STATE OF MINNESOTA

IN SUPREME COURT

A19-0115
A19-0134

Court of Appeals

Chutich, J.
Took no part, Thissen, J.

In the Matter of Issuance of Air Emissions
Permit No. 13700345-101 for PolyMet Mining, Inc.,
City of Hoyt Lakes, St. Louis County, Minnesota.

Filed: February 24, 2021
Office of Appellate Courts

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S Y L L A B U S

The Minnesota Pollution Control Agency is not required under the Clean Air Act, 42 U.S.C. §§ 7401–7671q, and its applicable regulations to investigate allegations of sham permitting when a source first applies for a synthetic minor source permit.

Reversed and remanded.

O P I N I O N

CHUTICH, Justice.

At issue in this case is whether appellant, the Minnesota Pollution Control Agency (the Agency), is required to investigate allegations of "sham" permitting when considering whether to initially approve the air-emissions permit of appellant PolyMet Mining, Inc. (PolyMet) for its NorthMet mine project. In particular, we consider whether the federal Clean Air Act, 42 U.S.C. §§ 7401–7671q, mandates that the Agency scrutinize whether PolyMet intends to expand mining operations in the near future, making it subject to the more stringent emissions limitations that apply to a "major source" instead of those that apply to a "synthetic minor source."[1]

[1] A "synthetic minor source" is a source that accepts enforceable limits restricting its potential to emit air pollutants to a level below the threshold limits set for a "major source" by the Clean Air Act. *See In re Shell Offshore, Inc.*, 15 E.A.D. 536, 550 (EAB 2012).

Respondents—a coalition of environmental groups led by the Minnesota Center for Environmental Advocacy and the Fond du Lac Band of Lake Superior Chippewa—filed two certiorari appeals challenging the decision of the Agency to grant an air-emissions permit to PolyMet for the proposed mine. They asserted that, before the Agency issued the synthetic minor source permit, it had failed to conduct an adequate investigation into whether PolyMet intended to operate within the limits of the permit or whether PolyMet was instead seeking a "sham" permit.

The court of appeals concluded that the Agency's factual findings were "insufficient to facilitate judicial review of the permitting decision" and remanded the matter to the Agency for further fact-finding. *In re Issuance of Air Emissions Permit No. 13700345-101 for PolyMet Mining Inc.*, 943 N.W.2d 399, 402 (Minn. App. 2020). Specifically, the court of appeals concluded that the Agency's short response to the written concerns of the environmental groups was not the sort of "hard look" required under the Minnesota Administrative Procedure Act, Minn. Stat. § 14.69 (2020). *In re Air Emissions Permit for PolyMet Mining, Inc.*, 943 N.W.2d at 408–11.

The Agency and PolyMet each petitioned for further review, asserting that the court of appeals incorrectly applied the relevant laws and improperly considered extra-record information. We granted their petitions. Because the applicable federal regulations and guidance contemplate retrospective enforcement after the applicant has obtained a synthetic minor source permit—and do not *mandate* prospective investigation—we reverse the decision of the court of appeals. Accordingly, we remand the matter to the court to consider the remaining issues on appeal.

FACTS

In 2005, PolyMet first proposed developing a copper-nickel-platinum mine, the first of its kind in Minnesota, approximately six miles from Babbitt. The proposed facility would include both new construction and refurbished equipment left from a previous iron ore processing facility on the site. The project proceeded through environmental review until 2015. In 2016, the Minnesota Department of Natural Resources (DNR) deemed the Final Environmental Impact Statement to be adequate.

On August 25, 2016, PolyMet submitted its draft air emissions permit application to the Agency. The application included details about the proposed facilities, projected pollutant emissions, and expected air quality impact. PolyMet applied for the permit as a synthetic minor source.

A brief review of air permitting terminology provides context to PolyMet's choice of air permit type and the core issues of this case. Under the federal Clean Air Act, a facility that emits or has the potential to emit over 250 tons per year of a regulated pollutant is a "major stationary source" (major source). 40 C.F.R. § 52.21(b)(1)(i)(a)–(b) (2020). Major sources must undergo an exacting review process before construction that includes stringent pollution control measures known as "best available control technology." 40 C.F.R. § 52.21(b)(12). A source that has the capacity to be a major source of emissions—that is, to emit over 250 tons per year of a specified pollutant—but chooses instead to adopt enforceable operational restrictions so as to reduce its actual emissions to less than that limit is a "synthetic minor source." *See In re Shell Offshore, Inc.*, 15 E.A.D. 536, 550 (EAB 2012).

A synthetic minor source is treated the same as a true minor source—that is, a source that does not have the capacity to emit over 250 tons per year of a regulated pollutant. 40 C.F.R. § 52.21(aa)(2)(xv) (2020). Either type of minor source undergoes a review process that is less demanding than that for a major source; neither type must use best available control technology that major sources are required to install. 40 C.F.R. § 52.21(b)(12).

What qualifies as best available control technology depends on a case-by-case analysis weighing energy, environmental, and economic impacts. *Id.* As a general rule, it is more expensive to retrofit pollution control measures onto existing equipment than to construct new equipment with better pollution control measures. *See United States v. Cinergy Corp.*, 458 F.3d 705, 709 (7th Cir. 2006) ("The Clean Air Act treats old plants more leniently than new ones because of the expense of retrofitting pollution-control equipment."). A source that first obtains a minor source permit and later, after construction of the facility, seeks modification of the permit to become a major source could therefore, depending upon the circumstances, be allowed to install less stringent pollution control technologies than if it had originally sought a major source permit. For example, if the cost of retrofitting outweighs the environmental benefits of the available pollution control measures, the facility may not be required to install the more stringent measures. *See, e.g.*, *United States v. Ameren Mo.*, 421 F. Supp. 3d 729, 808–09 (E.D. Mo. 2019).

This scenario raises the potential problem of a source improperly seeking and receiving a synthetic minor source permit and shortly thereafter actually emitting major source levels of pollution. The Environmental Protection Agency (EPA) refers to such

synthetic minor source permits as "sham permits." *See* Terrell E. Hunt & John S. Seitz, *Guidance on Limiting Potential to Emit in New Source Permitting*, U.S. EPA (June 13, 1989) (EPA Guidance); *see also* Requirements for the Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 54 Fed. Reg. 27,274, 27,280–81 (June 28, 1989) (codified at 40 C.F.R. pts. 51, 52).

The EPA, which ordinarily delegates to states its authority to enforce the Clean Air Act, has retained concurrent authority to enforce federal law if a facility obtained a sham permit. *See* Approval and Promulgation of Implementation Plans, 54 Fed. Reg. at 27,274, 27,280–81. In determining whether a permit is a sham, the "EPA will look to objective indicia to evaluate" whether the facility "obtained a minor source permit with the purpose of obtaining, after construction, a major source permit, so as to evade preconstruction review." *Id.* at 27,281. Such objective indicia include whether the facility "would not be economically viable for any appreciable period of time if it were restricted to emitting at minor levels," "how a project's projected level of operation was portrayed to lending institutions," and if the facility applies for a major source and minor source permit around the same time. *Id.* If the EPA finds that the facility obtained a sham permit, it will consider "seeking injunctive relief, civil penalties, and criminal sanctions" dating back to "the beginning of the actual construction." *Id.* at 27,280.

The EPA emphasizes that these enforcement principles are not directed to sources that "accept emissions limitations in pursuit of legitimate business purposes, and who in good faith later seek a relaxation of those limitations." *Id.* at 27,281. But regardless, any synthetic minor source that seeks relaxed restrictions, such as increasing "hours of

operation," which would then increase its emissions to the level of a major source, will undergo control technology review as though "construction had not yet commenced." 40 C.F.R. § 52.21(r)(4) (2020).

With this general background in mind, we turn to the facts here. PolyMet applied for a synthetic minor source permit, with its potential emissions capped by a key restriction limiting the amount of ore that it processes (the "throughput") to a proposed maximum of 32,000 tons per day, among other restrictions. The Agency's permit requirements includes numerous federal enforceable emission limits, as well as operational and production limits that restrict emission of regulated pollutants. The permit further includes daily, weekly, and monthly monitoring and recordkeeping requirements to help ensure that PolyMet actually remains below the 250 tons per year threshold for regulated pollutants that is required to operate as a synthetic minor source.

Throughout the permitting process, the Agency provided for community and stakeholder involvement. These measures included designing a dedicated web portal for interested parties, emailing updates, and providing links to all public application materials. The Agency also provided notice of, and held, two public meetings for the project. Before the public comment period began, the Agency provided the draft permit to tribal authorities and the EPA. On January 31, 2018, the Agency publicly announced a 45-day comment period that ended on March 16, 2018. During this period, the Agency received 88 timely comments; it did not receive a request for a contested case hearing.

Several environmental groups raised concerns during the comment period that, in light of the capacity of the existing facilities at PolyMet's mine site to process ore at a

higher rate than set forth in the permit application, PolyMet was applying for a sham permit. The Agency responded that the draft permit includes many limitations on mining that can be enforced—including recordkeeping requirements—to ensure that PolyMet's emissions will remain below the maximum limit of 250 tons per year.

In March 2018, ten days after the close of the public comment period, PolyMet's Canadian parent corporation filed a Form 43-101F1 Technical Report (the March 2018 Report) with Canadian regulatory authorities. Such reports are directed to investors, or potential investors, in publicly traded mining companies to inform them of the viability of proposed mining operations. The approximately 270-page Report primarily addressed the economic viability of the proposed mining facility at the 32,000 tons per day throughput limit. At that throughput, the Report stated that the NorthMet project would produce an internal rate of return of about 10 percent and fully recoup its startup costs in 7.5 years.

About 10 pages of the lengthy March 2018 Report also provided preliminary economic analysis of two higher throughput scenarios, 59,000 and 118,000 tons per day. These preliminary projections suggested that, because of existing infrastructure at the NorthMet site, PolyMet could increase internal rates of return, decrease payback time, and increase revenues under the higher throughputs.

This section of the March 2018 Report, however, cautioned that "[t]he estimates for these two scenarios are preliminary in nature" and are "too speculative geologically" to demonstrate economic viability. It emphasized that "further engineering, environmental studies, and permitting" would be required "to improve the economic uncertainties associated with these [higher throughput] estimates." The Report concluded that

"PolyMet's focus and intention is to put into operation the 32,000 [tons per day] plan detailed in this Technical Report as soon as possible."

In light of the March 2018 Report, the Minnesota Center for Environmental Advocacy (the Center) petitioned the DNR to prepare a Supplemental Environmental Impact Statement. *See In re Applications for a Supplemental Env't Impact Statement for the Proposed NorthMet Project*, Nos. A18-1312, A18-1524, A18-1608, 2019 WL 2262780, at *1 (Minn. App. May 28, 2019), *rev. denied* (Minn. Aug. 20, 2019). The Center argued that the Report showed PolyMet's intent to build a larger project than the one for which it was seeking permits, and that this "substantial new information" required preparation of a supplemental environmental impact statement. *Id.* at *6–7. The DNR denied the petition, and the court of appeals affirmed that denial. *Id.* at 7. The court of appeals deferred to the DNR's judgment, noting that "the expansions are not part of the project as currently proposed" and that the 32,000 ton per day throughput was still projected to be profitable. *Id.* at *6.

The Center wrote to the Agency on December 13, 2018, raising concerns that PolyMet was applying for a sham permit. It requested that the Agency stay its permit approval pending further investigation. The Agency responded by letter six days later, stating that it had reviewed the March 2018 Report and disagreed that further investigation was warranted. Specifically, the Agency quoted the various statements in the Report that characterized the higher throughput scenarios as "preliminary in nature," "speculative," and uncertain. The Agency determined that the higher throughputs "reflect potential future scenarios that would require significant additional study and for which economic viability

has not been demonstrated." It concluded that "[n]either the Technical Report, nor PolyMet's submittals in support of the Air Permit, indicate any intent by PolyMet to circumvent major source permitting." The next day, the Agency issued the approximately 700-page permit, accompanied by its Findings of Fact, Conclusions of Law, and Order that incorporated by reference a 200-page Technical Support Document. The Technical Support document detailed how the various restrictions and reporting requirements are designed to ensure that emissions limits are not exceeded.

The Center, other environmental groups, and the Fond du Lac Band of Lake Superior Chippewa (collectively, the environmental groups) appealed by writ of certiorari, challenging the Agency's permit decision. *In re Issuance of Air Emissions Permit No. 13700345-101 for PolyMet Mining Inc.*, 943 N.W.2d 399 (Minn. App. 2020). The court of appeals first addressed the scope of the record. The environmental groups moved to correct and to supplement the record. They sought to add to the record two documents submitted after the close of the public comment period (1) the earlier petition to the DNR for a supplemental environmental impact statement, with the accompanying exhibits and (2) a November 8 letter sent by the Center to the Agency requesting a stay of all permits pending appeal of the DNR's denial of that petition. *Id.* at 406.

A special term panel of the court of appeals denied the motion to correct, but the merits panel later granted the motion to supplement.[2] *Id.* at 406–07. In its ruling on the

[2] A motion to correct or complete the record under Minnesota Rule of Civil Appellate Procedure 110.05 is limited to documents that are "material to either party" that were omitted from the record "by error or accident, or . . . misstated in it." A motion to supplement, on the other hand, seeks to add evidence to the record that the agency did not

merits, the court concluded that it had the authority to consider evidence outside the record "as probative of whether the [Agency] 'failed to consider information relevant to making its decision.' " *Id*. at 407 (quoting *White v. Minn. Dep't of Nat. Res.*, 567 N.W.2d 724, 735 (Minn. App. 1997), *rev. denied* (Minn. Oct. 31, 1997)).

The court of appeals then examined whether the Agency took a "hard look" at the evidence of sham permitting. *Id.* at 408–11. The court concluded that the EPA Guidance is consistent with the requirement that the Agency "anticipate[] that the applicant will . . . comply with all conditions of the permit." *Id.* at 409 (quoting Minn. R. 7007.1000, subp. 1(G) (2019)). The court critiqued the Agency's "conclusory" Findings of Fact and its "short" response to the Center's letter requesting a stay and further investigation. *Id.* at 409–10. The March 2018 Report, the court concluded, raised questions about whether the proposed 32,000 tons per day throughput limit would enable NorthMet to remain "viable" if metal prices fell. *Id.* at 410. And finally, the court stated that "if expansion is the *current* intent, the time to comply with [major source review] requirements is now." *Id.* Because the Agency did not transmit "all documents that it considered or was invited to consider" and did not make particularized findings of fact on the sham permitting issue, the court concluded that remand and a reopening of the record were required to facilitate judicial review. *Id.* at 410–11. The Agency and PolyMet each petitioned for review, which we granted.

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consider but is "necessary for the court to conduct a substantial inquiry." *See In re Air Emissions Permit for PolyMet Mining, Inc.*, 943 N.W.2d at 406 n.8 (citation omitted) (internal quotation marks omitted).

ANALYSIS

Judicial review of the Agency's issuance of a permit is governed by the Minnesota Administrative Procedure Act. *See Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 826−27 (Minn. 1977); Minn. Stat. § 14.69. Under the Act, a reviewing court may "affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are" affected by an error in law, unsupported by substantial evidence, or arbitrary or capricious. Minn. Stat. § 14.69. We review questions of law, including statutory interpretation, de novo. *In re Restorff*, 932 N.W.2d 12, 18 (Minn. 2019).

A.

The central issue here is whether the applicable federal regulations require the Agency to investigate allegations of sham permitting before issuing a synthetic minor source permit. Accordingly, we address those arguments first.

The Agency contends that the EPA Guidance supports issuing a synthetic minor source permit when operational restrictions, like those in the PolyMet permit, are present. The Agency further argues that the EPA Guidance is designed to determine whether a facility has circumvented preconstruction review, which presents a different situation than a facility intending to expand at some indefinite point in the future. The fundamental question, according to the Agency, is whether PolyMet will comply with the terms of its permit.

PolyMet agrees that the key question is whether it will comply with the permit. It adds that if it seeks to expand its throughput limits beyond the terms of its synthetic minor source permit and becomes a major source, certain consequences will follow. For example, it would have to undergo preconstruction review as though it had never begun construction. *See* 40 C.F.R. § 52.21(r)(4).

The environmental groups respond that the EPA Guidance was written to help permitting agencies determine whether a proposed synthetic minor source permit is a sham. They assert that the EPA Guidance requires permitting agencies to look beyond material submitted in the permit application. To support this assertion, they note that various documents cited in the EPA Guidance—like "stockholder reports"—would not be submitted with the permit application. The groups maintain that the Clean Air Act's fundamental emphasis on preconstruction review, instead of retrofitting after construction has occurred, suggests that a retrospective analysis of best available control technology is not sufficient.

The parties cite two primary sources of authority produced by the EPA. First are the federal regulations defining appropriate restrictions in synthetic minor source permits and the accompanying supporting commentary in the Federal Register. *See* 40 C.F.R. § 50.21; Approval and Promulgation of Implementation Plans, 54 Fed. Reg. at 27,280–81. These regulations were passed through notice and comment and therefore have the force of law. *See United States v. Mead Corp.*, 533 U.S. 218, 231–32 (2001).

Second is the EPA Guidance, which was released in the same month as the federal regulations. This memorandum primarily provides more detail for states to determine what

restrictions are permissible in synthetic minor source permits and how to identify when a facility has received a sham permit. The EPA Guidance, in contrast to the federal regulations described above, is not a regulation or agency adjudication; it is therefore not legally binding and is only afforded deference to the extent that it is persuasive. *See Mead Corp.*, 533 U.S. at 227–28; *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

Because the federal regulations are binding, we first look to those to determine what obligations the Agency, which reviews applications for and issues synthetic minor source permits, *see* Minn. R. 7007.0250, subps. 1, 5 (2019), has concerning sham permitting. The federal regulations show that the EPA was concerned that some state permitting authorities may not enforce the operational restrictions in synthetic minor source permits,[3] which would allow those sources to actually emit major source levels of pollution in violation of their permit. Approval and Promulgation of Implementation Plans, 54 Fed. Reg. at 27,277. The EPA's proposed solution was to retain concurrent authority to enforce operational restrictions in synthetic minor source permits. *Id.* at 27,274 (granting the EPA enforcement authority under 40 C.F.R. § 52.23).

The EPA explained that its concurrent enforcement has two benefits. First, the specter of EPA enforcement "giv[es] sources more incentive to comply." *Id.* at 27,278. Second, having the EPA as backup would give state authorities "more leverage over industrial sources." *Id.* This federal authority and the corresponding operational

[3] Although "decisions of administrative agencies enjoy a presumption of correctness," *Reserve Mining Co.*, 256 N.W.2d at 824, state agency decisions cannot supersede the EPA's lawfully promulgated regulations.

restrictions required in synthetic minor source permits were ultimately designed to ensure that synthetic minor sources comply with their permits and emit less than 250 tons per year of regulated pollutants.[4]

The EPA identified another potential problem in issuing and enforcing synthetic minor source permits. A source could have an incentive to accept operational restrictions as a synthetic minor source so that it could begin construction and operation relatively quickly. *Id.* at 27,281. Then soon thereafter, the source could seek relaxation of those restrictions—making it a major source—without undergoing preconstruction review. *Id.*

The EPA proposed three solutions to this potential problem. First, it could simply deny the major source permit and require the source to continue operating as a synthetic minor source. *Id.* at 27,280. Second, if the EPA were to approve the major source permit, then it would require the source to undergo preconstruction review—including determination of best available control technology—as though it never began construction in the first place. *Id.*; *see also* 40 C.F.R. § 52.21(r)(4). Notably, even sources that seek

[4] The synthetic minor source permit issued to PolyMet contains the very sort of federally enforceable operational restrictions called for by the EPA Guidance and required under Minnesota's delegated permitting authority. These operational restrictions include the ore throughput limit (measured at two points in the process), limits on the hours of operation during winter months, limits on the types and quantities of fuel used in heaters and vehicles, limits on vehicle miles traveled and the number and type of engines used, and upgrading existing equipment for better efficiency and pollution control. Each of these restrictions requires monitoring and recordkeeping at regular intervals (between daily and annually depending on the limitation) that must be submitted to the Agency for regular review. And each of these restrictions is federally enforceable, meaning that the EPA can also review these records and bring an enforcement action if PolyMet is not in compliance.

relaxation of restrictions in good faith because of changing business plans must undergo this review. Approval and Promulgation of Implementation Plans, 54 Fed. Reg. at 27,280.

A final enforcement option allows the EPA to penalize bad faith actors. If the EPA believes that a source obtained a synthetic minor source permit with "an intent to construct, and possibly begin operation of, a major new source or modification without first obtaining a [] permit," then the EPA would consider the initial synthetic minor source permit to be a sham. *Id.* If such bad faith intent is shown, the EPA "deems the new source or modification to have been major" from the outset, and it will then consider "seeking injunctive relief, civil penalties, and criminal sanctions . . . from the beginning of actual construction." *Id.* Essentially, this enforcement alternative allows the EPA to look back to the first day of construction and view the source as having been in violation of its synthetic minor source permit because it was, in fact, a major source.[5]

The EPA then identified several "objective indicia" that, in the context of an enforcement action, suggest that a source intended to evade preconstruction review by obtaining a sham permit. *Id.* at 27,281. These indicia include seeking a minor and major source permit simultaneously, constructing a new source that would not be economically

[5] We note that civil penalties alone for such a violation could be substantial. Under the Clean Air Act, a permit violation can result in a civil penalty as high as $100,000 per day per violation. 40 C.F.R. § 19.4 (2020) (adjusting for inflation the $25,000 maximum civil penalty under 42 U.S.C. § 7413(b)). If a source, for example, gets caught violating only one operating condition of its synthetic minor source permit 5 years after receiving a sham permit, the civil penalties alone could amount to nearly $200 million. The EPA could also seek an injunction forcing the source to cease operations until it enacts best available control technology. 42 U.S.C. § 7413(b).

viable under operation restrictions, and portraying its operations to lenders as though it were or would soon be a major source. *Id.*

Critically, the EPA's discussion of enforcement is entirely retrospective. *See id.* (noting that the EPA would only seek remedies "where it believes it could show *to the satisfaction of a court* that a source . . . *had obtained* a minor source permit with the purpose of obtaining, *after construction*, a major source permit, so as to evade preconstruction review" (emphasis added)). At no point do the relevant regulations suggest that the objective indicia of a sham permit necessarily disqualify a source from obtaining a synthetic minor source permit in the first instance. In fact, the EPA specifically leaves open the possibility of a synthetic minor source seeking relaxation of operating restrictions, noting that it "in no way seeks to discourage or intends to penalize [sources that] accept emissions limitations in pursuit of legitimate business purposes, and who in good faith later seek a relaxation of those limitations." *Id.* Under those circumstances, the preconstruction review procedures under 40 C.F.R. § 52.21(r)(4) and enforcement actions for "any period in which minor source permit limits are actually exceeded" would "provide a complete remedy." *Id.*

B.

With this analysis in mind, we next address whether the federal regulations and guidance require the Agency to investigate sham permitting at the synthetic minor source permit application stage. Critically, nothing in the non-binding EPA Guidance contradicts the retrospective enforcement regime derived from the binding federal regulations laid out above. The first half of the EPA Guidance explains in greater detail what types of

limitations in synthetic minor source permits are "federally enforceable" and "enforceable as a practical matter." *See* EPA Guidance at 2, 5–10. And it stresses that recordkeeping is required so that agencies may review records to determine whether operational limits have been exceeded and consequently that the emissions limits of the permit have been violated. *Id.* at 6–7.

The EPA Guidance then addresses situations in which a facility improperly constructs a source with a synthetic minor source permit when it intends to operate as a major source; the Guidance notes that these permits are "void ab initio." *Id.* at 10. The EPA Guidance also "provides guidelines for identifying these 'sham' permits." *Id.* at 11−16. It concludes with a series of examples to illustrate the type of restrictions that are and are not permissible in a synthetic minor source permit. *Id.* at 17–21. Nowhere in the EPA Guidance does it dictate that a permitting agency must investigate sham permitting at the synthetic minor source permit application stage.

Amicus Environmental Integrity Project (the Project) suggests that the EPA Guidance is part of the minimum standards that the EPA considers when approving state permitting programs. *See* Operating Permit Program, 57 Fed. Reg. 32,250, 32,284 (July 21, 1992) (codified at 40 C.F.R. pt. 70). The section of the regulations cited by the Project, however, deals specifically with *modifications* to *existing* minor source permits. *See id.* This review of existing permits is, therefore, entirely after the fact, looking at the originally issued minor source permit, and is accordingly consistent with our interpretation of the EPA Guidance. Several paragraphs after the passage cited by the Project, the EPA specifically notes that "[s]tates that have serious nonattainment problems *may* wish to

adopt more stringent review procedures than those that do not." *Id.* This latter statement suggests a key point: based upon our review of the applicable federal regulations, the Agency could, if it so desired, investigate sham permitting during the synthetic minor source permit application process, but it is not *required* to do so.

Instead, the legally binding regulations, passed through notice and comment, are specifically designed to provide the EPA its own independent authority to enforce the operational restrictions within synthetic minor source permits issued by the Agency and to punish *after the fact* those sources that obtained a synthetic minor source permit through deceit. Approval and Promulgation of Implementation Plans, 54 Fed. Reg. at 27,280–81. Accordingly, because we conclude that the Agency was under no federal obligation to investigate sham permitting during the synthetic minor source permit process, we reverse the decision of the court of appeals ordering a remand on that basis.

C.

We now turn to the remaining issues presented by this appeal.

First, the Agency and PolyMet object to the decision of the court of appeals to remand without explicitly finding a violation of the Minnesota Administrative Procedure Act. Each argues that the court's decision to remand was improper because a reviewing court should seek to affirm an agency decision if possible on the existing record. *See In re Excess Surplus of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278–79 (Minn. 2001). Because we conclude above that the court of appeals relied on an erroneous interpretation of federal law to remand to the Agency, we need not decide this issue and decline to do so here.

Second, in their appeals to the court of appeals, the environmental groups challenged the Agency's decision to issue the permit on grounds not specifically addressed by the court of appeals. In particular, the groups asserted that the March 2018 Report and other evidence undermined the Agency's conclusion that PolyMet "will . . . comply with all conditions of the permit," Minn. R. 7007.1000, subp. 1(G). They also contend that the Agency should have denied the permit because PolyMet "has failed to disclose fully all facts relevant" to the permit and has "knowingly submitted false or misleading information to the agency." *Id.*, subp. 2(C). These arguments should be addressed by the court of appeals on remand.

Finally, on appeal the parties have disputed the proper scope of review. Because this appeal must be remanded to the court of appeals to address the remaining issues, we briefly address these arguments. In general, appellate review is confined to the record. Minn. R. Civ. App. P. 110.01; 115.04. The court of appeals, however, granted the environmental groups' motion to supplement the record with two documents: the petition to the DNR requesting a supplemental environmental impact statement and the November 8 letter to the Agency requesting a stay of permits pending appeal of the petition denial.

Neither the Agency nor PolyMet sought review of this decision, and they did not challenge this decision in their briefs filed with our court; only at oral argument did the Agency suggest that it was challenging the court of appeals' decision to grant the motion to supplement. Instead, the Agency challenged in its brief the court of appeals' denial of its motion to strike extra-record information from the environmental groups' briefing.

Based on this record, we conclude that the Agency and PolyMet forfeited any challenge to the court of appeals' decision to grant the motion to supplement.[6] *See In re Welfare of Children of J.D.T.*, 946 N.W.2d 321, 326 n.3 (Minn. 2020); *Rhodes v. State*, 875 N.W.2d 779, 784 n.3 (Minn. 2016). As to the motion to strike, because the court of appeals did not rely on any extra-record information contained in the briefing,[7] we see no error in denying the motion.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand to that court to address the remaining issues on appeal.

Reversed and remanded.

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[6] Even if the Agency had not forfeited its challenge to that decision, the court of appeals may look to federal administrative law in granting the motion. *See In re Application of Minn. Power for Auth. to Increase Rates for Elec. Serv. in Minn.*, 838 N.W.2d 747, 766 (Minn. 2013) (Anderson, J., dissenting) ("[F]ederal courts have considerable experience implementing a very similar standard of review, and . . . we therefore find those federal decisions to be persuasive authority in many of our own administrative law cases."). Supplementing the record can be appropriate for "a limited class of documents which should have been considered by the [agency] in reaching the challenged decision." *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1281 (D. Colo. 2010). Here, there is no dispute that the two documents subject to the motion to supplement were sent to the Agency months before it issued the permit.

[7] The court of appeals stated the following in remanding to the Agency: "[T]he Canadian technical report raises questions concerning whether, if metal prices drop, the project can remain viable with the 32,000 [tons per day] throughput limit that the synthetic-minor permit necessitates." *In re Air Emissions Permit for PolyMet Mining, Inc.*, 943 N.W.2d at 410. The March 2018 Report and the potential that dropping metal prices could lead to a lack of viability (as described in the Report) were each in the record as submitted by the Agency to the court of appeals.

THISSEN, J., took no part in the consideration or decision of this appeal.