

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2017-000466-001 DT

12/18/2018

HONORABLE PATRICIA ANN STARR

CLERK OF THE COURT

C. Avena
Deputy

THE TOWN OF FLORENCE
S W V P - G T I S M R L C
PULTE HOME COMPANY L C

BARBARA U PASHKOWSKI
RONNIE P HAWKS
D CHRISTOPHER WARD

v.

ARIZONA DEPARTMENT OF
ENVIRONMENTAL QUALITY (001)
MISAEL CABRERA (001)
WATER QUALITY APPEALS BOARD (001)
FLORENCE COPPER INC (001)
PINAL COUNTY SUPERIOR COURT

JEFFREY D CANTRELL
DAVID L DECKER

JUDGE STARR
OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

MINUTE ENTRY

Appellants the Town of Florence, SWVP-GTIS MR, LLC, and Pulte Home Company, LLC (“Appellants”) seek reversal of the May 17, 2017 Decision of the Water Quality Appeals Board (“the Board”) upholding a Temporary Aquifer Protection Permit (“APP”) issued by the Arizona Department of Environmental Quality (“ADEQ”). For the following reasons, the Court affirms the Decision of the Board.

I. FACTS AND PROCEDURAL BACKGROUND

In March of 2012, Curic Resources, Inc. (“Curic”), now known as Florence Copper, Inc. (“Florence Copper”) applied for a Temporary Individual Aquifer Protection Permit (“APP”) with

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ADEQ to operate a short-term, small-scale production test facility (“PTF”). Curic sought to gather data for an APP application for a full-scale in situ copper recovery commercial mine.

ADEQ issued the temporary APP in July of 2013. Appellants in this action (joined at the time by Johnson Utilities, LLC) appealed that Decision. The Board remanded the matter to ADEQ for further proceedings.

In January of 2015, ADEQ directed Florence Copper to prepare and submit an application for amendment to the 2013 Temporary APP to address the five issues presented on remand. Florence Copper submitted its Application for Significant Amendment to the Temporary APP in April of 2015. After a public process, ADEQ issued the Significant Amendment to the 2013 Temporary APP in August of 2016.

The Significant Amendment authorized Florence Copper to operate the Florence Copper Project-Pilot Test Facility Florence, over groundwater of the Pinal Active Management Area. (Significant Amendment at 1.) The Temporary APP is for a PTF on approximately 160 acres of Arizona State Land; the PTF will occupy approximately 13.8 contiguous acres and the PTF well field will occupy approximately 2.2 acres. (*Id.* at 2.)

The In-Situ Copper Recovery process proposed by Florence Cooper “involves injecting a lixiviant (99.5% water mixed with 0.5% sulfuric acid) through injection wells into the oxide zone of the bedrock beneath the site for the purposes of dissolving copper minerals from the ore body. (*Id.*)

Appellants filed an appeal in September of 2016 and Florence Copper intervened.

The Board considered written testimony, as well as written and oral argument of the parties. The Board conducted a hearing and took testimony in March of 2017. The Board subsequently reached the following conclusions of law.

1. Appellants did not establish that ADEQ’s consideration of the BHP (BHP Copper, Inc.) draft reports was arbitrary, unreasonable, unlawful, or based upon a technical judgment that was clearly invalid.
2. Appellants did not establish that the alert level established for fluid electrical conductivity shown in Table 4.1-8 of the 2016 Significant Amendment was arbitrary, unreasonable, unlawful, or based upon a technical judgment that was clearly invalid.

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3. Appellants did not establish that the revised PTF (Production Test Facility) PMA in the 2016 Significant Amendment was arbitrary, unreasonable, unlawful, or based upon a technical judgment that was clearly invalid.
4. ADEQ and Florence Copper established that the Point of Compliance Wells (“POCs”) in the 2016 Significant Amendment comply with Arizona law and were rational, reasonable, lawful, and based upon sound technical judgment. Therefore, Appellants did not establish that the POCs in the 2016 Significant Amendment were arbitrary, unreasonable, unlawful, or based upon a technical judgment that was clearly invalid.
5. Appellants did not establish that ADEQ’s decision to issue the 2016 Significant Amendment after receiving and considering the revised geochemical model report and revised rinsing flow sheet from Florence Copper was arbitrary, unreasonable, unlawful, or based upon a technical judgment that was clearly invalid.
6. As to all other issues raised in the appeal, including public participation issues, Appellants did not establish that ADEQ’s actions were arbitrary, unreasonable, unlawful, or based upon a technical judgment that was clearly invalid.

Appellants sought rehearing, and the Board denied the request. Appellants filed a timely notice of appeal from the order denying rehearing. This Court has jurisdiction to hear this appeal pursuant to A.R.S. §§ 12-124(A) and 12-905(A).

II. STANDARD OF REVIEW

A reviewing court shall affirm the action of an agency unless, after reviewing the record, the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion. A.R.S. § 13-910(E).

If an agency’s factual conclusions can be supported by the record, then there is substantial evidence to support the agency’s decision, even if an inconsistent factual conclusion could also be supported by the record. *DeGroot v. Arizona Racing Comm'n*, 141 Ariz. 331, 336 (App. 1984).

When reviewing an agency action, the superior court makes its own determinations on questions of law. *Smith v. Arizona Long Term Care Sys.*, 207 Ariz. 217, 220, ¶ 14 (App. 2004).

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III. ISSUES

Appellants raise the following issues:

1. Did the Board err when it approved the temporary APP?
2. Did the Board err when it upheld the Pollution Management Area?
3. Did the Board err when it upheld the Point of Compliance Well locations?
4. Did the Board err when it upheld a particular permit Alert Level for fluid electrical conductivity at Florence Copper's Observation Wells?
5. Did the Board err when it dismissed certain claims without presentation of evidence or a hearing?

IV. LEGAL ANALYSIS

1. Temporary APP

Appellants first argue that the Board wrongly approved a temporary permit that violates its own prior 2014 decision, which no party appealed.

First, the record establishes that the Significant Amendment addressed the lack of Best Available Demonstrated Control Technology ("BADCT")/operational monitoring in the prior permit. The Significant Amendment identifies two different PMAs, as well as a cone of depression BADCT barrier. The Significant Amendment also includes enhanced BADCT/operation monitoring including expanded aquifer pump testing, monitoring from supplemental monitoring wells, expanded groundwater elevation monitoring, and electrical conductivity monitoring. Given these changes, the Board's current order does not violate the 2014 Decision.

Moreover, because the facts, issues, and evidence changed between the 2014 Decision and the one at issue here, the law of the case doctrine does not apply. The doctrine of the "law of the case" is not applied when there has been a change of essential facts or substantial change of evidence, or if "the issue was not actually decided in the first decision." *Dancing Sunshines Lounge v. Indus. Comm'n of Arizona*, 149 Ariz. 480, 483 (1986). Here, the Board took new evidence and considered substantial changes to Florence's Copper's proposal before determining

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whether the Significant Amendment complied with its previous orders. Thus, law of the case does not apply, and Appellants arguments based on the law of the case are unavailing.

2. Pollution Management Area

Appellants next argue that the Board approved a PMA that was unlawful, unreasonable, and technically indefensible. A Pollution Management Area is defined by statute:

for a pollutant that is a hazardous substance the point of compliance is the limit of the pollutant management area. The pollutant management area is the limit projected in the horizontal plane of the area on which pollutants are or will be placed. The pollutant management area includes horizontal space taken up by any liner, dike or other barrier designed to contain pollutants in the facility.

A.R.S. § 49-244(1).

Here, the Significant Amendment requires a 550-foot cone of depression to be established, maintained, and monitored as a barrier. The Board found that the “cone of depression will operate as the primary hydraulic barrier for the in-situ copper recovery operation,” based on Arizona’s Mining BADCT Guidance Manual. (Decision at 4.) Thus, the PMA complies with Arizona law.

There is substantial evidence in the record to support the Board’s determinations regarding the PMA, including testimony provided by two different witnesses, Maribeth Greenslade and Phil Lagas. Appellants’ witness, Dr. Lee Wilson, disagreed. But that does not mean that the Board’s Decision is not supported by substantial evidence. Instead, as noted above, as long as substantial evidence supports the Board’s conclusion, it must stand, even if other evidence supports an inconsistent conclusion.

3. Point of Compliance Well Locations

Appellants next challenge the POC well locations. The Board found that the 2016 Significant Amendment establishes two new POC wells and uses four existing POC wells for the PTF PMA. (Decision at 4.) The two new wells are in the PTF PMA boundary, and the four existing wells are within 350 feet of the PTF PMA boundary, “between the nearest sources of drinking water and the PTF well block.” (*Id.*)

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Point of compliance is defined by statute:

the point of compliance is the point at which compliance must be determined for either the aquifer water quality standards or, if an aquifer water quality standard is exceeded at the time the aquifer protection permit is issued, the requirement that there be no further degradation of the aquifer as provided in § 49-243, subsection B, paragraph 3. The point of compliance shall be a vertical plane downgradient of the facility that extends through the uppermost aquifers underlying that facility.

A.R.S. § 49-244.

Here, Appellants argue that the POC wells are not located in a reasonable or lawful location, because they do not allow for meaningful monitoring of pollutants during Florence Copper's pilot test. But the record supports the Board's finding that the enhanced BADCT/operational monitoring included in the Significant Amendment along with the monitoring of the POC wells provides meaningful monitoring of groundwater. For example, Greenslade testified that the monitoring is "very comprehensive," and includes both horizontal and vertical monitoring. (Reporter's Transcript, March 6, 2017, at 110.) According to Greenslade, the project is "probably the most monitored 20 acres" she has "ever seen in the APP program." (*Id.*)

The record also shows that the two new POC wells are at the PMA boundary, which comports with A.R.S. § 49-244(1). The other four wells are not located at the PMA boundary, but the evidence showed that they comply with Arizona law because they are substantially less costly. When certain conditions are met, "[t]he alternative point of compliance will allow installation and operation of the monitoring facilities that are substantially less costly." A.R.S. § 49-244(b). Here, the record supports the conclusion that those wells comply with A.R.S. § 49-244 because they are protective of down gradient drinking water sources, and because Florence Copper established that the conditions set forth in A.R.S. § 49-244(b) were met.

Thus, the Board did not err by approving the location of the POC wells.

4. Alert Level – Fluid Electrical Conductivity

Appellants argue that the Board wrongly concluded that the 2016 Significant Amendment properly set the alert level for Fluid Electrical Conductivity.

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In the 2014 Decision, the Board found that Appellants showed “that the Temporary APP does not require meaningful monitoring of possible vertical migration through electric conductivity sensors or a hydrosleeve . . . or require any contingency action if such migration is identified.” (Decision at 9.) In the 2014 Decision, the Board further found that “ADEQ’s issuance of the Temporary APP that required only a single monitoring well downgradient to detect vertical and horizontal migration of in-situ solution” was unreasonable, and based on a technical judgment that was clearly invalid. (*Id.*)

After considering the record, the Board concluded that the 2016 Significant Amendment appropriately set the alert level for Fluid Electrical Conductivity. (*Id.* at 10.) Substantial evidence supports that conclusion. That evidence includes cross-examination of the expert witnesses, as well as technical briefs.

Under the Significant Amendment, conductivity data equal to or greater than the injection well conductivity data triggers an alert and requires a contingency action by Florence Copper. The evidence supports a finding that such a level would indicate a failure to maintain capture of the lixiviant, despite the fact that Appellants argued for a different level.

Moreover, Appellants have failed to establish that requiring contingency action, and not an immediate permit violation, was an abuse of the Board’s discretion.

5. Dismissal of Claims

Finally, Appellants argue that the Board erred by dismissing their due process claims without taking evidence at the hearing. After considering the appeal and pending motions, the Board asked the parties to submit technical memoranda to assist it in identifying the issues for which a hearing would be required. (Decision at 5.) The Board issued a Procedural Order permitting additional written testimony, additional legal argument, and setting a hearing to develop a factual record on the issues of Monitoring and the PMA and POCs. (Decision at 6.) All parties consented to that order. (*Id.*)

Appellants fail to establish that the Board wrongly failed to consider their claim that the public participation requirements were not complied with.

The record shows that ADEQ published notice of its preliminary decision to issue the Significant Amendment, accepted written public comment, noticed and conducted a public

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hearing, and responded in writing to comments. ADEQ thus complied with A.R.S. § 49-208, A.A.C. R18-9-109 and R18-9-A210(D).

Absent a requirement that any public hearing be reported by a court reporter, Appellants cannot establish that the recording of a hearing by video instead of a court reporter violated Arizona law. The applicable regulation requires that a general public hearing “shall be recorded by means of an electronic device or stenographically.” A.A.C. R18-1-402(F). Here, the public hearing was recorded by an electronic device, and ADEQ thus complied with the regulation. Moreover, Appellants fail to show any prejudice from the lack of a court reporter at the public hearing.

Nor have Appellants established that ADEQ prejudged the issues by sending document preservation letters. Moreover, because the letters were not properly made part of the record, this Court declines to consider them on appeal.

V. CONCLUSION

Based on the foregoing, this Court concludes there was substantial evidence to support the Board’s Decision, and the Decision was not contrary to law, was not arbitrary or capricious, and was not an abuse of discretion.

If any party wishes to appeal this decision, that party must do so pursuant to A.R.S. § 12-913 and Rule 9(a), Ariz. R. Civ. App. Proc.

IT IS THEREFORE ORDERED the affirming the Decision of the Board.

IT IS FURTHER ORDERED denying Appellants’ request for attorneys’ fees and costs.

IT IS FURTHER ORDERED this is a final order for purposes of appeal, as no further matters remain pending. See Rule 54(c), Ariz. R. Civ. P.

IT IS FURTHER ORDERED signing this minute entry as a formal order of the Court.

/s/ Patricia A. Starr
THE HON. PATRICIA A. STARR
JUDGE OF THE SUPERIOR COURT

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