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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0950

Minnesota Chamber of Commerce,
Appellant,

vs.

Minnesota Pollution Control Agency,
Respondent,

WaterLegacy, defendant intervenor,
Respondent.

Filed December 17, 2012
Affirmed
Chutich, Judge

Ramsey County District Court
File No. 62-CV-10-11824

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Considered and decided by Hudson, Presiding Judge; Stauber, Judge; and Chutich, Judge.

U N P U B L I S H E D   O P I N I O N

CHUTICH, Judge

This dispute involves an environmental rule that protects wild rice, Minn. R. 7050.0224, subp. 2 (2011) (the Wild Rice Rule). Appellant Minnesota Chamber of Commerce challenges the district court's grant of summary judgment in favor of respondent Minnesota Pollution Control Agency. The Chamber contends that the district court erred in finding that (1) the agency's actions did not exceed its statutory authority; (2) the Wild Rice Rule is not unconstitutionally vague; and (3) the Chamber is not entitled to equitable relief or to a declaratory judgment. Because the Chamber cannot prevail on an as-applied challenge to the Wild Rice Rule and because we do not have jurisdiction to rule on its request for declaratory judgment, we affirm.

FACTS

The agency adopted the Wild Rice Rule in 1973 to protect and support the growth of wild rice in Minnesota, and to comply with Clean Water Act requirements set by the U.S. Environmental Protection Agency. Recognizing the importance of wild rice in Minnesota, the legislature subsequently declared wild rice to be the official state grain. Minn. Stat. § 1.148, subd. 1 (2012).

The Wild Rice Rule sets a discharge standard for sulfate in waters containing wild rice because that pollutant can be harmful to growth of the grain.[1] The rule provides a guideline sulfate-discharge standard of 10 mg/L for "water used for production of wild

[1] A discharge standard seeks to regulate "the addition of any pollutant to the waters of the state or to any disposal system." Minn. Stat. § 115.01, subd. 4 (2012).

rice during periods when the rice may be susceptible to damage by high sulfate levels." Minn. R. 7050.0224, subp. 2. The agency adopted the rule's 10 mg/L standard based on recommendations by the Minnesota Department of Natural Resources, which found that sulfate concentrations above that level are a "serious detriment to the natural and cultivated growth of wild rice."

The agency enforces water-quality standards, including the Wild Rice Rule, through the permitting process. *See* Minn. R. 7001.0150, subp. 2 (2011) (requiring permits to include terms necessary to comply with state and federal law). To discharge a pollutant such as sulfate into the waters of the state, an entity must obtain a National Pollution Discharge Elimination System Permit. Minn. R. 7001.1030, subp. 1 (2011). Upon receiving a permit application, the agency makes a preliminary determination as to whether the permit should be issued or denied, and if it determines that the permit should be issued, the agency issues a draft permit and seeks public comment on the draft. Minn. R. 7001.0100 (2011); *see also* Minn. R. 7001.1100 (2011). After these proceedings, and any contested-case hearing, the agency issues the permit if it determines that "the proposed permittee . . . will . . . comply or will undertake a schedule of compliance to achieve compliance with all applicable state and federal pollution control statutes and rules." Minn. R. 7001.0140, subp. 1 (2011).

The agency invoked the Wild Rice Rule for the first time in 1975 to set a wastewater-discharge sulfate limit for the Minnesota Power Clay Boswell steam power plant facility. The Clay Boswell permit provided that

> the discharges from the plant shall not raise the sulfate concentration of the receiving water . . . above 40 mg/L during the period of April 15 (or ice out in Blackwater Lake whichever is later) to June 15 (or emergence of wild rice in the aerial leaf stage whichever is earlier) or above 60 mg/L at other times.[2]

The agency did not rely on the Wild Rice Rule to set a sulfate discharge limitation in a permit again until 2010.

In 2009 and 2010, the agency began taking steps to apply the Wild Rice Rule's sulfate standard in the mining areas of northern Minnesota. The agency contacted several mining companies that held wastewater discharge permits or were seeking permits for new projects. It requested that these companies conduct surveys to detect the presence of wild rice in waters to which their facilities discharge wastewater, to determine whether they are subject to the Wild Rice Rule's sulfate standard for future permitting actions. The agency made such requests of United Taconite LLC, Mesabi Mining LLC, and PolyMet Mining, Inc. These companies are all members of appellant Minnesota Chamber of Commerce. The agency has not yet issued any permits in connection with

[2] In the Clay Boswell permit, the agency originally sought to enforce the Wild Rice Rule's 10 mg/L sulfate standard. Minnesota Power opposed this standard, and after an administrative hearing, the hearing officer ultimately concluded that a sulfate limitation of 40 mg/L during critical months, and 60 mg/L the balance of the year, was more appropriate.

these requests and has not otherwise taken any action to enforce the Wild Rice Rule against these companies.

The agency has, however, recently enforced the Wild Rice Rule against another Chamber member, U.S. Steel Corporation. In 2011, the agency issued modified permits to U.S. Steel that imposed sulfate-discharge limitations under the rule, prescribed a timetable for compliance, and required U.S. Steel to undertake several studies and sulfate-reduction plans in connection with its Keewatin taconite mining operation. U.S. Steel did not challenge these permits through the administrative process.

The parties now disagree as to whether the Wild Rice Rule applies to waters containing naturally occurring wild rice, as well as commercially cultivated wild rice. The Chamber contends that the rule applies only to water used for the commercial cultivation of wild rice and not to waters where wild rice occurs naturally. It asserts that the agency's proposed application of the rule to waters containing natural wild rice is unsupported.[3] The agency contends that the Wild Rice Rule applies to waters containing both naturally occurring and commercially cultivated wild rice stands. Accordingly, it asserts that it is entitled to request the surveys and to enforce the rule through the permitting process for waters containing either type of rice.

The Chamber sued the agency in February 2011, claiming that the Wild Rice Rule is unconstitutionally vague and that the agency exceeded its statutory authority in proposing to apply the rule to waters containing natural stands of wild rice. The Chamber

[3] The parties agree that many of the waters surrounding the Chamber members' mines are not used for commercial production of wild rice.

also sought declaratory judgment that the agency "may not impose sulfate discharge limitations in wastewater discharge permits unless the discharges are to those waters of the State used for agricultural irrigation to produce wild rice, and the discharges are occurring during those times when wild rice is susceptible to damage from high sulfate levels"; and that the agency may not require Chamber members to conduct surveys of wild rice in their discharge waters, unless the waters are used for commercial cultivation of wild rice.

In 2011, while this dispute between the Chamber and the agency was pending, the legislature passed a law requiring further research and rulemaking, and eventual amendment of the Wild Rice Rule. 2011 Minn. Laws 1st Spec. Sess. ch. 2, art. 4, § 32, at 71–73. The agency is to conduct research "to assess the impacts of sulfates and other substances on the growth of wild rice . . . to protect wild rice." *Id.*, § 32(c). When this research is complete, the agency is to amend the Wild Rice Rule to

> (1) address water quality standards for waters containing natural beds of wild rice, as well as for irrigation waters used for the production of wild rice; (2) designate each body of water, or specific portion thereof, to which wild rice water quality standards apply; and (3) designate the specific times of year during which the standard applies.

Id., § 32(a). Thus, once the agency's study is complete, it will amend the Wild Rice Rule to address all of the issues raised by the Chamber.

After the Chamber filed its complaint, respondent-intervenor WaterLegacy, an environmental-advocacy organization, intervened in the action and has generally joined in the arguments of the agency. The parties brought cross-motions for summary

judgment, and in May 2012, the district court granted summary judgment in favor of the agency and WaterLegacy and dismissed the Chamber's complaint in its entirety. The Chamber now appeals.

D E C I S I O N

On appeal from a grant of summary judgment, we "review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law." *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011). Neither the Chamber nor the agency allege any disputed factual issues, and therefore we review the district court's legal conclusions de novo to determine whether it erroneously applied the law. *SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 861 (Minn. 2011). We need not adopt the reasoning of the district court, and we may affirm the district court's grant of summary judgment "if it can be sustained on any grounds." *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012).

I. As-Applied Challenge

Although the Chamber is challenging the agency's proposed application of the Wild Rice Rule to waters containing natural stands of wild rice, the agency has not taken any steps to actually enforce the rule against the Chamber or its members United Taconite, Mesabi Mining, and PolyMet Mining, and the case is not otherwise at the proper procedural stage for us to consider an as-applied challenge to the rule. The agency has only *requested* that United Taconite, Mesabi, and PolyMet conduct surveys for natural wild rice in their discharge waters—it has not yet issued any permits or otherwise

taken action to enforce the rule against them. Further, while the agency issued modified permits to U.S. Steel, the company chose not to challenge those permits in the administrative process.

Under established administrative procedures, if a permittee does not agree with the agency's proposed permitting action, such as a sulfate-discharge limitation, it may request a contested-case hearing before the permit issues, during which an administrative-law judge takes evidence and testimony and makes a recommendation to the agency, which issues a final decision on the challenged action. Minn. R. 7000.1750–.2000 (2011); Minn. Stat. §§ 14.57–.62 (2012). If the permittee objects to the final decision after the contested-case hearing, or wishes to challenge the agency's denial of its request for a contested-case hearing, it may petition this court for certiorari review. Minn. Stat. §§ 115.05, subd. 11, 14.63–.69 (2012). In considering a certiorari appeal of an agency decision, we determine whether the administrative action exceeds the agency's statutory authority, or is unconstitutional, procedurally improper, legally erroneous, unsupported by substantial evidence, or arbitrary and capricious. Minn. Stat. § 14.69.

Because the as-applied claims of the Chamber's members are not ripe for review, consideration of any as-applied challenges brought by the Chamber is inappropriate at this time. We decline to review whether the agency's permitting decision was arbitrary or capricious, or exceeded its statutory authority, where the agency has made no final permitting decision or where the full administrative process has not been exhausted. *See Minn.-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 363 (Minn. 1979) ("Broad and far-reaching scrutiny of a rule or regulation, based upon hypothetical facts,

is a premature exercise by the judiciary when the actual application or enforcement of the rule remains subject to prosecutorial discretion or formal or informal variance or waiver procedures."). We cannot review any agency action against United Taconite, Mesabi Mining, or PolyMet Mining until the agency actually takes steps to enforce the Wild Rice Rule against them, and then only after the companies first seek recourse through the administrative process. Concerning U.S. Steel, no record exists to enable us to review the agency's actions; nor do we know whether the agency would have granted a variance or waiver if U.S. Steel had challenged the permits.

Thus, we conclude that the Chamber cannot maintain an as-applied challenge to the Wild Rice Rule, and we affirm the district court's grant of summary judgment in favor of the agency and WaterLegacy to the extent it addressed an as-applied challenge.

II. Declaratory Judgment

The Chamber also asked the district court for a declaratory judgment that the agency may enforce the Wild Rice Rule only in waters containing commercial stands of wild rice and that the agency may not require Chamber members to conduct surveys for wild rice in their discharge waters, unless they discharge to waters containing commercial wild rice. We conclude that the Chamber is not entitled to declaratory judgment under either the Minnesota Uniform Declaratory Judgments Act or the declaratory-judgment provision in the Minnesota Administrative Procedures Act.

A. Declaratory Judgments Act

The Chamber originally sought declaratory judgment under chapter 555 of the Minnesota Statutes, which allows a party "whose rights, status, or other legal relations are

affected by a statute . . . [to] have determined any question of construction or validity arising under the . . . statute . . . and [to] obtain a declaration of rights, status or other legal relations thereunder." Minn. Stat. § 555.02 (2010). A court does not have jurisdiction over a declaratory judgment claim unless there is a justiciable controversy, which exists if the claim "(1) involves definite and concrete assertions of right that emanate from a legal source, (2) involves a genuine conflict in tangible interests between parties with adverse interests, and (3) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion." *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 617–18 (Minn. 2007).

No justiciable controversy exists in this case because no "genuine conflict in tangible interests" is present between the Chamber and the agency. *See id.* As discussed above, the agency has not enforced, or threatened to enforce, the Wild Rice Rule against the Chamber; nor has any final determination been made as to how and when the rule will be enforced against Chamber members United Taconite, Mesabi, or PolyMet.[4] Further, U.S. Steel has declined to exercise any available administrative remedies. Declaratory judgment under section 555.02 is inappropriate where a party's injuries are merely

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[4] The Chamber claims that a justiciable controversy exists because the agency is currently requiring Chamber members to undertake expensive surveys for wild rice. The record shows, however, that, beyond requesting that the companies conduct such surveys, the agency has not taken any steps to enforce the survey requirement or to sanction the companies for noncompliance.

Moreover, the recent legislation addresses the Chamber's concerns about expensive mitigation procedures. *See* 2011 Minn. Laws 1st Spec. Sess. ch. 2, art. 4, § 32(e), at 72 (stating that, until the rule amendment is complete, the agency must "exercise its authority . . . to ensure, to the fullest extent possible, that no permittee is required to expend funds for design and implementation of sulfate treatment technologies").

"[p]ossible or hypothetical," or where administrative remedies have not been exhausted. *S. Minn. Constr. Co. v. Minn. Dep't of Transp.*, 637 N.W.2d 339, 344 (Minn. App. 2002) ("[S]ection 555.02 does not provide for declaratory judgment of rights before the agency has made its determinations."), *review denied* (Minn. Mar. 19, 2002). We therefore conclude that no justiciable controversy exists, and the Chamber is not entitled to declaratory judgment under Minn. Stat. § 555.02.

B. Minn. Stat. § 14.44 (2010)

Next, to the extent that the Chamber challenges the *facial* validity of the Wild Rice Rule, we conclude that the Chamber is not entitled to declaratory judgment under Minn. Stat. § 14.44. That section, which is part of the Minnesota Administrative Procedures Act, provides a mechanism by which a party may seek declaratory judgment as to the facial validity of an administrative rule before any enforcement action occurs.

Section 14.44 provides:

> The validity of any rule may be determined upon the petition for a declaratory judgment thereon, addressed to the Court of Appeals, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner. . . . The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, and whether or not the agency has commenced an action against the petitioner to enforce the rule.

An action under section 14.44 "questions the process by which the rule was made and the rule's general validity before it is enforced against any particular party." *Manufactured Hous. Inst. v. Petterson*, 347 N.W.2d 238, 240 (Minn. 1984); *see also*

Minn. Chamber of Comm. v. Minn. Pollution Control Agency, 469 N.W.2d 100, 102 (Minn. App. 1991), *review denied* (Minn. July 24, 1991). Although, as discussed above, we conclude that the Chamber's suit is a pre-enforcement challenge to the Wild Rice Rule, we decline to address a facial challenge under section 14.44 for similar reasons.

First, the language of the statute specifically provides that a petition for declaratory judgment under section 14.44 must be brought in the court of appeals. Minn. Stat. § 14.44; *see also Minn. Chamber of Comm.*, 469 N.W.2d at 102 ("This court has original jurisdiction to determine the validity of an agency's rules, including amendments."). We decline to exercise jurisdiction to consider any facial challenge at this stage of the proceedings because such consideration would unjustifiably excuse the Chamber's failure to comply with section 14.44's clear directive as to which court a petition must be brought. *See In re Occupational License of Haymes*, 444 N.W.2d 257, 259 (Minn. 1989) (ruling that the court of appeals had no authority to extend discretionary review to an administrative decision because the agency seeking review did not pursue certiorari, the proper remedy).

Second, even if we do have authority to consider this matter, we decline to address a section 14.44 challenge under the circumstances before the court. To bring a petition under section 14.44, "[t]here must be a showing that the rule is or is about to be applied to the petitioner's disadvantage. A mere possibility of an injury or mere interest in a problem does not render the petitioner aggrieved or adversely affected so that standing exists." *Coalition of Greater Minn. Cities v. Minn. Pollution Control Agency*, 765

N.W.2d 159, 163 (Minn. App. 2009) (citation omitted), *review denied* (Minn. Aug. 11, 2009).

Here, the rule does not currently require Chamber members to do anything. The agency originally requested that United Taconite, Mesabi Mining, and PolyMet Mining conduct wild rice surveys in 2009 and 2010, but has not yet brought an enforcement action or otherwise required the companies to take any action under the Wild Rice Rule. If the rule is enforced against Chamber members in the future, those members may challenge that enforcement through a contested-case proceeding.

Moreover, the Chamber does not assert that the agency lacked the authority to adopt the Wild Rice Rule or that it adopted the rule without complying with statutory rulemaking procedures. Rather, the Chamber challenges the agency's proposed interpretation of the rule. A petition under section 14.44 is not the proper method for challenging the proposed interpretation of an administrative rule, especially where the rule's application has not yet been considered in an administrative proceeding. *See Minn. Educ. Ass'n v. Minn. State Bd. of Educ.*, 499 N.W.2d 846, 849 (Minn. App. 1993) (holding that "a declaratory judgment petition [under section 14.44] is not the proper method to review a proposed interpretation of a promulgated rule when the proposed interpretation is not made part of the properly promulgated rule").

Finally, we decline to review any proposed interpretation or application of the Wild Rice Rule because the Chamber's claims as to the agency's application of the rule and its scope are essentially moot. The 2011 legislation directs the agency to amend the Wild Rice Rule to confirm that it applies to both natural and commercial stands of wild

rice and to specify the bodies of water to which the rule applies and the specific time period during which it applies. 2011 Minn. Laws 1st Spec. Sess. ch. 2, art. 4, § 32, at 71–73. We decline to consider the rule's application when the legislature has already addressed the issue, and especially where the agency has not yet attempted to enforce the rule as currently written.

In sum, the Chamber's complaints are not properly before this court because the agency has not yet taken steps to enforce the Wild Rice Rule against Chamber members United Taconite, Mesabi Mining, and PolyMet Mining, and because U.S. Steel did not challenge its permits in the administrative process. Further, we lack jurisdiction to address a facial challenge to the rule and, most importantly, the legislature has spoken on all of the issues raised in this case. Therefore, although the district court erred in addressing the Chamber's claims on the merits given the procedural posture of the case, we affirm the district court's grant of summary judgment for the agency and WaterLegacy.

Affirmed.