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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0634

Northshore Mining Company,
Relator,

vs.

Minnesota Pollution Control Agency,
Respondent,

Minnesota Center for Environmental Advocacy,
Respondent.

Filed May 20, 2008
Affirmed; motions denied
Poritsky, Judge*

Minnesota Pollution Control Agency
File No. 0750003-004

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

Considered and decided by Shumaker, Presiding Judge; Willis, Judge; and Poritsky, Judge.

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

PORITSKY, Judge

Relator Northshore Mining Company (Northshore) challenges respondent Minnesota Pollution Control Agency's (MPCA) denial of Northshore's application for an administrative permit amendment to eliminate the "control-city" standard from its existing permit. Because MPCA did not err in concluding that Northshore used the wrong amendment procedure, we affirm.

FACTS

Northshore operates a taconite production facility in Silver Bay, Minnesota. The facility was originally constructed by Reserve Mining in the 1950's. The facility produces ore containing a mineral known as cummingtonite-grunerite. Processing this type of ore results in the release of asbestos fibers[1] that may be dangerous to human health. In 1975, the Eighth Circuit Court of Appeals determined that "Reserve's air and water discharges pose a danger to the public health and justify judicial action of a preventative nature." *Reserve Mining Co. v. Envtl. Prot. Agency*, 514 F.2d 492, 535 (8th Cir. 1975) (*Reserve I*). The Eighth Circuit allowed the facility a "reasonable time" to

[1] Northshore notes that processing of cummingtonite-grunerite results in "cleavage fragments," which are short, blocky, and non-flexible, as opposed to asbestos fibers, which are long, thin, and flexible. Northshore contends that a recent geological study of its mine found no evidence of asbestos. However, *Reserve Mining Co. v. Envtl. Prot. Agency*, 514 F.2d 492 (8th Cir. 1975), referred to the fibers as asbestos fibers, as do MPCA and MCEA.

implement air emission controls. *Id.* at 500. To determine whether the air emission controls were effective, the Eighth Circuit ordered the facility to abide by a "control-city" standard, stating that the facility

> must use such available technology as will reduce the asbestos fiber count in the ambient air at Silver Bay below a medically significant level. According to the record in this case, controls may be deemed adequate which will reduce the fiber count to the level ordinarily found in the ambient air of a control city such as St. Paul.

Id. at 538-39. As a result, Northshore's operating permit was amended to include a "control-city" standard: "the ambient air shall contain no more fibers than that level ordinarily found in the ambient air of a control city such as St. Paul."

In December 2006, Northshore submitted to MPCA an application to eliminate the "control-city" standard from its operating permit. The application was submitted pursuant to Minn. R. 7007.1400 (2005), which provides procedures for administrative permit amendments.[2] In its application Northshore argued that the "control-city" standard "was satisfied decades ago," rendering it "obsolete, redundant and less strict than current control requirements."

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[2] Three MPCA rules govern amending permits: Minn. R. 7007.1400 (2005), for "administrative permit amendments"; Minn. R. 7007.1450 (2005), for "minor and moderate permit amendments"; and Minn. R. 7007.1500 (2005), for "major permit amendments." Rule 7007.1400, the rule relied upon by Northshore in this case, is the most expeditious of the three. Unlike the other two procedures, the administrative amendment procedure requires that the agency act on the permittee's request within 60 days without public notice or an opportunity for public comment and hearing. Minn. R. 7007.1400, subp. 3.

In February 2007, MPCA denied Northshore's administrative amendment application "based on [Northshore's] selection and use of the wrong permit modification procedures." MPCA explained that the administrative permit amendment procedure under Minn. R. 7007.1400 is typically used when dealing with simple, noncontroversial amendments such as correcting typographical errors and changing names or addresses on the permit. MPCA also noted that because Minn. R. 7007.1400 is used to address insignificant amendments, the procedure involves no public notice, no opportunity for public comment or hearings on the proposed amendment, and a requirement that MPCA issue its final decision within 60 days. MPCA determined that Northshore's attempt to eliminate the "control-city" standard was a substantial change and should be dealt with through a major permit amendment process under Minn. R. 7007.1500.

In May 2007, Northshore filed its petition for a writ of certiorari with this court, challenging the decision of MPCA and seeking this court's review of the decision. In June 2007, this court granted a motion by respondent Minnesota Center for Environmental Advocacy (MCEA) for leave to intervene on appeal.

In September 2007, Northshore filed a motion in the U.S. District Court for the District of Minnesota seeking to clarify or vacate the "control-city" injunction established by the Eighth Circuit Court of Appeals in *Reserve I.* The court denied the motion, stating that the injunction was moot and that even if the court were to grant the motion, there would be no practical effect because Northshore is still bound by its state permits that require compliance with the "control-city" standard. *United States v. Northshore Mining Co.*, Civ. No. 72-0019, 2007 WL 4563418, at *3-5 (D. Minn. Dec. 21, 2007).

D E C I S I O N

I.

Northshore argues that MPCA erred as a matter of law when MPCA denied Northshore's application and concluded that Northshore could not eliminate the "control-city" standard through the administrative permit amendment procedure in Minn. R. 7007.1400 (2005). "[An appellate court] presume[s] the agency's decision . . . is correct, but the court may reverse an agency decision if the decision was affected by an error of law." *N. States Power Co. v. Minn. Pub. Utils. Comm'n*, 344 N.W.2d 374, 377 (Minn. 1984).

Northshore's argument to this court is grounded solely on subpart 1(G),[3] which reads:

> Subpart 1. Administrative amendments allowed. The agency may make the permit amendments described in this subpart through the administrative permit amendment process described in this part.
>
> . . .
>
> G. an amendment to clarify the meaning of a permit term.

[3] Although Northshore's briefs make passing reference to a number of subparts of rule 7007.1400, Northshore cites only two subparts in support of its argument that it used the appropriate procedure: subparts 1(D)(3) and 1(G). Subpart 1(D)(3) allows amendments to eliminate monitoring requirements that are "redundant to or less strict than other existing requirements." However, Northshore has not made any showing that there are any existing monitoring requirements that would make the "control-city" requirement redundant, nor has Northshore made a showing that the "control-city" requirement is less strict than such other requirements. In any event, Northshore's briefing on this issue is sorely lacking, and this court declines to reach issues in the absence of adequate briefing. *State Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.,* 558 N.W.2d 480, 480 (Minn. 1997).

Minn. R. 7007.1400, subp. 1(G) (2005). When "the language of an administrative rule is clear and capable of understanding, interpretation of the rule presents a question of law reviewed de novo." *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 440 (Minn. 2002). If the rule is unambiguous, we give no deference to the agency's interpretation. *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the discharge of Treated Wastewater*, 731 N.W.2d 502, 516 (Minn. 2007).

A. Plain Language of the Administrative Permit Amendment Rule

Northshore first argues that MPCA erred in denying its application to eliminate the "control-city" standard because the plain language of Minn. R. 7007.1400 expressly allows such an amendment. Specifically, Northshore claims that eliminating the "control-city" standard is an administrative permit amendment that is meant "to clarify the meaning of a permit term" under Minn. R. 7007.1400, subp. 1(G). Northshore contends that removal of the "single, obsolete control-city provision from its 92-page permit is exactly the type of 'permit term clarification'" allowed under the rule.

We disagree. Northshore does not seek to clarify any term in the permit; what it seeks to do is eliminate a substantive monitoring requirement from the permit. Northshore argues that the entire permit would be clarified because the "control-city" standard was unenforced for approximately 25 years—until 2005—and is therefore obsolete. But the plain language of the rule does not provide for amendments to clarify the meaning of the entire permit, but rather provides for amendments that clarify the meaning of a "permit term." Minn. R. 7007.1400, subp. 1(G). The word *term* is defined as "a word or group of words having a particular meaning." *The American Heritage*

College Dictionary 1422 (4th ed. 2007). Northshore's argument—that a 92-page permit is a "word or a group of words having a particular meaning"—is less than persuasive.

B. Major Permit Amendment Procedure Determination

Northshore next argues that MPCA erred in concluding Northshore should have used the major permit amendment procedure under Minn. R. 7007.1500 (2005) to eliminate the "control-city" standard. Northshore argues that MPCA's interpretation of the major permit amendment rule is incorrect as a matter of law.

Northshore contends that Minn. R. 7007.1500 is expressly intended for "significant" permit amendments, and because the "control-city" standard is obsolete, its elimination would not constitute a significant amendment.

But Northshore fails to demonstrate that the "control-city" standard is obsolete. As MPCA has pointed out, "[t]here is no current health-based ambient air standard or an equivalent precautionary and preventative substitute for the control-city standard." In the recent ruling on Northshore's motions, the U.S. District Court for the District of Minnesota confirmed MPCA's statement: "MPCA has informed Northshore that it will develop a numeric standard for the asbestos fiber limit in Northshore's permits, rather than relying on the 'control city' standard" and that "MPCA intends to have this standard in place early in 2008, after which Northshore can challenge the fiber limit through administrative and state-court proceedings." *Northshore*, 2007 WL 4563418, at *3. The court noted that the EPA is "researching safe ambient asbestos exposure levels and will release that research to the states [in spring 2008] to allow them to promulgate exposure standards." *Id.* Northshore cannot point to an adequate substitute for the "control-city"

standard that is now in effect. Thus, the standard is not obsolete and its elimination from the permit would be a significant amendment.

Finally, Minn. R. 7007.1500, subp. 1 (2005), states that a major permit amendment is "required for any change . . . for which an amendment cannot be obtained under the administrative permit amendment provisions of part 7007.1400." We have concluded that Northshore's proposed amendment did not fall within the plain language of the rule governing an administrative permit amendment (Minn. R. 7007.1400). Thus, it is clear that MPCA did not err in concluding that Northshore should proceed under the major permit amendment procedure under Minn. R. 7007.1500.

II.

Northshore moves to strike MCEA's entire appellate brief appendix and any related references, arguing that the information in the appendix is outside the administrative record. Northshore also moves to strike two extra-record citations found in MPCA's appellate brief. MPCA filed a motion to supplement the administrative record. Northshore moves to strike documents that MPCA filed with the clerk of the appellate courts to "correct" the administrative record.

In reaching our decision, the existing record was sufficient for us to address the issues raised by the parties, and we did not rely on any of the disputed documents or references. Northshore's and MPCA's motions are therefore moot, and we find it unnecessary to address their merits. Accordingly, the motions are denied. *See, e.g.*,

Drewitz v. Motorwerks, Inc., 728 N.W.2d 231, 233 n.2 (Minn. 2007) (motion to strike denied as moot when court did not rely on materials).

Affirmed; motions denied.