

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A25-1450**

In the Matter of: Wermager Beach Utility Company.

**Filed April 27, 2026
Affirmed
Connolly, Judge**

Minnesota Pollution Control Agency
File No. 4550

Andrew D. Cook, Ohnstad Twichell, P.C., West Fargo, North Dakota (for petitioner Wermager)

Keith Ellison, Attorney General, Philip S. Pulitzer, Assistant Attorney General, St. Paul, Minnesota (for respondent MPCA)

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Jesson, Judge.*

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

In this certiorari appeal, relator challenges an order by respondent requiring relator to apply for a water-discharge permit for the continued operation of its sewage system. Relator asserts that (1) because the system was constructed and installed in accordance with Minnesota law as it existed at the time, respondent did not have the authority to issue the order; and (2) relator's compliance with certain provisions of the order negates the

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

violations alleged by respondent. Because respondent has the authority to require relator to secure a permit for the continued operation of the sewage system, and because the issue of relator's compliance with the order is not properly before the court, we affirm.

FACTS

Relator Wermager Beach Utility Company owns and operates a pond-based sewer system (the system) located on Big Cormorant Lake in Lake Park, Minnesota. The system was constructed in late 1971 and early 1972 and has been in operation since that time. In total, the system currently services 37 homes.

In 1991, respondent Minnesota Pollution Control Agency (MPCA) inspected the system “to determine the physical condition of the pond system, and to evaluate the system’s current and future capability for treating wastewater.” The MPCA ultimately recommended minor repairs be made to the system but did not notify Wermager as to any permit non-compliance.

In 2024, the MPCA received a phone call from a real estate agent who was listing a house for sale in Becker County. The agent requested compliance paperwork for Wermager’s system. The MPCA then contacted Becker County asking for confirmation of the system’s location. Becker County provided the MPCA with design data from 1971 for waste-treatment facilities and a sanitary sewer system. The MPCA reviewed its files and confirmed that Wermager did not have, and had never been issued, a water-discharge permit for the system.

The MPCA then inspected the system. Following the inspection, the MPCA requested all permits related to the construction and operation of the system, original design

documents, number of people connected to the system, the location of where the system discharges, and how the system and system's components are maintained. Wermager responded with a copy of the MPCA letter from 1991 that outlined the inspection conducted at that time, notes on who the system serves, and routine maintenance information.

The MPCA negotiated a draft schedule of compliance to bring Wermager into compliance and secure a permit for the system. Wermager responded with a redlined version of the document that contained several revisions. Ultimately, the parties were unable to reach a negotiated settlement.

After negotiations failed, the MPCA issued Wermager the administrative order that is the subject of this appeal. The order stated several conclusions. Relevant to this appeal, it provides that: (1) the MPCA has authority to require National Pollutant Discharge Elimination System (NPDES)/State Disposal System (SDS) permits pursuant to Minn. Stat. § 115.07, subd. 1 (2024), and Minn. R. 7001.0030 (2023); (2) Wermager is required to apply for an NPDES/SDS permit for a wastewater treatment facility pursuant to this authority and is prohibited from commencing construction, installation and operation activities until the MPCA has issued a written permit for the facility; (3) Wermager is required to have a compliant treatment system for wastewater; (4) to date, Wermager has not submitted a permit application for the system; and (5) Wermager has not adequately operated or maintained the ponds to provide effective treatment to the wastewater. The order then requires Wermager to complete a series of action items to come into compliance with current regulations.

Wermager seeks review by writ of certiorari.

DECISION

On appeal, Wermager argues that the MPCA erred by disregarding the fact that the facility was properly approved when built and by interpreting Minnesota Statutes section 115.07 to require Wermager to obtain a permit for the system. Wermager also argues that its compliance with certain items of the order negates the violations alleged by the MPCA.

The MPCA's administrative orders are subject to judicial review under Minnesota Statutes sections 14.63-.69 (2024). Minn. Stat. § 115.05, subd. 11 (2024). Under Minnesota Statutes section 14.69 this court “may affirm, remand, or reverse an agency decision if the agency’s findings of fact are unsupported by substantial evidence, arbitrary or capricious, or affected by an error of law.” *In re NorthMet Project Permit to Mine Application*, 959 N.W.2d 731, 749 (Minn. 2021).

Whether the MPCA has the authority to require a permit involves the interpretation of Chapter 115 of the Minnesota Statutes and Chapter 7001 of the Minnesota Rules. “The interpretation of statutes and administrative regulations presents a question of law which we review de novo.” *In re Reissuance of an NPDES/SDS Permit to United States Steel Corp.*, 954 N.W.2d 572, 576 (Minn. 2021).

Wermager's challenges to the MPCA's order require us to understand federal and state statutes and regulations governing the discharge of pollutants into waters of the state. The Federal Pollution Control Act aims to “restore and maintain the . . . integrity of the Nation's waters” and prohibits the discharge of any pollutant into navigable waters without a permit. 33 U.S.C. §§ 1251(a), 1311 (2024). The federal act was significantly amended

in 1972 and is now commonly known as the Clean Water Act (CWA). Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (2024)). The 1972 amendments established the National Pollutant Discharge Elimination System (NPDES) permit program. *Id.* at 86 Stat. 880 (codified as amended at 33 U.S.C. § 1342).

The CWA authorizes states with approved permit programs to grant NPDES permits. 33 U.S.C. §§ 1251(b), 1342(b) (2024). Under the Minnesota Water Pollution Control Act, the MPCA has authority to “administer and enforce all laws relating to the pollution of any waters of the state,” including authority to issue and enforce permits “in order to prevent, control or abate water pollution, or for the installation or operation of disposal systems.” Minn. Stat. § 115.03, subd. 1(a)(1), (5) (2024). This authority includes administration of both the NPDES and SDS permit programs. Minn. Stat. §§ 115.03, subd. 5(a) (2024), 115.07, subd. 1; Minn. R. 7001.1010 (2023). Because Minnesota’s statutory amendments requiring water-discharge permits were adopted after the CWA’s passage, Minnesota law did not require such permits before that time. *See* 1973 Minn. Laws ch. 374, §§ 7-9, at 745-749; § 12, at 750-751.

NPDES/SDS permits are “required to discharge pollutants from a point source into any water in the state of Minnesota.” *Minnesota Ctr. for Env’t Advoc. v. Comm’r of Minnesota Pollution Control Agency*, 696 N.W.2d 95, 101-02 (Minn. App. 2005). Chapter 7001 of the Minnesota Rules governs how the MPCA grants permits and issues certifications, including NPDES and SDS permits. *See* Minn. R. 7001.1000-.1190 (2023).

I. The MPCA has the authority to require Wermager to secure a permit for the continued operation of the sewage system.

Wermager argues that the MPCA does not have the authority to require an NPDES/SDS permit because such permits did not exist when the system was installed in 1971. Wermager further argues that the MPCA “cannot retroactively deem the construction and installation of the [s]ystem to be a violation of [a] state law that was not yet in effect.” In response, the MPCA argues that the operation of Wermager’s system requires a permit and that the MPCA has statutory authority to require Wermager to secure a permit to continue operating its system. We agree with the MPCA.

A. The MPCA’s order is not a retroactive application of the statute.

“No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.” Minn. Stat. § 645.21 (2024). A retroactive law is one that takes away or impairs vested rights acquired under previously existing laws, creates a new obligation, imposes a new duty, or attaches a new disability to a transaction in the past. *Cooper v. Watson*, 187 N.W.2d 689, 693 (Minn. 1971). “[A] right is not ‘vested’ unless it is something more than a mere expectation, based on an anticipated continuance of present laws. It must be some right or interest in property that has become fixed or established, and is not open to doubt or controversy.” *U.S. Home Corp. v. Zimmerman Stucco and Plaster, Inc.*, 749 N.W.2d 98, 101 (Minn. App. 2008).

Here, Wermager’s system was constructed and installed in late 1971 and early 1972. At that time, the statutes and rules requiring the NPDES/SDS permits were not yet in place. The MPCA’s order does not penalize Wermager for not having these permits at the time

the system was constructed and installed. Instead, the order requires Wermager to apply for and obtain the necessary permit to bring the system into compliance with current regulations. As the order explains, Wermager is “prohibited from commencing construction, installation and *operation activities* until the MPCA has issued a written permit for the facility” because Wermager is “required to have a compliant treatment system for wastewater to ensure that the wastewater will not *continue* to be a source of pollution of the underground waters or impair the natural quality thereof.” (Emphasis added.) Because the system was already constructed and installed, and because Wermager has stated that it did not have plans to construct or install additions to the system, the relevant portion of the order is that which prohibited Wermager’s continued operation until it had obtained the necessary permit.

While Wermager may have had an expectation that it would not be required to obtain a permit for continued operation because it was not required to do so when the system was constructed and installed, such an expectation did not create a vested right. *See U.S. Home Corp.*, 749 N.W.2d at 101. Furthermore, the transaction that occurred in the past was the system’s construction and installation. *See Cooper*, 187 N.W.2d at 693. Because the MPCA’s order does not penalize Wermager for not having a permit at the time the system was constructed and installed, Wermager’s framing of the issue as one of retroactivity is incorrect. Retroactivity is not implicated just because someone has been engaged in an activity that previously did not require a permit but that now requires one. *See State v. Reinke*, 702 N.W.2d 308, 312 (Minn. App. 2005) (stating that “if an individual began a course of conduct before a statute prohibiting the conduct was passed, she may be

prosecuted for continuing the conduct after enactment of the prohibitive provision”). As such, the MPCA’s order is not a retroactive application of the statute.

B. The MPCA has permitting authority to regulate the system.

The Water Pollution Control Act broadly defines “disposal system” to mean “a system for disposing of sewage, industrial waste and other wastes, and includes sewer systems and treatment works.” Minn. Stat. § 115.01, subd. 5 (2024). Because Wermager is operating a sewer system, the system is within the Act’s purview.

The legislature has authorized the MPCA to issue and enforce “reasonable orders . . . in order to prevent, control or abate water pollution, or for the installation or operation of disposal systems.” Minn. Stat. § 115.03, subd. 1(a)(5). The legislature has also established that it is unlawful to “construct, install, or operate a disposal system, or any part thereof, until plans and specifications for the disposal system have been submitted to the agency . . . and a written permit for the disposal system is granted by the agency.” Minn. Stat. § 115.07, subd. 1(a).¹ Finally, the Minnesota Rules provide that “no person required by statute or rule to obtain a permit may construct, install, modify, or operate the facility to be permitted . . . until the agency has issued a written permit for the facility or activity.” Minn. R. 7001.0030.

¹ While Wermager argues that Minn. Stat. § 115.07, subd. 1 is inapplicable because “the [s]ystem was constructed and installed over 50 years ago,” this interpretation ignores that the statute also regulates the operation of a disposal system. *See* Minn. Stat. § 115.07, subd. 1(a) (stating it is unlawful to “construct, install, or *operate* a disposal system . . .” (Emphasis added.))

Pursuant to this authority, the MPCA’s order, which requires Wermager to secure an NPDES/SDS permit for the continued operation of the system, is a reasonable order related to the operation of the system. *See* Minn. Stat. § 115.03, subd. 1(a)(5). As such, the MPCA has the authority to require Wermager to secure a permit for the continued operation of the system. Wermager admits that it is continuing to “operat[e] the same [s]ystem that has existed for over 50 years.” Further, it is unlawful for Wermager to continue operating the system without the required permit. *See* Minn. Stat. § 115.07, subd. 1(a); *see also* Minn. R. 7001.0030.²

C. Wermager’s reliance on the system’s history is misguided.

Wermager argues that the relevant Minnesota watershed district “properly authorized the system in accordance with Minnesota law” at the time the system was constructed and installed. Wermager further argues that the MPCA erred as the order did not “explain how the Watershed District’s construction and installation of the [s]ystem was unlawful,” and did not “cite or discuss Minnesota law as it existed at the time the [s]ystem was established.” We disagree.

Because this is not an issue of retroactivity, it is irrelevant whether the system was properly authorized in the 1970’s. And, as discussed, because the MPCA’s order does not

² Wermager additionally argues that Minnesota Statutes section 115.07, subdivision 1 “allows a person to construct and install a disposal system without first obtaining a permit so long as plans and specifications are submitted to the [a]gency.” However, this argument overlooks that the portion of the statute referenced applies only to the construction and installation of disposal systems, not to the operation of these systems. *See* Minn. Stat. § 115.07, subd. 1(b). Furthermore, the statute explicitly states such action is taken “at the person’s own risk.” *See* Minn. Stat. § 115.07, subd. 1(b).

penalize Wermager for not having the required permit at the time the system was constructed and installed, the order did not need to address whether the system's construction and installation was unlawful. Instead, the relevant inquiry is whether the MPCA has the authority to require Wermager to secure a permit for the continued operation of the system under current law. The MPCA has the authority to do so. *See* Minn. Stat. § 115.03, subd. 1(a)(5); Minn. Stat. § 115.07, subd. 1(a); Minn. R. 7001.0030. As such, Wermager's reliance on the system's history, and the laws in effect at the time the system was constructed and installed, is misguided.

Wermager also suggests that, because it sent the MPCA "the plans and specifications for the [s]ystem in 1971," and because the MPCA "inspected the [s]ystem in 1991" and did not raise concerns with permits at that time, the MPCA cannot now deem the system in violation of Minnesota law. We disagree. The MPCA's order does not rely on the 1991 inspection to suggest that there were permit violations during that time. Instead, the order addresses Wermager's current violations. As such, the results of the 1991 inspection are largely irrelevant to the issue before the court.

Accordingly, the MPCA has the authority to require Wermager to secure a permit for the continued operation of the sewage system.

II. The issue of Wermager's compliance with the order is not properly before the court.

Wermager argues that it has complied with the MPCA's order and that, as a result, the language in the order that requires Wermager to obtain a permit is "largely irrelevant because the [o]rder dictates the actions Wermager must abide by and Wermager already

fulfilled those directives.” In response, the MPCA argues that this appeal “involves an on the record review of the [o]rder” and that the issue of Wermager’s compliance is premature because compliance must first be decided by the MPCA, and there have not been any MPCA administrative proceedings to enforce the order against Wermager. We agree with the MPCA.

The record in a certiorari appeal is composed of documents submitted to the agency or considered by the agency in reaching its decision. *See* Minn. R. Civ. App. P. 110.01, 115.04; *see also Amdahl v. County of Fillmore*, 258 N.W.2d 869, 874 (Minn. 1977) (stating “[c]ertiorari is, by its nature, a review based solely upon the record.”). Wermager had completed the first item of the order—retaining a Minnesota licensed professional engineer—prior to the order being issued, and MPCA acknowledged in the order that this item had already been completed. As such, Wermager’s completion of the first item was submitted to, and considered by, the MPCA in reaching its decision. *See* Minn. R. Civ. App. P. 110.01, 115.04; *see also Amdahl*, 258 N.W.2d at 874. However, Wermager acknowledged that “[s]ince the time [it] filed this appeal” it also completed item two. But, because the issue of Wermager’s compliance with item two, or any subsequent items, was not known to the MPCA when it issued the order, it is not part of the record on appeal. *See Gustafson v. Comm’r of Hum. Servs.*, 884 N.W.2d 674, 684 (Minn. App. 2016) (declining to consider documents “created after the commissioner’s decision” and thus “not part of the appellate record”); *In re Block*, 727 N.W.2d 166, 177 (Minn. App. 2007) (granting motion to strike extrarecord documents that post-dated decision subject to certiorari review).

However, even assuming this information were included in the record, the issue of Wermager's compliance with the order would still be premature. Here, the MPCA points out that it has not yet determined whether Wermager has complied with the order, nor have there been any administrative proceedings in which the MPCA has attempted to enforce the order against Wermager. Because Wermager has not exhausted the administrative remedies within the MPCA, this issue is premature. *See AAA Striping Servs. Co. v. Minnesota Dep't of Transp.*, 681 N.W.2d 706, 714 (Minn. App. 2004) (stating the "[e]xhaustion of administrative remedies requires that a party seeking judicial relief from a decision of an administrative body must first exhaust the right to seek relief within that body").

Accordingly, the issue of Wermager's compliance with the order is not properly before the court.

Affirmed.