

STATE OF MINNESOTA

COUNTY OF FILLMORE

Southeastern Minnesotans for
Environmental Protection, et al.,
Plaintiffs,

and

City of Preston,

Plaintiff-Intervener,

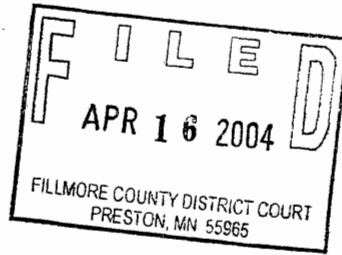
vs.

Minnesota Pollution Control Agency,
Defendant,

vs.

Heartland Energy & Recycling, LLC,
Defendant-Intervener.

IN DISTRICT COURT
CIVIL DIVISION
THIRD JUDICIAL DISTRICT
File No. C1-03-404



**FINDINGS, ORDER,
AND MEMORANDUM**

The above-entitled matter came on for hearing before the Honorable Joseph F. Wieners, Judge of District Court, at the Olmsted County Government Center, Rochester, Minnesota, on April 1, 2004, on Plaintiff SEMEP's motion for clarification. James P. Peters of Peters & Peters, PLC, Alexandria, Minnesota, appeared on behalf of Plaintiffs. Steven Corson, Attorney at Law, Preston, Minnesota, appeared on behalf of Plaintiff-Intervener City of Preston. Kathleen L. Winters, Assistant State Attorney General, St. Paul, Minnesota, appeared on behalf of Defendant Minnesota Pollution Control Agency. B. Andrew Brown of Dorsey & Whitney, Minneapolis, Minnesota, appeared on behalf of Defendant-Intervener Heartland Energy & Recycling.

Based upon the submissions on file herein and upon the arguments of counsel, the Court makes the following FINDINGS:

1. The Court has continuing jurisdiction over this matter based on Minn. Stat. §116D.04, subd. 10, and this Court's Order and Memorandum of February 17, 2004.
2. Plaintiff's motion for clarification is granted.
3. The environmental review process contemplated by Minn. Stat. § 116D.04 regarding the Heartland tire burner project is not "complete" for all purposes under Minnesota law as this Court remanded the matter to the MCPA and ultimately the MCPA Citizens Board for

reconsideration of its original Findings of Fact, Conclusions of Law, and Order of February 26, 2003, so as to address questions identified by this Court as more fully set forth in the Memorandum.

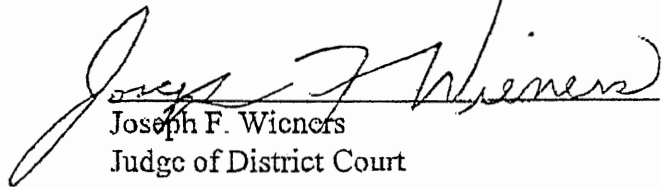
Based upon the foregoing, the Court hereby orders:

Utilization of the air emissions permit, currently issued but on hold, by Intervener/ Defendant Heartland Energy and Recycling, LLC, may be and hereby is STAYED pending reconsideration and completion of the EAW as ordered by this Court on February 17, 2004. This stay shall terminate upon further court order or 30 days following a negative declaration on the presently pending EAW.

The attached Memorandum is incorporated herein by reference and made a part hereof.

Dated: April 16, 2004

BY THE COURT:


Joseph F. Wickers
Judge of District Court

MEMORANDUM

This case arises out of a situation where the PCA believed that all preconditions for the issuance of an air permit had been fulfilled, and thus the PCA issued the permit. Following that, this Court determined that the EAW upon which the PCA relied in determining that an EIS was not needed was not complete, and thus the matter was remanded to the PCA by this Court.

At the time when the air permit was issued, all of the preconditions required by Minnesota Rules 7007.1000, subpart 1, had arguably been completed. The flaw in the thinking of the PCA and Heartland as this Court sees it is that while those parties may have believed that all preconditions for issuance of the permit had been met, this Court after the fact determined that not all applicable provisions of Chapter 116A had been fulfilled. When this Court determined that there were a number of important substantive questions not addressed by the Findings of Fact, Conclusions of Law, and Order of the PCA and the Board, it seems to follow that substantive questions arose with respect to the air permit that had been subsequently issued.

The statutes and administrative rules provide little guidance with respect to what to do in this circumstance. However, the state has adopted in its statutes and rules a detailed scheme for consideration of environmental issues. In Minn. Stat. 116B.01, there is a clear statement that "it is in the public interest to provide an adequate civil remedy to protect air, water, land, and other natural resources located within the state from pollution, impairment, or destruction." Similarly, in Minn. Stat. § 116D.01, the state's policy is declared to be to "encourage productive and enjoyable harmony between human beings and their environment" as well as "to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of human beings," among other things. In the following statutory section, Minn. Stat. § 116D.02, can be found the declaration of state environmental policy, which provides that it is the policy of this state "to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which human beings and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of the state's people." Additionally, in Minnesota Rules Chapter 4410, which establishes the rules for the Environmental Quality Board, the rules state that "a first step in achieving a more harmonious relationship between human activity and the environment is understanding the impact which a proposed project will have on the environment." It

is further stated that “environmental documents shall contain information that address the significant environmental issues of a proposed action.”

Implicit in this Court’s previous order is that this Court believes the original negative declaration as to the need for an EIS was based on neither an adequate nor a complete proceeding. In other words, what was done was completed inadequately. The notion that building of Heartland’s plant should be allowed to proceed unchecked after such a process seems at cross-purposes with the intent of the statutory scheme as expressed in the statutes and rule cited above. The question remains what to do about permits which were arguably properly issued at the time.

It seems to the Court that there is some merit to the arguments made by the Pollution Control Agency and Heartland with respect to whether or not the air permit is void. However, as pointed out by the Attorney General, a perverse sequence of events can result when construction is allowed to continue before environmental review is complete. See, Popc County Mothers v. Minnesota Pollution Control Agency, 594 N.W.2d 233 (1999). In that case construction was completed and the project operational before the environmental impact statement that a court ordered following an original negative declaration as to the need for an EIS by the Board had been completed. It does not seem to this Court that the purposes and policy of this state’s environmental scheme is promoted by a situation where a court’s order is rendered meaningless and environmental review has no purpose because construction of the project is allowed to be completed while environmental review is ongoing.

In determining to order the stay here as to the air permit, this Court has been informed by the General Purposes and Policies of the statutes and rule as set forth herein, as well as by the following considerations. First, although admittedly within the context of judicial review by the Court of Appeals, the Administrative Procedure Act specifically provides for stays in Minn. Stat. § 14.65. Second, in City of Winona v. Minnesota Pollution Control Agency, 443 N.W.2d 344 (Minn. App. 1989), the Appellate Court vacated the granting of a permit to Winona County by the MPCA to build a municipal solid waste incinerator where the Appellate Court had remanded the matter to the PCA for the preparation of a supplemental EIS. In this Court’s view, the situations are analogous in that in both cases further environmental review was deemed by a court to be necessary, and in the interim logic and promotion of the integrity of the process seem to dictate that you would not build until that environmental review has been completed.

Third, this Court relies upon language in Reserve Mining Company v. Herbst, 256 N.W.2d 808 at 825 (Minn. 1977), as follows: “Where there is a combination of danger signals which suggest the agency has not taken a ‘hard look’ at the salient problems and ‘has not genuinely engaged in reasoned decision making,’ it is the duty of the Court to intervene.”

This Court determined to intervene with respect to the negative declaration decision of February 26, 2003. In doing so, this Court attempted to follow the precedent that suggested that 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. This Court was attempting to exercise restraint by remanding. It seems to the Court that its judicial restraint should be matched by restraint on the part of the proposer in regards to proceeding with construction while the environmental issues are still being reviewed. Anything else seems to the Court to strike at the integrity of the whole process.

Finally, the Court notes that in the Reserve case, *supra*, a stay was utilized to preserve the status quo pending final resolution of the issues in that case. *See id. at p. 834.*