] financial viability, but did not request financial information from [relator]." But relator offers no support for its view that the burden was on the MPCA to obtain the financial information, rather than on relator to provide it. Relator cites *Rsrv. Mining*, 256 N.W.2d at 841, for the proposition that "the MPCA is required by statute to consider both the economic impact and the environmental impact" of its decisions, but *Rsrv. Mining* does not concern a party that failed to provide its own financial information for the MPCA to consider. In that case, a hearing officer appointed by the MPCA and the Department of Natural Resources had received information as to how much the regulated party was planning to spend to build a disposal site and to change its processing, 256 N.W.2d at 816, the number of its employees, the size of its payroll, the amount the party spent on supplies in Minnesota, and the amount of tax it paid, *id.* at 818, and the effect that the shutdown would have on the economic well-being of those affected by it. *Id*. at 821. There is no indication that the regulated party expected the regulating entities to seek its financial information for themselves. Moreover, relator had already shut down almost two years before the MPCA issued its orders;

information on its finances at the time it shut down would have been outdated and irrelevant.

Relator also relies on *In re Hibbing Taconite Co.*, 431 N.W.2d 885, 892 (Minn. App. 1988), citing it for the proposition that the MPCA may "not take official notice of the specific facts relating to [the regulated party's] financial viability." But the issue in that case was whether "foreign parent corporations [were] entitled to a contested case hearing" before being named as parties to a permit. *Id*. at 889. *Hibbing Taconite* did not concern a company's refusal to comply with MPCA rules for alleged financial reasons, nor does it support the view that the MPCA is responsible for seeking financial information of a party that alleges financial reasons for noncompliance.

Relator has not shown that the MPCA erred in not seeking relator's financial information.

B. Fact issues concerning feasibility

Relator argues that both the contractors' estimates, or proposals,[3] and the consultant's letter reporting on the meeting with the contractors demonstrate the infeasibility of MPCA's order. The MPCA argues that these documents demonstrate the feasibility, not the infeasibility, of its order.

The consultant's letter raises eight concerns about the project. The first is site access; it mentions the narrow drive and limited area near the ponds as well as limited

[3] The order denying reconsideration refers to these documents as proposals; relator argues that they are cost estimates, not proposals. That appears to be a distinction without a difference: both documents are the contractors' responses to a question of what the project would cost.

hours of operation at the landfill. The second is the grade of the hill and the turnaround space, which limits the type of trucks that can be used. The third is water remaining in the ponds, which will need to be moved so the ponds can be cleaned out. The fourth is the moisture content of the pond solids, because they are much lighter when dry. The fifth is access to the landfill and a limited dumping area. The sixth is traffic buildup at the river crossings, which adds time to the trip to the landfill. The seventh is the volume of the solids, which cannot be accurately measured until the work is near completion, and the eighth is possible damage to the road, which the contractors could not be responsible for unless they were paid for it.

The commissioner disagreed with relator's view that each of these concerns "necessitates reconsideration" at a contested-case hearing, noting that each one "is common information that the MPCA would expect to be included in *any* plan and which should have been considered and resolved long ago" and that "the fact that [relator] is only now looking into these issues after closing in 2019 and considers them a challenge further supports the MPCA issuing its [o]rder and setting deadlines." The order further stated:

> 34. Issues 1 and 2 deal with access and just note that because it is narrow and the material is moist certain types of trucks will have to be used over others.
>
> 35. Issues 3 and 4 deal with pond water and make the rather obvious observation that any remaining wastewater will have to be disposed of . . . .
>
> 36. Issue 5, landfill access, proves that the MPCA's remedy is feasible. One of the contractors "has been hauling pond solids removed from stormwater ponds this year to the . . . landfill," which is exactly what the MPCA has ordered in this matter.

> 37. Issues 6, 7, and 8 relate to the cost to complete the project, not its feasibility. . . .
>
> 38. . . . [C]ontrary to [relator's] position that removal is infeasible, the contractors' proposals show that the MPCA's [o]rder can be accomplished, on the timeframe the MPCA identified, and for a reasonable cost. . . .
>
> 39. . . . [T]he two proposals . . . were from competitors and approximately the same amount, $1.2 – 1.5 million. . . . [T]he MPCA considers those to be reasonable, if not low, for the work that needs to be completed at a site of this size. . . .
>
> 40. The proposals confirm the MPCA's own analysis and show that the [o]rder is feasible, reasonable, and can be done on the schedule the MPCA ordered, if done diligently.

Thus, relator's claim that "[t]he MPCA finding grossly mischaracterizes the communications received from the two contractors," is not accurate.

Relator has not demonstrated a basis for reversing the denial of the petition for reconsideration and a contested-case hearing.

Affirmed.