STATE OF MINNESOTA
IN COURT OF APPEALS
A10-876

In the Matter of the Administrative Penalty Order (APO) Issued to
Larry Cozzi

Filed January 4, 2011
Affirmed
Ross, Judge

Minnesota Pollution Control Agency
File No. 4-2200-19898-2

Paul R. Haik, Krebsbach & Haik, Ltd., Minneapolis, Minnesota (for relator)

Lori Swanson, Attorney General, Robert B. Roche, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Ross, Judge; and Schellhas, Judge.

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

ROSS, Judge

This appeal arises from a dispute between a developer and the Minnesota Pollution Control Agency (MPCA) after the developer allegedly placed fill material on wetlands. The MPCA issued an administrative penalty order (APO) to Larry Cozzi for failing to apply for a stormwater permit, failing to comply with construction activity requirements, and improperly discharging waste. An Administrative Law Judge (ALJ) agreed with the MPCA and its commissioner affirmed the penalty. Cozzi appeals by certiorari,

contending that the penalty is factually, procedurally and constitutionally infirm. We affirm.

FACTS

Larry Cozzi owns three lots in a Rice Lake subdivision. In the summer of 2005, Cozzi applied for a permit from the U.S. Army Corps of Engineers to place 400 cubic yards of fill material on 10,000 square feet of the wetland areas of lot 516 to facilitate a construction project for a pole barn, a house, and a garage for commercial trucks. The corps asked R.C. Boheim, a district manager of the South St. Louis Soil and Water Conservation District, to visit the construction site with corps staff to identify wetland boundaries before Cozzi began construction.

In September 2005, Boheim, Cozzi's brother Steven Cozzi, and corps personnel visited the site to identify wetlands. The corps issued a permit authorizing Cozzi to place 400 cubic yards of fill material on approximately 10,000 square feet of the upland areas of lot 516, but not to place any material in the wetlands. Cozzi also obtained several permits from Rice Lake Township to engage in construction involving grading and filling on Lots 516 and 527.

Boheim next visited the site in August 2006 and observed clearing, grading, and filling that exceeded Cozzi's 2005 permits. Boheim saw soil, rocks, and concrete blocks in a ditch running along the property and believed that the construction was not following best management practices designed to prevent soil from eroding into state waters. Boheim tested soil and took photographs to document perceived wetlands disturbance, and he determined that the construction area involved approximately 1.39 wetland acres.

Boheim learned that Cozzi did not have the required National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) construction stormwater permit required by Minnesota Rules 7090.2010 and 7090.0080 (2009) for any construction disturbing more than one acre.

On December 8, 2006, conservation officer Kipp Duncan issued Cozzi a restoration order requiring him to obtain a general stormwater permit from the MPCA and to follow best practices to avoid additional wetland sediment encroachment. The order was based upon Cozzi's illegally discharging fill material violating the Minnesota Wetland Conservation Act. Minn. Stat. § 103G.2372, subd. 1 (2006); Minn. R. 8420.0290 (2005). Cozzi appealed the administrative order, but his appeal was untimely. *State v. Cozzi*, No. A09-1027, 2010 WL 1439974, at *1 (Minn. App. 2010), *review denied* (Minn. June 15, 2010). The district court then convicted Cozzi of non-compliance with the order, and this court affirmed his conviction. *Id.* at *2.

Boheim again inspected the site in August 2007, observing few changes from his 2006 inspection and identifying five problems. Cozzi had still not obtained a stormwater permit. The site still did not adhere to best management practices. Nuisance conditions still existed in a wetland adjacent to the site; specifically, 1.39 acres of wetland area had been covered with soil and solid material. Construction waste still rested in a public ditch. And the construction site was within 500 feet of Tischer Creek, a designated trout stream. Boheim alleged violations in a report he gave to the MPCA and to Cozzi.

The MPCA mailed Cozzi an "alleged violation letter" on August 27, 2007, directing him to obtain an NPDES/SDS permit. Cozzi did not respond to the letter. On

February 7, 2008, the MPCA issued Cozzi an APO for engaging in construction activity without an NPDES/SDS permit, Minn. R. 7090.2010, subp. 1; failing to comply with stormwater discharge requirements and to implement best practices, Minn. R. 7090.2010, subp. 3; and causing nuisance conditions by discharging construction runoff into state waters, Minn. R. 7050.0210. The order penalized Cozzi $9,350.

Cozzi requested review, and after a two-day hearing, the ALJ recommended that the Commissioner affirm the APO. The Commissioner adopted the ALJ's report and recommendation. Cozzi appeals.

D E C I S I O N

This court reviews a final decision of the MPCA under the Minnesota Administrative Procedure Act, Minn. Stat. §§ 14.63–.69 (2010). Minn. Stat. § 115.05, subd. 11 (2010); *In re Univ. of Minn.*, 566 N.W.2d 98, 103 (Minn. App. 1997). On appeal, "[d]ecisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency (MCEA v. MPCA)*, 644 N.W.2d 457, 463 (Minn. 2002) (quotation omitted). When an agency's decision relies on applying technical knowledge and expertise to the facts, we give deference to the decision. *In re Review of the 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils.*, 768 N.W.2d 112, 119 (Minn. 2009). "The MPCA has technical expertise regarding water, air, and land pollution." *MCEA v. MPCA*, 644 N.W.2d at 465.

We reverse agency decisions "only when they reflect an error of law, the findings are arbitrary and capricious, or the findings are unsupported by substantial evidence." *White v. Minn. Dept. Natural Res.*, 567 N.W.2d 724, 730 (Minn. App. 1997), *review denied* (Minn. Oct. 31, 1997). An "agency's conclusions are not arbitrary and capricious so long as a rational connection between the facts found and the choice made has been articulated." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001) (quotation omitted). However, "[i]f the agency's decision represents its will, rather than its judgment, the decision is arbitrary and capricious." *Pope Cnty. Mothers v. Minn. Pollution Control Agency*, 594 N.W.2d 233, 236 (Minn. App. 1999). An agency's decision is arbitrary and capricious if

> the agency (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise.

Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs, 713 N.W.2d 817, 832 (Minn. 2006). And "[i]f there is room for two opinions on a matter, the [agency's] decision is not arbitrary and capricious, even though the court may believe that an erroneous conclusion was reached." *In re 2005 Automatic Adjustment*, 768 N.W.2d at 120. Substantial evidence is more than a scintilla of relevant evidence that a reasonable person might accept to support a conclusion. *White*, 567 N.W.2d at 730. The party challenging the agency's decision has the burden of persuasion on appeal. *Minn.*

Ctr. for Envtl. Advocacy v. Comm'r of Minn. Pollution Control Agency, 696 N.W.2d 95, 100 (Minn. App. 2005).

I

We first determine whether the MPCA reasonably concluded that Cozzi committed the violations in the administrative penalty order (APO). Cozzi argues that the MPCA's determination was arbitrary and capricious and not supported by substantial evidence. He challenges all three rule violations in the APO claiming that (1) he was not required to apply for an NPDES/SDS construction stormwater permit because he was not engaging in "construction activity" as defined in Minn. R. 7090.0080, (2) he was not required to observe other construction activity requirements under Minn. R. 7090.2010, subp. 3, and (3) he was not contributing to a nuisance condition because he was not discharging into any "waters of the state" because there were not wetlands on his property and because a public ditch is not a water of the state.

We are not persuaded by Cozzi's assertion that he was not required to obtain an NPDES/SDS storm water permit for his construction. Persons engaging in construction activity that disturbs more than one acre of land must obtain an NPDES/SDS construction stormwater permit and take associated pollution prevention measures. Minn. R. 7900.0080, subp. 4; 7900.2010. "Construction activity" includes the kind of work allegedly being done on Cozzi's property, such as

> activities for the purpose of construction, including clearing, grading, and excavating, that result in land disturbance of equal to or greater than one acre, including the disturbance of less than one acre of total land area that is part of a larger

> common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one acre.

Minn. R. 7090.0080. The rule defines common plan of development as "one proposed plan for a contiguous area where multiple separate and distinct land disturbing activities may be taking place at different times . . . but under one proposed plan." *Id*., subp. 3. "One proposed plan" is broadly defined and includes land-disturbing activities with common design, permit application, advertisement, or physical demarcation. *Id.*

Cozzi argues that the MPCA acted arbitrarily and capriciously because his disturbances occurred at two different sites, neither of which was large enough separately to require him to obtain an administrative permit. But Cozzi owns three contiguous lots and applied for the two different use permits from the township only one day apart. Boheim observed, photographed, and mapped the contiguous construction activity on 2.5 acres of land spanning Cozzi's lots. Given the broad definition of "one proposed plan" and the ALJ's finding of Boheim's testimony to be credible, the ALJ was not arbitrary or capricious in concluding that Cozzi's construction activity qualifies as a common plan of development disturbing more than one acre. Cozzi's argument provides no basis for us to reverse the determination that his construction project required an NPDES/SDS permit and that he violated Minn. R. 7090.2010, subp. 1.

We also are not persuaded by Cozzi's contention that he was not required to observe the permit-holder best practices requirements of Minn. R. 7090.2010, subp. 3. Construction-activity owners and operators who are required to have a stormwater permit but fail to apply for one must still comply with discharge design, construction activity,

and Appendix-A storm water permit requirements. *Id.*; 7090.0060 (2009) (incorporating discharge design requirements, construction activity requirements, and Appendix-A requirements by reference). Because Cozzi was required to apply for an NPDES/SDS permit, he was also bound to comply with requirements of rule 7090.2010, subpart 3. These requirements include implementing additional best management practices for activities near designated "special waters." The MPCA found that there was a designated trout stream within 500 feet of the construction site. Although Cozzi claims that the MPCA's trout-stream finding was erroneous, Cozzi was also required to comply with the general best management practices incorporated under Minn. R. 7090.0060. Because Cozzi did not comply with any of these measures, the MPCA reasonably found that Cozzi violated Minn. R. 7090.2010, subp. 3.

Cozzi's argument that he was not contributing to a nuisance condition because he was not discharging waste into any "waters of the state" is also unavailing. A prohibited nuisance occurs when construction waste enters waters of the state. Minn. R. 7050.0210, subp. 2 (2009). "Waters of the state" includes "all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, reservoirs, aquifers, irrigation systems, drainage systems and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, which are contained within, flow through, or border upon the state or any portion thereof." Minn. Stat. § 115.01, subd. 22 (2010). Cozzi maintains first that he could not have created a nuisance condition because his property included no wetlands and that no drainage system exists near his property through which waste entered "waters of the state."

We first address Cozzi's contention that substantial evidence does not support the finding of the existence of wetlands. Cozzi focuses on the Wetlands Conservation Act (WCA) under which wetland delineations must be made according to technical methods described in the U.S. Army Corps of Engineers Wetland Delineation Manual. Minn. Stat. § 103G.2242, subd. 2 (2010); Minn. R. 8420.0111, subp. 72(D) (2009). But this case is not governed by the WCA; rather, it is an enforcement action under the State Water Pollution Control Act (SWPCA), Minn. Stat. §§ 115.01–.09 (2010). We agree with the MPCA that the WCA wetland delineation standards do not necessarily apply to enforcement of an APO under the SWPCA. The Acts are governed by separate statutory schemes and enforced by separate agencies. *See* Minn. R. 8420.0100, subp. 3 (2009) (stating that the Department Of Natural Resources enforces the WCA); Minn. Stat. § 115.03 (giving the MPCA the power to enforce the SWPCA). And the WCA and the SWPCA require separate permits for work that might impact wetlands. *See* Minn. Stat. 103G.245 (2010) (requiring a permit for work in public waters); Minn. R. 7090.2010 (requiring stormwater permit). Although reasonable arguments may exist for consistency, Cozzi fails to establish that the legislature intended to limit the broad pollution controls of the SWPCA by the restrictive definition of wetland in the WCA.

Cozzi's focus on the definition of wetlands in relation to the nuisance violation is not on point. The antinusiance provision prohibits the dumping of waste into any waters of the state, even on private property. Minn. R. 7050.0210, subp. 2. The statute defines "waters of the state" with a comprehensive list that includes even "marshes" and "all other bodies or accumulations of water." Minn. Stat. 115.01, subd. 22. Boheim testified

that "[T]here was an area of inundation . . . meaning water accumulated on the surface, that I observed . . . . [T]here was water accumulated there where the surface was inundated with water in that area." Boheim's observations of water accumulation on Cozzi's property meet this broad definition. We therefore need not determine whether Cozzi's property contained "wetlands."

But we add that the record does include substantial evidence supporting the finding of wetlands as understood by the MPCA on Cozzi's property. In 2005, Boheim and two of his colleagues walked the lots to identify wetlands based on vegetation, hydrology, and soil quality. Boheim, a wetlands expert, testified that he observed wetlands on the property. The MPCA found Boheim's testimony on the wetland identification to be credible and probative. Boheim's colleague Nathan Schroeder of the South St. Louis Soil and Water Conservation District testified that he found that there were wetlands on the property. Marty Paavola, Rice Lake's building inspector who is also trained in identifying wetlands, confirmed that he too observed wetlands there. Cozzi's brother was present at the initial wetland identification meeting and, at the time, did not dispute the identification of wetlands.

Cozzi's argument contending for objective evidence proving the existence of the wetland is not without merit. The state's position that a wetland exists principally because experts simply say that a wetland exists has apparent weakness, particularly when the record does not reveal whether the experts' conclusions arise from any objective and testable criteria. But in this case, Cozzi's own admission of the existence of wetlands dulls the argument. Cozzi admitted that there were "wetlands" on his

property when he hand drew and labeled a wetland area on one of his township construction permit applications. Despite the lack of evidence of specific objective criteria, the testimony of three individuals who have expertise in identifying wetlands, Cozzi's admission, and MPCA's credibility determinations are sufficient to support the MPCA's conclusion that Cozzi's property contained wetlands.

Cozzi contends that a public ditch does not qualify as a "water of the state." But "waters of the state" broadly includes "all streams, . . . watercourses, waterways, . . . drainage systems and all other bodies or accumulations of water, . . . natural or artificial, public or private, . . . contained within . . . the state." Minn. Stat. § 115.01, subd. 22. We understand that the ditch here is a common roadside channel constructed to facilitate the flow of water. So in a colloquial sense applying our common impression of a ditch, it is an artificial "watercourse" or "waterway," or a "drainage system," consistent with the SWPCA. Cozzi counters by emphasizing that the ditch was dry and argues that it therefore cannot constitute "*waters* of the state." He also points to a technical definition of "drainage system" that he again borrows from the WCA, which refers to a system of ditches constructed by "drainage authority." Minn. Stat. § 103E.005, subd. 12 (2010). Cozzi concludes by highlighting that the state has not proven that this particular ditch was constructed by an official drainage authority. Cozzi's first argument fails on practical absurdity. By its logic, the statute permits a contractor to fill a dry creek bed with construction material so long as he does so during drought. The SWPCA would be an impotent safeguard against pollution if it prohibited polluters from dumping construction

debris into streams, watercourses, waterways, and drainage systems only at those times of active water flow.

Cozzi's second argument is slightly stronger than the first, but it also fails. Cozzi is correct that the WCA defines "drainage system" to include those ditches designed by an official drainage authority. But he does not explain why that narrow definition found in a different statutory scheme should apply to lessen the broad protections of the SWPCA, particularly when applied to a list of types of waters of the state so comprehensively described as section 115.01, subdivision 22. The logic of Cozzi's argument extends to another absurdity: the SWPCA would prohibit the dumping of even a small amount of construction waste on one side of the street in a ditch that empties into a stream (so long as the ditch was dug by a local drainage authority), but could not prohibit the dumping of large amounts of toxic waste into a ditch on the other side of the street if the second ditch was dug by a mere developer at the direction of a township board. We add another reason to reject Cozzi's restrictive view of the SWPCA; the ditch into which he dumped his construction waste could just as well be considered an artificial stream or waterway or watercourse under subdivision 22, and neither the SWPCA nor the WCA restrictively defines these terms.

Substantial evidence supports the conclusion that Cozzi discharged waste into wetlands on the property and the ditch adjacent to it. He therefore discharged waste into the waters of the state, creating a nuisance in violation of Minn. R. 7050.0210, subp. 2.

II

We next consider Cozzi's penalty. Courts review agency penalties under a deferential abuse-of-discretion standard. *In re Haugen*, 278 N.W.2d 75, 80 n.10 (Minn. 1979). The commissioner may asses a penalty of up to $10,000 for all violations identified during a property inspection, Minn. Stat. § 116.072, subd. 2 (2010), and if a party has committed a repeated or serious violation, the commissioner may "issue an order with a penalty that will not be forgiven after corrective action is taken." *Id*., subd. 5(b) (2010). The commissioner's discretion may be guided by several factors:

> (1) the willfulness of the violation;
> (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
> (3) the history of past violations;
> (4) the number of violations;
> (5) the economic benefit gained by the person by allowing or committing the violation; and
> (6) other factors as justice may require, if the commissioner or county board specifically identifies the additional factors in the commissioner's or county board's order.

Id., subd. 2 (b). Applying these statutory concerns and its own deliberative process, the MPCA determined that Cozzi's violations were serious, that their potential for harm ranged from moderate to major, and that their deviation from compliance was also major. Applying its internal guidelines, the MPCA calculated a base penalty of $8,500 and added a ten-percent enhancement because of Cozzi's apparent disregard of multiple prior warnings. It deemed the penalty unforgivable because the violations were "serious." The MPCA's process was deliberative and reasonable. Cozzi has not demonstrated that its

assessment relied on factors outside of its discretion. We hold that the MPCA's penalty does not reflect an abuse of its discretion.

III

Cozzi argues that the MPCA failed to give him proper hearing notice under Minnesota Rule 1400.8550 (2009). He does not claim that he did not receive notice but that the notice failed to inform him of the issues to be heard. The commissioner must give notice "to whom the order is directed of the time and place of the hearing at least 20 days before the hearing." Minn. Stat. § 116.072, subd. 6 (2010). Notice for an administrative hearing should include the time, date, and place for the hearing, a statement of the allegations or issues, a brief description of the hearing procedure, and statements advising parties of their rights and the consequences of failure to appear. Minn. R. 1400.8550.

The notice and order for hearing that the MPCA sent Cozzi included a copy of the APO and incorporated it by reference. The APO identified the relevant rules that Cozzi allegedly violated, explained the details of Cozzi's alleged misconduct in narrative form, and included the details required by the rule. Cozzi's procedural challenge is not convincing.

IV

Cozzi also maintains that the MPCA proceedings violated his Fifth Amendment right against self-incrimination. He claims that he was essentially forced not to testify at the administrative hearing in order to protect himself from further liability in his collateral criminal proceeding then under review by this court. Under his theory, because

he felt inhibited from testifying in the administrative process without forgoing his Fifth Amendment privilege against self-incrimination, the administrative proceeding violated his constitutional rights even though the state never sought his testimony in that proceeding. Cozzi does not support this theory with any legal authority and logic defies it.

The Fifth Amendment privilege against self-incrimination may be invoked by a witness if the court or counsel asks questions of or seeks testimony from a witness that would have a tendency to criminally incriminate that witness. *Minn. State Bar Ass'n v. Divorce Assistance Ass'n., Inc.*, 311 Minn. 276, 278, 248 N.W.2d 733, 737 (1976). The privilege applies in civil as well as criminal proceedings. *Parker v. Hennepin Cnty. Dist. Court, Fourth Judicial Dist.*, 285 N.W.2d 81, 82 (Minn. 1979). But "[t]he availability of the right is delineated by the Fifth Amendment's prohibition against comp[elled] testimony in *criminal* cases," and so it may be invoked in a civil case only when testimony would enhance the threat of a criminal prosecution. *Id.* at 83.

The state did not seek Cozzi's testimony at his administrative hearing. He was therefore never in a position to invoke the Fifth Amendment privilege against self-incrimination. And although delaying the administrative process to await the completion of the criminal matter would have avoided even attenuated concerns about the use of his testimony, the record does not suggest that Cozzi requested to continue the administrative process. If Cozzi's Fifth Amendment theory is valid, each person whose administrative charges are heard before any actual or potential criminal charges have been resolved may rely on the Constitution to invalidate any resulting administrative penalty simply because

he chooses not to testify for fear of potential collateral prejudice. We are aware of no caselaw supporting this theory, and we need not discuss the other apparent deficiencies in Cozzi's argument. We hold that Cozzi's Fifth Amendment privilege against self-incrimination was not violated.

V

Finally, Cozzi claims that because the state's positions are not justified, he was entitled to fees and other expenses under the Equal Access to Justice Act, Minn. Stat. § 15.472(a) (2010). An ALJ must award attorney fees and expenses when the relator is a prevailing party in a civil action or administrative proceeding when the state's position was not substantially justified. *Id*. Cozzi was not a prevailing party and the MPCA's position was substantially justified. Cozzi's claim for attorney fees lacks any basis.

Affirmed.