

STATE OF MINNESOTA
IN COURT OF APPEALS

Minnesota Center for Environmental
Advocacy, Duluth for Clean Water,
Friends of the Boundary
Waters Wilderness, Center for
Biological Diversity, Save Lake
Superior Association, Friends of
the Cloquet Valley State Forest,
Save Our Sky Blue Waters,
Petitioners,

PETITION FOR
DECLARATORY JUDGMENT

Court of Appeals Number: _____

vs.

**STATEMENT OF
THE CASE OF PETITIONER**

Minnesota Department of Natural
Resources,

Respondent.

1. Court or agency of case origination and name of judge or hearing officer who presided.

Minnesota Department of Natural Resources (“DNR”); Administrative Law Judge
Phyllis A. Reha.

2. Jurisdictional statement.

(C) Other appellate proceedings.

Declaratory Judgment pursuant to Minn. Stat. § 14.44.

Authority fixing time limit for appellate review (cite statutory section and date of event triggering appeal time, e.g., mailing of decision, receipt of decision, or receipt of other notice):

Minn. Stat. § 14.44 does not establish a time limit for appellate review.

3. State type of litigation and designate any statutes at issue.

Declaratory judgment action to establish the validity of a rule under Minn. Stat.

§ 14.44.

4. Brief description of claims, defenses, issues litigated and result below.

Petitioners seek a declaration that the DNR's Nonferrous Metallic Mineral Mining Rules, Minnesota Rules Chapter 6132, is invalid because the rules fail "to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure" as defined by Minnesota Statutes section 14.02, subd. 4, and are otherwise so vague that neither a party affected by these rules nor this Court can determine what is required or prohibited. Further, Petitioners seek a declaration that Minnesota Rules chapter 6132 fails to include provisions mandated by statute, and unconstitutionally grants the DNR discretion in excess of its statutory authorities.

In 1973, the Minnesota Legislature prohibited mining without a permit issued by the Commissioner of the DNR ("Commissioner"). Minn. Laws 1973, ch. 526, sec. 1. In 1983, the Legislature prohibited the Commissioner from issuing a permit to mine metallic minerals other than taconite and iron ore (i.e., "nonferrous" metals) until the Commissioner amended or adopted new rules governing reclamation of such minelands. Minn. Laws 1982, ch. 270, sec. 5 (codifying Minn. Stat. § 93.481, subd. 6). The Legislature required the Commissioner to "develop procedures that will identify areas or types of areas which, if mined, cannot be reclaimed with existing techniques to satisfy the rules promulgated under this subdivision" and prohibited the Commissioner from issuing permits to mine "until the commissioner determines technology is available to satisfy the rules so promulgated." Minn. Stat. § 93.47.

In 1993, the DNR adopted Chapter 6132 to govern mine-waste disposal, mining areas and permits to mine for nonferrous metallic mineral mining. 17 *State Register* 2207

(March 15, 1993). The DNR included a statement called “goals” in each section of the Chapter 6132 rules governing reclamation. Chapter 6132 defines “goals” to mean “reclamation targets of achievement toward which the specific requirements of parts 6132.02100 to 6132.5300 are directed.” Minn. R. 6132.0100, subp. 8. The “goals” are followed by “requirements,” but the “requirements” set forth in Chapter 6132 are also expressed as general statements, and rarely establish directly enforceable criteria. *See, e.g.*, Minn. R. 6132.2200; Minn. R. 6132.2400; Minn. R. 6132.2500; and Minn. R. 6132.3200.¹ On November 1, 2018, the DNR issued the first permit under Chapter 6132, prompting the need for review of the rules by this Court.

“The validity of any rule may be determined upon the petition for a declaratory judgment thereon, addressed to this Court, 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.” Minn. Stat. § 14.44. Under Minnesota Statutes section 14.45, this Court may invalidate a rule under substantive due process jurisprudence if it fails to offer an “explanation of how the conflicts and ambiguities in the evidence are resolved, no explanation of any assumptions made or the suppositions underlying such assumptions, and no articulation of the policy judgments.” *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 246 (Minn. 1984); *see also Minn. Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 104 (Minn. Ct. App. 1991). A rule is void for vagueness “if it fails to give a person of ordinary

¹ As an exception to this generality, Minn. R. 6132.2300 and Minn. R. 6132.2400, subp. 2, item B, establish prescriptive criteria for “benches” and “lifts” in waste rock stockpiles and pits.

intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement.” *In re Appeal of Rocheleau*, 686 N.W.2d 882, 894 (Minn. Ct. App. 2004). Under Minnesota Statutes section 14.45, this Court also may invalidate a rule if it exceeds the agency’s statutory authority. *Wangen v. Comm'r of Pub. Safety*, 437 N.W.2d 120, 124 (Minn. Ct. App. 1989).

Petitioners are organizations with members who use and value natural resources, including wildlife, clean water, and clean air, and who live near a non-ferrous metal mining site that the DNR has permitted, and also near other potential non-ferrous metal mining sites that may be permitted by the DNR in the future under Chapter 6132. Chapter 6132, or its threatened application by the DNR, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of Petitioners because the rules do not provide sufficient standards to be enforced, and thus do not protect Petitioners’ interests in natural resources.

The deficiencies in Chapter 6132 are illustrated by the DNR’s recently-issued permit, the first under Chapter 6132. In issuing this permit, the DNR declared that the “goals” in Chapter 6132 are unenforceable and cannot be used as a “performance standard,” and that “[a] Permit to Mine, therefore, does not violate a rule if [a permittee] fails to specify how it will satisfy one of the goals set forth in the Rules.” DNR permit to mine finding 729 (November 1, 2018)². Further, the DNR has denied that a permit issued under Chapter 6132 must have “design and operational details [] firmly in place once

² Available at <https://www.dnr.state.mn.us/polymet/permitting/ptm/index.html>.

the . . . Application is submitted,” claiming that “[n]o mining project could ever get permitted if this were the applicable standard.” DNR permit to mine finding 792 (November 1, 2018)³. But if such design and operational details are not required to be “firmly in place” at permitting, Chapter 6132 is fatally deficient, because neither the Petitioners, nor this court, nor the DNR itself, can ascertain if the rule goals or standards are met at that critical juncture, when the permit becomes irrevocable. *Cf. Minn. Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 104 (Minn. Ct. App. 1991) (finding water quality standards based on *equations* in rule to be valid on the ground that the future application of the standard can be challenged upon permitting). *See also* Minn. Stat. § 93.481, subd. 4 (making a permit to mine irrevocable). Because Petitioners cannot be sure that permits issued under Chapter 6132 contain the necessary conditions to protect the natural resources that they cherish and enjoy, including wildlife, clean water and clean air, Chapter 6132 interferes with their rights.

Chapter 6132 is also deficient because it fails to include provisions mandated by Minnesota Statutes section 93.47, the enabling authority for the rule, and thus grants the DNR authority in excess of its statutory limits. Instead of including “*procedures* that will identify areas or types of areas which, if mined, cannot be reclaimed with existing techniques *to satisfy the rules*,” as required by Minnesota Statutes section 93.47, the rule allows non-ferrous mining to proceed without procedures that require the Commissioner

³ Available at <https://www.dnr.state.mn.us/polymet/permitting/ptm/index.html>.

to determine if existing techniques satisfy the rules, and without standards adequate to allow the Commissioner to make the mandated determination. The DNR thus effectively enjoys unlimited discretion to regulate mining as it sees fit, without any oversight by the public or the courts, throughout the life of an irrevocable permit to mine.

For the reasons stated above, Petitioners seek a judgment of this Court declaring that the reclamation standards in Chapter 6132 are invalid.

5. List specific issues proposed to be raised on appeal.

1. Whether Minn. R. ch. 6132, including but not limited to Minn. R. 6132.0100, subs. 2, 3, and 17; Minn. R. 6132.0200; Minn. R. 6132.0300, subp. 3; Minn. R. 6132.1000; Minn. R. 6132.1200; Minn. R. 6132.2100; Minn. R. 6132.2200; Minn. R. 6132.2400; Minn. R. 6132.2500; Minn. R. 6132.2600; Minn. R. 6132.2700; Minn. R. 6132.2800; Minn. R. 6132.3000; Minn. R. 6132.3200; Minn. R. 6132.4200; Minn. R. 6132.4300 and Minn. R. 6132.4600, is unconstitutional because it is “void for vagueness” and fails to provide adequate due process.

2. Whether the Commissioner failed to comply with statutory criteria by adopting Minn. R. ch. 6132 without procedures adequate for the Commissioner to determine that technology is available to satisfy the rules nor standards against which the technology can be compared, and instead adopted rules that grant discretion to the Commissioner in excess of applicable statutory authorities.

6. Related appeals.

List all prior or pending appeals arising from the same action as this appeal: None.

List any known pending appeals in separate actions raising similar issues to this appeal:

Petitioners concurrently seek a writ of certiorari for this Court to review the issuance of the first permit to mine issued by DNR pursuant to Chapter 6132. Petitioners will move the Court to stay that appeal because, if the Court invalidates the rule in this case, the permit decision should be invalidated and the case rendered moot.

7. Contents of record.

Is a transcript necessary to review the issues on appeal? Yes () No ()

DNR must provide the official rulemaking record, including the transcripts of the rulemaking hearing.

8. Is oral argument requested? Yes () No ()

9. Identify the type of brief to be filed.

Formal brief under Rule 128.02. ()

Informal brief under Rule 128.01, subd. 1 (must be accompanied by motion to accept unless submitted by claimant for reemployment benefits). ()

Trial memoranda, supplemented by a short letter argument, under Rule 128.01, subd. 2. ()

10. Names, addresses, zip codes and telephone numbers of attorney for appellant and respondent.

Attorneys for Petitioners:

Ann E. Cohen, Senior Staff Attorney
Evan Mulholland, Staff Attorney
Minnesota Center for Environmental Advocacy
1919 University Avenue West, Suite 515
Saint Paul, Minnesota 55104
(651) 223-5969
acohen@mncenter.org
emulholland@mncenter.org

Attorney for Respondent:

Office of the Attorney General
444 Minnesota Street Suite 1100
St. Paul, MN 55101

Sherry Enzler, General Counsel
Minnesota Department of Natural Resources
500 Lafayette Road
Saint Paul, MN 55117
(651) 259-5066
sherry.enzler@state.mn.us

Dated: December 3, 2018

/s/Ann E Cohen (#0166777)
Ann E. Cohen, Senior Staff Attorney
Minn. Center for Env. Advocacy
1919 University Avenue West, Suite 515
Saint Paul, Minnesota 55104
(651) 223-5969
acohen@mncenter.org

Attorney for Petitioner Minnesota Center
for Environmental Advocacy, Duluth for
Clean Water, Center for Biological
Diversity, Save Lake Superior
Association, Friends of the Cloquet Valley
State Forest, Save Our Sky Blue Waters

MASLON LLP

Margo S. Brownell (#307324)
Evan A. Nelson (#0398639)
3300 Wells Fargo Center 90 South
Seventh Street
Minneapolis, MN 55402-4140
Telephone: (612) 672-8200
Email: margo.brownell@maslon.com
evan.nelson@maslon.com

*Attorneys for Respondent Friends of the
Boundary Waters*