NO. A18-1956

State of Minnesota

In Court of Appeals

Minnesota Center for Environmental Advocacy and
Friends of the Boundary Waters Wilderness, et al.,

Relators,

vs.

Minnesota Department of Natural Resources,

Respondent,

Poly Met Mining, Inc.,

Intervenor-Respondent.

BRIEF AND ADDENDUM OF RELATORS MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY AND FRIENDS OF THE BOUNDARY WATERS WILDERNESS

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ISSUES

I. Whether the Minnesota Department of Natural Resources ("DNR") failed to comply with Minn. Stat. § 93.47, subd. 3 and due process standards when it adopted Minn. R. Ch. 6132 ("Chapter 6132") without prescriptive or performance standards or mandated procedures?

A. Description of how the issue was raised in the trial court – *Commenters on the rules raised the lack of enforceable standards in the rules as a deficiency.*

B. Statement of trial court's ruling – *The Administrative Law Judge determined that no statutes required specific standards for the conduct of mining operations and DNR adopted the rules without such standards.*

C. Description of how the issue was subsequently preserved for appeal – *Not Applicable*

D. List apposite statutes/cases – Minn. Stat. §§ 14.44-5; Minn. Stat. § 14.02, subd. 4; Minn. Stat. § 93.47; Minn. Stat. § 93.481; *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238 (Minn. 1984); *In re Charges of Unprofessional Conduct Against N.P.*, 361 N.W.2d 386 (Minn. 1985).

STATEMENT OF THE CASE

Minnesota has non-iron ("nonferrous") mineral resources, including minable deposits of copper, nickel, platinum, and titanium. (R. 6632).[1] While all mining can cause environmental issues, nonferrous mining has the potential to cause the release of particularly toxic metallic pollutants and acid mine drainage. (R. 6859).

In 1973, the Minnesota Legislature (the "Legislature") prohibited mining without a permit issued by the Commissioner of the DNR ("Commissioner"). Minn. Stat. § 93.481, subds. 1-2. The Legislature also authorized DNR to adopt rules. Minn. Stat. § 93.47, subd. 3. In 1983, the Legislature prohibited the Commissioner from issuing a permit to mine nonferrous minerals until the Commissioner amended or adopted new rules governing reclamation of such minerals. Minn. Stat. § 93.481, subd. 6.

In the late 1980s and early 1990s, to spur the development of nonferrous mining, DNR began to develop rules governing nonferrous mining. (R. 1-6). During the preliminary rulemaking process, commenters, including the Minnesota Pollution Control Agency ("MPCA"), some industry interests, but in particular groups representing environmental interests, criticized proposed Chapter 6132 because it did not include enforceable performance standards and gave the Commissioner too much discretion. (*See* R. 181, 186, 199-201, 206, 214-15).

In 1993, DNR adopted Chapter 6132. 17 *State Register* 2207 (March 15, 1993). Despite the comments regarding the lack of enforceability of the proposed rules, DNR

[1] Citations to the record omit the letters "DECL" and all "0s" preceding a non-zero numeral. Thus, for example, record page DECL06632 shall be cited (R. 6632) and record page DECL00003 shall be cited (R. 3).

did not amend Chapter 6132 to include enforceable prescriptive or performance standards.[2] The Administrative Law Judge reviewing the rules concluded that DNR was not required to adopt enforceable performance standards. R. 8821.

At the time DNR adopted Chapter 6132, no nonferrous mining projects were imminent. (R. 6, 1288). This remained the case for over twenty years. DNR issued the first permit under Chapter 6132 on November 1, 2018.[3]

Petitioners are environmental organizations representing individuals who own property and who enjoy natural resources on property near nonferrous mineral deposits that could be mined, including some who live near or enjoy natural resources near the nonferrous mine DNR permitted in November 2018.[4] After receiving DNR's

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[2] A "prescriptive standard" defines the exact actions regulated entities must take. *See* Cary Coglianese, et al., *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection*, 55 Admin. L. Rev. 705, 706 (2003). A "performance standard" specifies the desired level of performance and allows regulated entities to decide how to achieve that level. *Id.* For example, MPCA adopted a rule governing compost facility liners. Minn. R. 7035.2836, subp. 4(D). For areas where immature compost is located, a liner "must have a permeability no greater than 1 x 10-7 centimeters per second and, if constructed of natural soils, be at least two feet thick." *Id.* The rule does not restrict the permittee with regard to how to reach the required permeability (a "performance" standard), unless the permittee constructs the liner with natural soils (a "prescriptive" standard).

[3] *See* Minnesota Court of Appeals Case Nos. A18-1952, A18-1958, A18-1959, consolidated with A18-1953, A18-1960, Al8-1961.

[4] On January 10, 2019, DNR and Intervenor PolyMet Mining, Inc. ("PolyMet") challenged Petitioners' standing to bring this declaratory judgment action and argued laches precluded Petitioners' claims. PolyMet additionally argued Petitioners' declaratory judgment action should be dismissed under the residual statute of limitations. Petitioners opposed the motion and incorporate herein their arguments and supporting declarations by reference. Petitioners specifically reference the declarations submitted in support of their response to DNR's and PolyMet's motions to dismiss on grounds of standing. (*See* Decl. of Ann E. Cohen, Case No. A18-1956 (Jan. 18, 2019) (including member declarations attached as Exhibits 1-3); Decl. of Andra Mathews, Case No. A18-1956 (Jan. 18, 2019)).

November 1, 2018 permit decision, Petitioners determined that, due to Chapter 6132's lack of enforceable standards and the fact that Chapter 6132 failed to include standards and procedures mandated by Minn. Stat. § 93.47, subd. 3, Chapter 6132 threatened and impaired the legal rights and privileges of their members. *See* Minn. Stat. § 116B.01 ("[E]ach person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state . . . .").

Minnesota Statutes § 14.44 authorizes this Court to determine the validity of any rule upon the petition for a declaratory judgment when it appears that the rule, or its threatened application, will "interfere with or impair the legal rights or privileges of the petitioner." Section 14.44 further provides that "[t]he declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, and whether or not the agency has commenced an action against the petitioner to enforce the rule." The Court "shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency. . . ." Minn. Stat. § 14.45.

To ensure that Minnesota's natural resources are protected from uncontrolled mining of nonferrous metals,[5] this Court should declare Chapter 6132 invalid for failure to include statutorily mandated standards and procedures. The Court should further conclude Chapter 6132 violates the Minnesota Constitution because, as currently adopted, Chapter 6132 fails to give a person of ordinary intelligence a reasonable

[5] Other mining companies have proposals for additional nonferrous mining projects. *See* Cody Nelson & Dan Kraker, *4 Things to Know About the PolyMet Mine*, PostBulletin (Jan. 9, 2018), https://www.postbulletin.com/news/business/things-to-know-about-the-polymet-mine/article_ea216c67-560b-56d3-a696-e6f4545fdcaf.html.

opportunity to know what is prohibited and fails to provide sufficient standards for enforcement, making Chapter 6132 "void for vagueness."

FACTS

I. Natural Resources Must Be Protected And Preserved During Mining Operations.

Minnesota has long recognized the potential for environmental impacts from mining. In 1969, the Legislature recognized the need to control the "effects of mining upon the environment" by declaring reclamation to be necessary:

> both in the interest of the general welfare and as an exercise of the police power of the state, to control possible adverse environmental effects of mining, to preserve the natural resources, and to encourage the planning of future land utilization, while at the same time promoting the orderly development of mining, the encouragement of good mining practices, and the recognition and identification of the beneficial aspects of mining.

Minn. Laws 1969, ch. 774, § 1 (codified at Minn. Stat. § 93.44).

On January 9, 1973, DNR prepared a report for Governor Wendell Anderson titled "Inter-Agency Task Force Report on Base Metal Mining Impacts." (R. 4331-633). In this report, DNR noted that it appeared imminent that Congress would pass a mineland reclamation act in the near future. (R. 4522). DNR also anticipated that states would be allowed to operate their own mineland reclamation programs if the standards in state law met federal standards. (*Id.*) These standards, DNR believed, would need to provide for a permit system "to regulate the initiation and conduct of any new or previously mined and abandoned site and requires that a permit be obtained by an existing operator." (*Id.*) In addition, DNR anticipated federal standards would provide that "[n]o permit will be

issued *except where adequately demonstrated technology exists to reclaim the surface area*." (*Id.* (emphasis added)).

In 1973, the Legislature prohibited mining without a permit issued by the Commissioner and required the Commissioner to find that the "reclamation or restoration complies with lawful requirements and can be accomplished under available technology and that a proposed reclamation or restoration technique is practical and workable under available technology." Minn. Laws 1973, ch. 526, sec. 5; (codified at Minn. Stat. § 93.481, subds. 1 and 2). The Legislature also strengthened standards for rules governing mining operations and related permitting, and required the new mining rules to "substantially comply with or exceed any minimum mineland reclamation requirements which may be established pursuant to a federal mineland reclamation act." *Id.* sec. 3 (codified at Minn. Stat. § 93.47, subd. 3). Further, 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 and regulations promulgated under this subdivision" and prohibited DNR from issuing permits to mine "until the [C]ommissioner determines technology is available to satisfy the rules and regulations so promulgated." *Id.*

II. The Legislature Required Study Of Nonferrous Mining And New Rules Before DNR Issued Mining Permits Because Of Nonferrous Mining's Greater Potential For Pollution.

Minnesota has a long history of iron ("ferrous") mining.[6] Although explorers documented Minnesota nonferrous mineral deposits as early as the 1800s, public and private exploration from the 1940s through the 1960s resulted in the identification of large deposits of potentially mineable copper-nickel sulfides. (R. 6777). Prompted by private mining proposals, the Legislature and the Minnesota Environmental Quality Board ("EQB") concluded the state should conduct a statewide study of the impacts associated with copper-nickel mining. (R. 6777-78). EQB published this study ("Copper-Nickel Study") in 1978-79. (R. 6768-920, 8026-438).

The Copper-Nickel Study concluded there were "significant unknowns" associated with nonferrous mining, in particular with regard to water quality impacts from tailings basins and mine dewatering:

> Due to limited research on tailing water quality, the unknowns involving the quality of runoff and seepage from a tailing basin are greater than those associated with waste rock piles and create another source of significant risk involving future copper-nickel water management decisions. The [DNR] is conducting research on this topic.
>
> Mine dewatering can also contribute heavy metals, the amount depending upon the quantity of water from precipitation and groundwater sources that must be removed and the metal sulfide content of the mine. No precise conclusions can be made about expected levels of heavy metal release from this source.

(R. 6859). The Copper-Nickel Study also acknowledged the limits of water quality models, noting that "this information is not sufficient to allow precise statements on the

[6] DNR described the public safety and environmental problems that resulted from these operations in a 1975 report. (R. 6921-32).

quality of water produced from copper-nickel water pollution sources or on the effectiveness of reclamation practices for specific effluent parameters (e.g. sulfates, trace metals, processing reagents)." (R. 6860). But the Copper-Nickel Study noted that the "information strongly suggests that runoff from waste piles will contain elevated heavy metals and dissolved solids concentrations as compared to background surface water quality. Heavy metals could be 500 to several thousand times higher than natural water quality levels and sulfates could be ten to several hundred times higher." (*Id.*)

Following the publication of the Copper-Nickel Study, in 1983, the Legislature prohibited the Commissioner from issuing a permit to mine metallic minerals *other than taconite and iron ore* until the Commissioner amended or adopted *new* rules governing reclamation of such minelands. Minn. Laws 1983, ch. 270, § 5 (codified at Minn. Stat. § 93.481, subd. 6) (emphasis added).

III. Although No Mining Projects Were Imminent, And Reclamation Research Was Ongoing, DNR Proposed Rules Governing Nonferrous Mining.

In the 1980s, DNR continued to study issues associated with nonferrous mining. DNR studied the potential for waste rock and tailings to generate acid-mine drainage or other pollutants, and how those pollutants could be controlled. (R. 2362-98). But while these studies were ongoing, and despite the fact that no mining projects had been proposed, DNR proceeded to develop proposed rules. In June 1991, DNR published preliminary draft rules and presented the draft rules to the Legislature. (R. 6657).

In November 1992, DNR began the formal rulemaking process when DNR published the nonferrous mineral mining rules for public comment. (R. 6). DNR also adopted a Statement of Need and Reasonableness ("SONAR") in support of the proposed

rules. (R. 1288-328). In undertaking the rulemaking, DNR acknowledged "there is presently no reason to believe that nonferrous mining is imminent." (R. 1288).

The proposed rules addressed siting, how an applicant would obtain a permit to mine, and other aspects of reclamation. (*See* R. 6). The rules included General Provisions (including definitions, "purpose and policy," and "scope"), Minn. R. 6132.0100-.0300 (R. 8-10); Permit Requirements (including provisions dealing with mine waste characterization, permit application contents, provisions dealing with financial assurance, a requirement for an annual report, and how a permittee is released from a permit), Minn. R. 6132.1000-.1400 (R. 10-16); Reclamation Standards (dealing both with siting and buffers and also control on the impacts of mining through closure and postclosure), Minn. R. 6132.2000-.3200 (R. 16-24); and Administrative Procedures (addressing how a permit to mine is obtained, variances, amendments, modifications, suspension, revocation, assignment and release, and establishing procedures for issuance such as notice and hearing rights and procedures (including allowing a contested case hearing), and finally inspection and wetland mitigation), Minn. R. 6132.4000-.5300 (R. 24-29).

In adopting Chapter 6132, DNR generally did not include prescriptive or performance standards to protect natural resources during mining. Instead, DNR created the defined term "[a]dversely impact natural resources" which "means an unacceptable level of impact on the natural resources as determined by the [C]ommissioner based on an evaluation which considers the value of the resource and the degree of impact." Minn. R. 6132.0100, subp. 3. The SONAR states that the term was necessary "because it [was] one of the basic criteria used by the [C]ommissioner to establish several of the goal

statements contained in the reclamation standards portion of the proposed rules," and it was used as a factor to identify "generally acceptable locations" for mining. (R. 1291). The SONAR defended the broad definition as necessary because:

> the effect is not likely to be specifically identifiable until an exact mine site is identified and the specific operating plans are selected and approved. Because the [C]ommissioner has, through numerous statutes, been given specific authority to protect the state's natural resources, it is reasonable that each of the department's rules, on any specific topic, should, at a minimum, give general considerations to impacts on all natural resources. This term is used in those parts of the rules that describe the basic philosophy of the rules, and as noted, for some general siting decisions. Because the term is used only to provide general guidance, it is reasonable that the definition be broad and general. *The actual mandatory requirements of the rules, with which the permittee must comply, are necessarily very specific.*

(*Id.* (emphasis added)). Based on this statement, DNR intended that that this term would define a "general consideration[]" for DNR (*id.*), but DNR evidently intended to define what is "an unacceptable level of impact on the natural resources," *see* Minn. R. 6132.0100, subp. 3, by "the actual mandatory requirements of the rules . . . [which] are necessarily very specific." (R. 1291).[7]

Similarly, DNR created a concept called "goals" in the rules. *See* Minn. R. 6132.0100, subp. 8. As defined, " '[g]oals' means reclamation targets of achievement toward which the specific requirements of parts 6132.0100 to 6132.5300 are directed."

[7] While it defined "adversely affect natural resources" without reference to any specific standards, DNR appeared to recognize the need for "mandatory" and "specific standards" to be included in the rules, but nevertheless failed to adopt such standards, as discussed *infra* Part II. DNR does know how to craft a specific standard when it wants to. *See, e.g.*, DNR ferrous mining rule requiring stockpiles to meet a design standard for runoff and drainage control measures that can "withstand a 100-year frequency, 24-hour duration storm as developed using good hydraulic and hydrologic practices." Minn. R. 6130.2100 (C).

Id. DNR explained that DNR intended "goals" to "defin[e] the rationale used in the development of specific requirements contained in Reclamation Standards portion of the rules." (R. 1292). But DNR also stated that while:

> all goals in the proposed rule may not be fully attainable, they provide needed targets for achievement and a framework within which reasonably effective and attainable requirements have been developed, and they will provide guidance and a measurement of success by which any requests for variance from stated requirements can in part be judged.

(*Id.*)

Finally, DNR created a defined phrase: "minimize to the extent practicable." Minn. R. 6132.0100, subp. 17. This phrase:

> means minimize through application of technologies and practices including methods, specifications, guidelines, standards, and engineering safety factors, developed for and commonly used in mining or in reasonably similar activities. These technologies and practices shall be determined by the [C]ommissioner, based on problem assessment, examination of alternative practices, and input from appropriate regulatory authorities, to be the most effective and workable means of achieving reclamation, including being technologically, economically, and practically applicable.

Id. In the SONAR, DNR claimed that the definition was necessary "because it is a term used frequently in the rules to identify specific requirements of the reclamation standards section" and that "[t]he definition requires that the [C]ommissioner determine whether the technologies or practices are the most effective and workable means of achieving reclamation, that are available." (R. 1293). DNR also recognized that the Commissioner's approval of a particular mining practice was key, "since the selection of the practices, in effect, has the same force and effect as rule." (*Id.*)

IV. Commenters Criticized The Vagueness Of DNR's Proposed Nonferrous Mining Rules.

During rulemaking, commenters expressed concern that the proposed rules lacked any standards, either prescriptive or performance. MPCA commented that the definition "minimize to the extent practicable" is "very much a judgment call." (R. 199). Commenting on the "Permit Requirements," environmental commenters stated "the level of specificity of this portion of the rules needed for enforcement is severely lacking. For instance, it should address how to minimize the disturbed area and effects on the environment beyond the mining area boundary (e.g., 100 decibels allowable sound, fugitive dust, water table depletion)." (R. 243). Environmental commenters also noted with regard to the tailings basin standard that " '[p]rotection of natural resources' is vague. What specific performance standards must be met?" (R. 251).

Other environmental commenters stated that "[w]ithin the text where wordings such as 'to the maximum extent practical, minimize and mitigate' are found, such statements become defined as short-term economics vs clean water and environment. All such language shall be reworded and a clear intention stated. These are rules, not guidelines." (R. 215; *see also* R. 187 (commenting on "minimize to the extent practicable" definition and suggesting the test of "BAT" or "best available technology" or "BMPs" or "best management practices")). Environmental commenters stated that:

> The draft rules give the [C]ommissioner too much latitude and responsibility in areas of significant potential impact on Minnesota, especially under 6132.2000. Decisions of this magnitude belong to the people, not to a single nonelected [C]ommissioner who may or may not be versed in the issues or of sufficient capacity or competency to assimilate and deal with the complexity of such issues.

(R. 214). Environmental commenters complained that the rules "allow for the application of existing technologies as being acceptable for development of mining regardless of the ultimate devastation by the inadequacies of the technology." (R. 207). Environmental commenters noted the lack of demonstrated clean mining operations in other jurisdictions, and called for rules allowing mining "[o]nly when technology, demonstrated over time, can be shown to have the capabilities to remove the mineralization of Minnesota without adverse [e]ffects on the clean water and to the benefit of Minnesotans." (R. 214).

And the environmental commenters made the following prophetic observation:

> [i]n actuality, these are not rules but guidelines to be interpreted and manipulated to allow nonferrous mining to happen in Minnesota regardless of the long-term consequences. Rules give definitive guidance. These rules, as such, will only provide for continu[ed] confrontation and bitterness.

(R. 328). Although not satisfied with the rules, the environmental commenters relied on the public participation provisions DNR adopted as part of Chapter 6132, which included the right to request a contested-case hearing, to protect their interests.[8] (R. 575); *see also* Minn. R. 6132.4000.

Industry commenters expressed mixed views regarding the need for performance standards. The Minnesota Exploration Association noted that "[t]he lack of specificity" in the rules "could create problems" and therefore it:

[8] But in 2017, mining interests persuaded the Legislature to adopt statutory impediments restricting the public's right to participate in the permitting process through contested-case hearings. Minn. Laws 2017, ch. 93, § 57 (codified at Minn. Stat. § 93.483). DNR did not oppose the legislation. Petitioners and others challenge these limitations and DNR's application of them in Minnesota Court of Appeals Case Nos. A18-1952, A18-1958, A18-1959, consolidated with A18-1953, A18-1960, A18-1961.

> suggested places in the text where this could be appropriately modified by imposing a specific requirement to meet state and federal water- and air-quality standards, as these represent a definite yardstick. This would more closely define goals or performance criteria, but would not constitute design standards which both [DNR] and [Minnesota Exploration Association] feel are inappropriate.

(R. 186). Similarly, industry commenters complained that the rules were "undefined, vague and appear[ed] to lack statutory authorization." (R. 762 (testimony of Douglas Schrader, Iron Mining Association, complaining about the definition of "reactive mine waste" and the "Scope" section statement that "permittee [must] possess adequate capital and provide financial and operational decision making necessary to conduct the mining operation.")).

In general, however, industry commenters supported more flexibility in the rules governing operation, closure and reclamation, and favored allowing DNR to use its discretion in regulation of mines, supporting standards "specific enough to know what is required but not so specific that DNR is designing the mining operation." (R. 321). Industry commenters argued that DNR should disregard requests for more specific numerical requirements for several reasons, starting with DNR liability if specific numerical conditions caused a failure, but also because industry needed flexibility. (R. 321-22). In particular, industry and industry supporters argued that design and operational standards resulted in poor environmental protection at excessive cost, and preferred a system that would "allow[] judgment to be brought to bear by the authorities." (R. 935).

V. The Administrative Law Judge Concluded No Statute Required DNR To Establish Specific Standards For Mining.

Following the rulemaking hearings, the Administrative Law Judge ("ALJ") filed her report. This report addressed the issue—which MPCA and numerous commenters raised—that the rules lacked specific performance standards that would aid in DNR's rule enforcement. R. 8821-22. The ALJ agreed that "[t]he proposed rules do not set performance standards for mining operations." (R. 8821). The ALJ stated:

> the rules require that mining operations minimize adverse impacts on the environment. This approach is supported by the mining industry and Dr. Lewis Wade, Research Director of the Bureau of Mines, U.S. Department of the Interior. They maintain that outcome-based regulation allows site-specific tailoring of waste containment and treatment, thereby lessening costs. The [MPCA] and some interested groups opposed outcome-based regulation. They assert that, absent specific performance standards, mining operations will be designed to the least cost alternative, without regard to environmental impact.
>
> The statute authorizing these rules do[es] not require specific standards for the conduct of mining operations.

(R. 8821-22 (emphasis added)). The ALJ later noted that the rules "do set some specific standards in particular areas (e.g. siting, vegetation, and blasting), however, the bulk of these rules only establish performance criteria[9] to be applied in the various stages of mining under a permit to mine." (R. 8827). The ALJ concluded that "DNR ha[d] demonstrated that, overall, its performance criteria are needed and reasonable to minimize the adverse environmental impact arising from mining operations by arriving at specific standards which will vary from site to site." (*Id.*)

[9] The ALJ apparently distinguished "performance criteria" from "performance standards."

ARGUMENT

The purpose of rulemaking:

> is to ensure that we have a government of law and not of men. . . . [A]dministrative officials are not permitted to act on mere whim, nor their own impulse, however well-intention[ed] they might be, but must follow due process in their official acts and in the promulgation of rules defining their operations.

In re Appeal of Jongquist, 460 N.W.2d 915, 917 (Minn. App. 1990) (quoting *Monk & Excelsior, Inc. v. Minn. State Bd. of Health*, 225 N.W.2d 821, 825 (Minn. 1975)). Although likely "well-intentioned," Chapter 6132 fails to include standards and procedures—mandated by the DNR's enabling authority—that are necessary for the Commissioner to determine areas that "cannot be reclaimed with existing techniques to satisfy the rules" or that there is "available technology to satisfy the rules so promulgated" before issuing a permit to mine. Minn. Stat. § 93.47, subd. 3. The lack of standards in Chapter 6132 also means the rules fail "to implement or make specific the law enforced or administered by [the] agency" as defined in Minn. Stat. § 14.02, subd. 4. Further, Chapter 6132 is otherwise so vague that it fails to provide due process. Neither a party affected by these rules—nor this Court—can determine what is required or prohibited by Chapter 6132, and DNR enjoys unlimited discretion.

I. Standard of Review

Petitioners challenge Chapter 6132's validity pursuant to Minn. Stat. § 14.44, which provides:

> The validity of any rule may be determined upon the petition for a declaratory judgment thereon, addressed to the court of appeals, 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. Minnesota Statutes § 14.45 defines this Court's scope of review when it exercises original jurisdiction in a pre-enforcement challenge. A rule is invalid when it "violates constitutional provisions or exceeds the statutory authority of the agency. . . ." In a pre-enforcement challenge to a rule's general validity, this Court reviews the rule based on the agency's rulemaking record. *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 241 (Minn. 1984).

In a declaratory judgment action, appellate courts "apply the de novo standard of review to the question of whether the [agency] has exceeded its statutory authority" and "resolve any doubt about the existence of an agency's authority against the exercise of such authority." *In re Minn. Power for Authority to Increase Rate for Elec. Serv.*, 838 N.W.2d 747, 753 (Minn. 2003); *1A Smart Start, Inc. v. Minn. Dep't of Pub. Safety*, No. A18-0040, 2018 WL 3966396, at *2 (Minn. App. Aug. 20, 2018), *review denied* (Nov. 13, 2018) (declaratory judgment challenge to rules citing *In re Minnesota Power*). If the Court finds that a rule conflicts with the express purpose of the statute it administers and the intention of the legislature, this Court does not afford the agency's interpretation deference. *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988). And this Court does not defer to agency interpretation when "confronted with the threshold question of whether the legislature has granted an agency the authority to take the action at issue." *In re Hubbard*, 778 N.W.2d 313, 318 n.4 (Minn. 2010).

Similarly, this Court reviews de novo questions regarding a rule's constitutionality. *Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (Minn. App. 2001).

Where a declaratory judgment challenges the agency's basis and support for a rule, the standard of review for a declaratory judgement action is the arbitrary and capricious standard. *Petterson*, 347 N.W.2d at 244. But the Supreme Court has cautioned that:

> in determining if the agency acted arbitrarily and capriciously the court must make a "searching and careful" inquiry of the record to ensure that the agency action has a rational basis. Further, the agency must explain on what evidence it is relying and how that evidence connects rationally with the agency's choice of action to be taken.

Id. (citations omitted). If an agency provides "no 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," the Court will find the rule deficient. *Id.* at 246.

II. Chapter 6132 Does Not Comply With Statutory Requirements Or Constitutional Standards.

If a rule does not conform to requirements of the authority enabling its adoption, this Court may invalidate the rule under Minn. Stat. § 14.45. Chapter 6132 does not contain standards mandated by DNR's enabling authority and is therefore invalid. Similarly, this Court may invalidate a rule under Minn. Stat. § 14.45 if it is unconstitutional. Chapter 6132 is "void for vagueness" under constitutional principles.

A. The Legislature mandated reclamation standards.

In 1973, when the Legislature prohibited mining without a permit issued by DNR, the Legislature also adopted new standards for rules governing mining operations and

related permitting. Minn. Stat. § 93.47, subd. 3. The Legislature required DNR to promulgate rules that:

> substantially comply with or exceed any minimum mine land reclamation requirements which may be established pursuant to a federal mine land reclamation act. The rules so promulgated also shall conform with any state and local land use planning program; provided further the commissioner shall 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 the [C]ommissioner will not issue permits to mine such areas until the [C]ommissioner determines technology is available *to satisfy the rules* so promulgated.

Id. (emphasis added). DNR's enabling authority requires DNR to establish standards in *rules* so the Commissioner can determine whether proposed reclamation is able to "*satisfy the rules*" with "*available* technology" and "*existing* techniques," not technology or techniques that might be developed in the future.[10] *See id.*; Minn. Stat. § 93.481, subd. 2. Because of this statutory requirement, the ALJ erred in her conclusion that a statute did "not require specific standards for the conduct of mining operations" because Minn. Stat. § 93.47, subd. 3 does mandate such specific standards (whether "performance standards" or "prescriptive standards"). Without clear standards in the rules, the statutory requirement for the Commissioner to determine that existing technology will "satisfy the rules" has no meaning because there would be no metric against which existing or available techniques or technology are adequate.[11] Nothing in Minn. Stat. ch. 93

[10] DNR anticipated that the federal mine land reclamation requirements would include the requirement that "adequately demonstrated technology exists to reclaim the surface area." (R. 4522).

[11] As described *infra* Part III, Petitioners argue that when DNR adopted Chapter 6132 it failed to include "procedures" mandated by Minn. Stat. § 93.47, subd. 3 for the Commissioner to use to determine if a permittee could meet reclamation standards using existing techniques.

authorizes DNR to issue a permit to mine based on guidelines, hearings, or the Commissioner's discretion. Section 93.47, subdivision 3 requires formal rules.[12]

As described *infra* Parts II.D and II.E, DNR failed to include enforceable standards in Chapter 6132. As a result, this Court should conclude DNR failed to conform to statutory requirements when DNR adopted Chapter 6132.

B. All rules must contain standards sufficiently definite for enforcement.

To survive a vagueness challenge, statutes and rules must meet the definiteness standard under the United States and Minnesota Constitutions' due process clauses. *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 107 (Minn. App. 1991). To adopt a vague rule is to invite the arbitrary exercise of power. S*essions v. Dimaya*, __ U.S. __, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring in part) ("Vague laws invite arbitrary power."). Where a rule fails to set forth standards that govern an agency's discretion, arbitrary enforcement is possible and the rule should not be allowed. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

A rule is void for vagueness "if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement." *In re Charges of Unprof'l Conduct Against N.P.* ("*In re N.P.*"), 361 N.W.2d 386, 394 (Minn. 1985). Rules are unconstitutionally vague if their " 'terms are so uncertain and indefinite that after exhausting all rules of construction it is impossible to ascertain legislative intent.' " *Id.* at 394 (quoting *Getter v. Travel Lodge*, 260 N.W.2d 177, 180 (Minn. 1977)). Further, if the agency cannot "explain on what evidence it is

[12] See *infra* Part III.B.

relying and how that evidence connects rationally to the rule involved," the rule must be invalidated. *Minn. Chamber of Commerce*, 469 N.W.2d at 103.

A rule that is subject to "open ended interpretation" (such as a rule that prohibits "excessive" conduct) is constitutionally questionable; a rule that provides a numeric standard (a percentage based on weight) will likely survive challenge. *Compare Timpinaro v. S.E.C.*, 2 F.3d 453, 460 (D.C. Cir. 1993) (remanding a rule to the S.E.C. where the rule was "subject to seemingly open-ended interpretation"), *and Standard Chems. and Metals Corp. v. Waugh Chem. Corp.*, 131 N.E. 566, 567 (N.Y. 1921) (rule prohibiting "unreasonable" rates voided), *with Magic Valley Potato Shippers, Inc. v. Sec'y of Agric.*, 702 F.2d 840, 841 (9th Cir. 1983) (holding a regulation "for grading potatoes [to be] clear" where numeric standard applied). Where a rule intending a flexible approach sets out factors to guide interpretation and describes how an agency will interpret and apply each factor, including examples, courts uphold the rule – particularly where the rule provides an "advisory opinion" procedure. *U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 736-38 (D.C. Cir. 2016).

The Office of Administrative Hearings ("OAH") must review proposed rules and determine whether they meet procedural, statutory, and constitutional standards. *See* Minn. Stat. §§ 14.01-.69. This Court has taken note of OAH administrative decisions in its opinions. *See, e.g.*, *Jacka v. Coca-Cola Bottling Co.*, 580 N.W.2d 27, 36 (Minn. 1998) (considering an Administrative Law Judge's conclusion in a rules challenge). On numerous occasions, OAH has refused to approve rules that relied on unenforceable or vague terms and phrases.

In 2018, OAH would not approve a rule that allowed the Commissioner of Agriculture to determine whether a point source is a "significant source of nitrate-nitrogen contamination" because it lacked methods and standards and because it used the vague word "significant." Report of Administrative Law Judge at 40-41, 44, *Proposed Rules of the Dep't of Agric. Governing Groundwater Protection* (Office of Admin. Hearings Sept. 21, 2018) (No. OAH 71-9024-35205), 2018 WL 5298608, at *29-30, 32 [hereinafter "Groundwater Rule Decision"].

In a 2015 rulemaking governing approval of local water management plans, OAH determined that the use of "to include" (as opposed to "must include") was too vague because it was not clear whether the listed elements were required or discretionary. Order on Review of Rules at 3, *Proposed Rules of the Bd. of Water and Soil Res. Governing Metro. Area Local Water Mgmt.* (Office of Admin. Hearings Apr. 21, 2015), (No. OAH 5-3300-23081), 2015 WL 3372505, at *2. OAH also deemed the rule impermissibly vague because it used the phrases "similar issues," *id.* at 3-4, 2015 WL 3372505, at *2, and "reasonable time period," *id.* at 5 2015 WL 3372505, at *4.

In a 2014 rulemaking involving waste composting site regulation, OAH concluded that a rule allowing a site to accept additional types of compostable materials "after review by the Commissioner" was too vague because it failed set forth any criteria to guide the Commissioner's review or approval. Report of Administrative Law Judge at 55-56, *Proposed Rules of the Minn. Pollution Control Agency Governing Compost Facilities* (Office of Admin. Hearings June 16, 2014) (No. OAH 11-2200-31142), 2014 WL 3697669, at *44 [hereinafter "Compost Rule Decision"]. OAH also determined that

the phrase "the Commissioner may approve an exception" was impermissibly vague. *Id.* at 68-69, 2014 WL 3697669, at *55.

In 2006, OAH rejected the phrase "subject to approval by the [C]ommissioner" as too vague in rules governing environmental laboratories. Order on Review of Rules, *Adopted Rules of the Minn. Dep't of Health Governing Accreditation of Envtl. Labs.* (Office of Admin. Hearings Aug. 4, 2006) (No. OAH 11-0900-17002-1), 2006 WL 3488792, at *4, 6. In the same year, OAH concluded that a rule allowing an agency director to determine prevailing wages was impermissibly vague and indefinite despite the fact that the rule identified "factors" the agency director must consider. Report of Administrative Law Judge, *Proposed Amendments to Rules Governing Apprenticeship Wages* (Office of Admin. Hearings, Apr. 21, 2006) (No. OAH 7-1900-17022-1), 2006 WL 1412827, at *22.

As OAH's decisions demonstrate, phrases such as "subject to the approval of the Commissioner," broad terms such as "significant" or "similar," or open-ended phrases such as "include," will not pass scrutiny for proposed rules being adopted under modern standards of administrative law.[13] As set forth below, Chapter 6132 is replete with such open-ended phrases and overbroad terms.

[13] Some existing Minnesota rules, particularly those adopted in the 1970s and 1980s, may be defective under modern administrative law standards despite OAH approval. The fact that other defective rules exist does not undermine Petitioners' challenge.

C. Chapter 6132 lacks standards, uses vague terms, and allows the Commissioner unfettered discretion.

Although certain rules in Chapter 6132 establish some enforceable standards – as noted by the ALJ, (R. 8827)[14] – many provisions in Chapter 6132 establish no enforceable standards whatsoever and employ vague terms and phrases, including "approved by the Commissioner."[15] As a result, the Court should invalidate Chapter 6132.

1. The rule applicable to "buffers" is unconstitutionally vague.

Minnesota Rules 6132.2100, subpart 2(A)-(B) requires "buffers" (a term which is undefined) to be "constructed" before a mining company commences operations, but otherwise provides only that "[e]xisting terrain and vegetation, or revegetated berms, must be used to diminish impacts of mining activities." *Id.* at subp. 2(A). The word "diminish" cannot be enforced, as it cannot be measured in any meaningful way. The buffer rule establishes no minimum size or setback requirements. The rule only serves to *allow* "buffers" to be located within 500 feet of an occupied dwelling, public school, church public institution, or county or municipal park and within 100 feet of a cemetery

[14] But even these rules suffer from loopholes. For example, Minn. R. 6132.2300, subp. 2(A) includes specific and enforceable standards for slopes of benches and lifts. But Minn. R. 6132.2300, subp. 2(B) allows the Commissioner to "approve other measures that satisfy subpart 1" based on "acceptable research," which is defined as research "approved by the [C]ommissioner," Minn. R. 6132.0100, subp. 2.

[15] The Chapter 6132 uses the phrase "approved by the [C]ommissioner" over fifteen times. *See* Minn. R. 6132.0100, subp. 2; Minn. R. 6132.0100, subp. 30; Minn. R. 6132.100, subp. 2; Minn. R. 6132.1100, subp. 7; Minn. R. 6132.1200, subp. 4 (multiple references); Minn. R. 6132.1200, subp. 5; Minn. R. 6132.1300, subp. 6; Minn. R. 6132.1300, subp. 4; Minn. R. 6132.2800, subp. 2; Minn. R. 6132.3200, subp. 2(E) (multiple references).

or various roadways, and does not restrict them. Minn. R. 6132.2100, subp. 2(B). The type, size, and location of a buffer is left purely to DNR's discretion.

2. The rule governing "subsidence" is unconstitutionally vague.

Minnesota Rules 6132.3000 governs "subsidence." Chapter 6132 does not define "subsidence." Further, rather than specify actions to prevent "subsidence," the rule simply states that "[m]ining techniques shall be used that minimize subsidence to the extent practicable." Minn. R. 6132.3000, subp. 2(A). Neither "minimize" nor "to the extent practicable" can be enforced: these terms are too vague. The rule entirely fails to specify any "mining techniques." And DNR has sole discretion over a mining techniques' adequacy.

3. The rule governing "dust suppression" is unconstitutionally vague.

Minnesota Rules 6132.2800 governs dust suppression and pronounces that "[d]ust shall be controlled by techniques approved by the [C]ommissioner . . . ." Minn. R. 6132.2800, subp. 2. Although the rule lists various techniques for controlling dust, the rule entirely fails to establish a standard that would allow a party to determine if the dust control is adequate, i.e., "no visible emissions beyond the property boundary" or "no avoidable emissions." *See, e.g.*, Minn. R. 7011.0150.

4. Chapter 6132 contains numerous unconstitutionally vague definitions.

Similarly, Chapter 6132 contains definitions, such as "[a]cceptable research," Minn. R. 6132.0100, subp. 2, "[a]dversely impact natural resources," *id.*, subp. 3, and "[m]inimize to the extent practicable," *id.*, subp. 17, that are void for vagueness because they use phrases such as "approved by the [C]ommissioner" or "as determined by the

[C]ommissioner." A definition that turns on the discretion of the Commissioner cannot be construed by affected parties or the courts and such definitions grant DNR excessive and unfettered discretion. Due to the lack of any standards—prescriptive or performance—in these key definitions or the rules they apply to, this Court should invalidate Chapter 6132.

D. Key rules governing reactive mine waste storage and closure of storage facilities are vague.

DNR included the defective rules discussed above in Chapter 6132 because DNR sought to protect natural resources. But because a nonferrous mine has the potential to produce reactive mine waste, and reactive mine waste makes nonferrous mining different from mining minerals (such as sand or gravel) which generally do not produce substances that cause pollution, Chapter 6132's key provisions establish the requirements for reactive mine waste storage and facility closure. Unfortunately, these key rules also contain vague provisions that "fail to provide sufficient standards for enforcement," particularly when the rules are interpreted together, as Minnesota law requires. *Van Asperen v. Darling Olds, Inc.*, 93 N.W.2d 690, 698 (Minn. 1958) (various provisions of the same statute must be interpreted in the light of each other).

1. The "closure rule" fails due to unfettered discretion.

Minnesota Rules 6132.3200 ("closure rule") governs mine closure, and provides various deadlines for controlling access and removing debris. As defined, " '[c]losure' means the process of terminating and completing final steps in reclaiming any specific portion of a mining operation. Closure begins when, as prescribed in the permit to mine,

there will be no renewed use or activity by the permittee." Minn. R. 6132.0100, subp. 6.[16] The closure rule requires "[w]ithin three years after the start of the closure of basins constructed for the purpose of mining or processing, *or within a longer period if approved by the [C]ommissioner*, the permittee shall provide for drainage of the basins and reintegrate the area into the natural watershed." Minn. R. 6132.3200, subp. 2(E)(5) (emphasis added). The use of the phrase "if approved by the [C]ommissioner" allows unfettered discretion.[17] OAH has specifically disapproved use of similar phrases for that reason. Compost Rule Decision at 55-56, 68-69, 2014 WL 3697669, at *44, 55.

Because the closure rule gives the Commissioner unlimited discretion, the Court must find that the closure rule is fatally vague.

[16] The "closure" definition is vague because it allows DNR to set the date closure begins "in the permit to mine" rather than simply referencing the time when "there will be no renewed use or activity by the permittee." *See* Minn. R. 6132.0100, subp. 6. If the Commissioner fails to define a firm time for closure in the permit to mine, the definition becomes unenforceable. A permittee could argue that, even if the permittee ceased using a mine site or conducting "activity" at the mine site, the permittee has no obligation to begin closure because such cessation of use or must be "prescribed in the permit to mine." A definition that depends on a permit term is circular and impossible to enforce on its own terms.

[17] The SONAR says nothing about the *need* for such open-ended authority. The SONAR merely states that:

> Three years is also the allowable period to integrate basins back into the existing watershed. This has proven to be reasonable with the closure of other mine areas in Minnesota, since it often takes a season or two of experience, after the original contouring of a site, in order to fine tune the various water control structures that may be necessary.

(R. 1320). But if more time is needed, the rule should require a permittee to seek a variance as allowed by statute, Minn. Stat. § 93.48, and rule, Minn. R. 6132.4100.

2. The "reactive mine waste rule" fails to establish enforceable standards due to overbroad terms and grants of unfettered discretion.

Minnesota Rules 6132.2200 (the "reactive mine waste rule"), establishes two standards for designing a facility that stores reactive waste. The design must either:

> (1) modify the physical or chemical characteristics of the mine waste, or store it in an environment, such that the waste is no longer reactive; or
>
> (2) during construction to the extent practicable, and at closure, permanently prevent substantially all water from moving through or over the mine waste and provide for the collection and disposal of any remaining residual waters that drain from the mine waste in compliance with federal and state standards.

Minn. R. 6132.2200, subp. 2(B). After describing what a permittee must include in a facility design, the reactive mine waste rule further provides that "[t]he [C]ommissioner may allow variance from specific reclamation requirements of parts 6132.2100 and 6132.2300 to 6132.2700 if their use would inhibit designs necessary to meet the requirements of this part." Minn. R. 6132.2200, subp. 2(D).

Minnesota Rules 6132.2200, subpart 2(B)(1) is vague because it is unclear how it would be applied at closure. The impermissibly-vague closure rule and the "reactive mine waste" rule, Minn. R. 6132.2200, must be read together, as the reactive mine waste rule applies to all mine phases, including reclamation, and because it references closure.[18] Do the rules allow DNR to allow a neutralization basin to exist in perpetuity, or must a permittee drain such a basin in three years? Or is such a decision simply subject to the unfettered discretion of the Commissioner?

[18] Commenters understood that the reactive mine waste storage conditions would apply at closure. (R. 191).

Minnesota Rules 6132.2200, subpart 2(B)(2) is fatally vague because it uses the phrase "prevent *substantially* all water from moving through or over the mine waste." (Emphasis added). The word "substantially" fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and is unenforceable, as one could only guess whether fifty-one percent, ninety-nine percent, or all points in between, constituted "substantially all water."[19] OAH has disallowed similar words, such as "significant," as excessively vague. Groundwater Rule Decision at 40-41, 44, 2018 WL 5298608, at *29-30, 32.

The reactive waste rule is also fatally vague because Minn. R. 6132.2200, subp. 2(D) uses the phrase "the [C]ommissioner may allow variance" from the specific requirements found in other parts of the rules "if their use would inhibit designs necessary to meet the requirements of this part." This subdivision creates a loophole allowing DNR and the permittee *carte blanche* to elude standards that otherwise would have been applicable (assuming such standards exist), similar to "if approved by the [C]ommissioner."[20] The SONAR confirms this was DNR's intention, stating:

> This section recognizes that there may be parts of these proposed rules, that if implemented at a particular reactive mine waste facility, may not be completely compatible with the design. This rule merely states that, if this were the case, the design rather than the incompatible rule shall be given precedence.

[19] MPCA's rules governing landfills provide examples of enforceable performance and prescriptive standards governing permeability. *See* Minn. R. 7035.2815, subp. 7.

[20] DNR may argue the phrase "allow variance" refers to the procedure which allows a permittee to seek a variance under Minn. R. 6132.4100 rather than the phrase bestowing unfettered discretion upon DNR. But to avoid unfettered discretion, this rule should have stated that "a permittee may seek a variance as provided by Minn. R. 6132.4100." As it did not, this Court must apply the plain language.

(R. 1310). But allowing a "design" to override all other reclamation standards renders Chapter 6132 unenforceable.[21] The Commissioner can simply allow the mining company to violate the rules by approving a nonconforming design, and no party (neither an affected party nor this Court) can say otherwise. For these reasons, the reactive mine waste rule is fatally defective.

Because key reclamation standards cannot be applied or enforced, Chapter 6132 must be declared void for vagueness and invalid.

III. Chapter 6132 Fails To Include "Procedures" Mandated By Statute.

The Legislature required DNR to adopt new rules before issuing permits for nonferrous mining. Minn. Stat. § 93.481, subd. 6. In 1983, when the Legislature enacted this requirement, DNR and others did not fully understand the impacts of nonferrous mining and how those impacts might be controlled. (R. 6768-920, 8026-438).

In DNR's rulemaking authority, the Legislature mandated that the Commissioner "shall *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." Minn. Stat. § 93.47, subd. 3 (emphasis added). The Legislature's mandate that DNR include "procedures" in the rules elevated DNR's decision as to whether reclamation could meet the standards using "existing techniques" to an issue that must be specifically addressed in the rules governing the permitting process. In this context, a "procedure" is best defined as "a series of steps following in a regulare definite order." *Procedure*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/

[21] And it is not necessary where the rules provide for a variance. Minn. R. 6132.4100.

procedure (last visited Feb. 26, 2019). But Chapter 6132 lacks the mandated procedure allowing the Commissioner to determine whether reclamation at a particular mine can occur using existing techniques. When coupled with Chapter 6132's lack of standards against which the existing techniques can be judged, Chapter 6132 is doubly-deficient and should be voided by this Court under Minn. Stat. § 14.45.

A. Chapter 6132 fails to include a procedure for determining whether existing techniques will meet reclamation standards for a particular mine.

The only provision in Chapter 6132 that touches on the issue of using existing techniques to meet reclamation standards is the definition of "minimize to the extent practicable."[22] Minn. R. 6132.0100, subp. 17. DNR may argue that this definition establishes the "procedure" for the Commissioner to determine whether, for a particular mine, a mining company can accomplish reclamation using an existing technique. This argument fails because the definition neither establishes the mandated standard nor procedure, and because Chapter 6132 *does not use the definition* in a manner that would meet the "procedure" requirement.[23]

The definition "minimize to the extent practicable" does not limit the Commissioner to approving "existing techniques" in applying the "technologies and practices" requirement. *See* Minn. R. 6132.0100, subp. 17. Instead, the phrase more broadly requires "technologies and practices *including* methods, specifications, guidelines, standards developed for and commonly used in mining or reasonably similar

[22] The Minnesota Rulemaking Manual advises against using definitions in this manner. *Minnesota Rulemaking Manual* 30 (Patricia Winget ed., 23rd ed. 2018), *available at* https://www.health.state.mn.us/data/rules/manual/docs/2018manual.pdf.

[23] In fact, as noted below, it doesn't use the term at all.

activities" that "minimize" something unspecified.[24] *Id.* (emphasis added). The word "including" removes any limitation on the Commissioner to use commonly-used methods or specifications, even if that was DNR's intent.[25]

Further, the definition fails to establish a *procedure* to assess "existing technology" for a particular mine or to prohibit siting mines in areas that can't be reclaimed with "existing technology" to meet the rule's standards. Instead, the rule simply indicates that "[t]hese technologies and practices shall be determined by the [C]ommissioner" based on a host of factors. *See* Minn. R. 6132.0100, subp. 17. Although DNR recognized in the SONAR that the Commissioner's approval of a particular mining practice was key "since the selection of the practices, in effect, has the same force and effect as rule" (R. 1293), DNR included nothing in Chapter 6132's operative sections that would *require* the Commissioner to gather the particular information on whether a mining reclamation technique "exist[s]" and to make particular findings for each aspect of reclamation.[26] Including "factors" for the Commissioner to consider absent clear procedure and without standards will not avoid excessive discretion.

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[24] The transitive verb "minimize" requires an object. Likely DNR intended the word "minimize" to modify "impacts on natural resources" but the rule failed to include the necessary object in the definition.

[25] The rule's placement of the comma after the phrase "including methods" makes it clear that the phrase "developed for and commonly used" was not intended to limit the more general phrase "application of technologies and practices" but was instead intended simply to provide examples of such "technologies and practices."

[26] The fact Minn. R. 6132.1100, subp. 6 indicates that a reclamation plan needs to "address the goals and meet the requirements of part 6132.2000 to 6132.3200" does not create a "procedure" whereby the Commissioner will determine that "existing techniques" will meet the standards. Neither the rule nor the SONAR describe how the Commissioner will use this information. The SONAR states only that the information is

Finally, DNR's intent in defining the term "minimize to the extent practicable" is irrelevant, because after defining the term *Chapter 6132 never uses the term again*. The chapter uses a similar phrase in the "purpose and policy" section, stating that DNR's "policy" requires "that mining be conducted in a manner that will reduce impacts to the extent practicable." Minn. R. 6132.0200. But a "policy" cannot replace a "procedure," nor can DNR enforce a "policy" because a "policy" is nonbinding.[27] *See Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (a policy "genuinely leaves the agency and its decisionmakers free to exercise discretion"); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 (D.C. Cir. 1986) (even when referenced in a rule, "[a] general statement of policy . . . does not establish a 'binding norm' " (quoting *Pacific Gas & Electric Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974))).

The rule's "siting" section, Minn. R. 6132.2000, uses the phrase "to the extent practicable" to describe how a mining operation "shall be sited" to "minimize[]" various impacts on natural resources. But these determinations are not related to the Commissioner's duty to develop "procedures that will *identify* areas or types of areas which, if mined, *cannot* be reclaimed with existing techniques to satisfy the rules" as the Legislature required. Minn. Stat. § 93.47, subd. 3 (emphasis added). Further, the siting rule's "goals" section, Minn. R. 6132.2000, subp. 1, does not mention a goal to ensure

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required "[i]n order that the commissioner have a clear understanding of the rationale behind the selection of each reclamation procedure or techniques." (R. 1300).

[27] And this "policy" fails to reflect that the Legislature mandated that DNR find that the "reclamation or restoration . . . complies with lawful requirements and can be accomplished under available technology and that a proposed reclamation or restoration technique is practical and workable under available technology" before issuing a permit to mine. Minn. Stat. § 93.481, subd. 2.

sites must be able to be reclaimed using "existing techniques to satisfy the rules." *See* Minn. R. 6132.2000, subp. 1.

Chapter 6132 also does prohibit mining in a list of areas where *other authorities* prohibit mining. Minn. R. 6132.2000, subp. 2. In justifying prohibiting mining in already-prohibited areas, the SONAR claimed that "the reclamation act directs the [C]ommissioner to identify areas or types of areas which cannot be satisfactorily reclaimed under the rules, and further, prohibits the [C]ommissioner from issuing permits to mine such unreclaimable areas." (R. 1306). But this interpretation ignores the Legislative direction that the Commissioner "shall develop *procedures that will identify areas* or types of areas which, if mined, cannot be reclaimed with *existing techniques* to satisfy the rules." Minn. Stat. § 93.47, subd. 3 (emphasis added). Prohibiting mining in areas where the law already prohibits mining does not address whether "existing techniques" will be adequate.

The "subsidence" section includes the final instance where Chapter 6132 references a "minimize to the extent practicable" variant. Minn. R. 6132.3000. This rule simply states that "[m]ining techniques shall be used that minimize subsidence to the extent practicable." Minn. R. 6132.3000, subp. 2(A). While this rule come closest to referencing the defined phrase, the defined phrase fails to establish any mandate for the Commissioner to determine that a mining company can use "existing" techniques to control subsidence, or a procedure for doing so, and the rule establishes no standard against which the techniques can be measured.

B. A permit does not substitute for a "procedure" required to be in rule, nor mandated standards.

DNR may argue that the very fact that Chapter 6132 and applicable law requires DNR to issue a permit constitutes a "procedure" for the Commissioner to determine "areas or types of areas which, if mined, cannot be reclaimed with existing techniques to satisfy the rules," and thus Chapter 6132 complies with its enabling authority. This argument lacks merit.

First, if the Legislature only wanted DNR to issue a permit, the Legislature would not have adopted a separate statutory section specifically dealing with rules that required DNR to adopt such procedures.[28] The Legislature already requires DNR to ensure that "available" technology exists before DNR issues the permit. *See* Minn. Stat. § 93.481, subd. 2. If permit issuance constitutes a "procedure," there would have been no need for the Legislature to include, in the section on rulemaking, the requirement to include a "procedure" for the Commissioner to identify areas that cannot be reclaimed with existing techniques. Courts must presume that the Legislature intends that "[e]very law shall be construed . . . to give effect to all its provisions." Minn. Stat. § 645.16; *Staab v.*

[28] DNR could have designed a compliant procedure. Assuming *arguendo* that Chapter 6132 also established "standards" that are reasonably clear and capable of enforcement, a "procedure" could include a requirement during the pre-application process for the applicant to identify the techniques that it will use to meet each reclamation standard, along with evidence that the identified techniques "exist[]" and are "available" based on other existing mining operations or definitive research, and to submit its proof to the Commissioner. On this record, the Commissioner would review and approve the specified techniques if they are "existing" and "available" and have been shown to be capable of meeting the applicable standards, and reject any specified techniques that have not been demonstrated or that are still experimental or that have not been shown to meet the applicable standards. Techniques that are subject to testing and research would need to be rejected.

Diocese of St. Cloud, 853 N.W.2d 713, 716 (Minn. 2014); *S. Minn. Const. Co. v. Minn. Dep't of Transp.*, 637 N.W.2d 339, 343 (Minn. App. 2002). Further, the mere fact that DNR must issue a permit does not guarantee that the Commissioner will perform the necessary assessment.

Second, this Court prohibits agencies from using case-by-case adjudication, rather than adopting rules, where the matter involves important social and political policy questions. In *In re Hibbing Taconite Co.*, 431 N.W.2d at 894, this Court prohibited MPCA from naming parent corporations as permittees without a rule. In *In re Appeal of Jongquist*, 460 N.W.2d at 917, this Court prohibited a case-by-case approach governing resource allocation to the disabled. DNR does not proceed by contested case dockets and orders as does, for example, the Minnesota Public Utilities Commission ("PUC"). *See Matter of Investigation into Intra-LATA Equal Access & Presubscription*, 532 N.W.2d 583, 590 (Minn. App. 1995) (PUC appropriately decided long-distance service issues through contested case dockets rather than rules). The Legislature required DNR to adopt rules, Minn. Stat. § 93.47, subd. 3, and rules are appropriate.[29]

DNR cannot rely on *Minnesota Chamber of Commerce*, 469 N.W.2d at 105, to argue that its vague rules are somehow fixed by the fact that DNR will issue a permit. There, this Court upheld MPCA's water toxics standards rule because it would be applied through permits. *Id.* This Court noted that the rule included a specific equation that MPCA would use as the basis of future permit conditions. *Id.* The Court upheld this equation as a valid rule based on the unique challenges of developing standards for the

[29] The Legislature has similarly required MPCA to adopt rules to govern complex environmental facilities such as landfills. *See* Minn. Stat. § 116.07, subds. 2, 4.

myriad of toxic substances that might require permit limits and because aggrieved parties could challenge MPCA's application of this equation in a permit in a contested-case hearing.[30] *Id.* This Court has declined to extend this decision. *See U.S. Steel Corp. v. Minn. Pollution Control Agency*, No. A14-1789, 2015 WL 4508104, at *5 (Minn. App. July 27, 2015) (rejecting MPCA's reliance on *Minnesota Chamber of Commerce* to support a new modeling policy implemented through permits); *see also Dullard v. Minn. Dep't of Human Servs.*, 529 N.W.2d 438, 446 (Minn. App. 1995) (broad social importance of determining assets of institutionalized person required rules).

Chapter 6132 lacks any clear standards or procedures—let alone clear equations—that would ground permit conditions. How DNR decides that a mine will meet reclamation standards on the basis of existing techniques or available technology is a matter of important social and political policy. If DNR allows a mine to begin without clear standards and without information adequate to conclude that the proposed reclamation will meet those standards, the public may be harmed by environmental degradation. As a result, DNR cannot properly decide the question permit to permit, without a basis in rule.

IV. This Declaratory Judgment Action Is Not Barred By A Statute Of Limitation Or Equitable Principles.

Petitioners brought this action promptly and timely upon determining that DNR's Chapter 6132 application "threaten[ed] to interfere with or impair the rights or privileges

[30] But here, in 2017, the Legislature attempted to eliminate the public's right to a contested-case hearing at which permit conditions could be challenged. *See* Minn. Stat. § 93.483.

of the petitioner[s]" as Minn. Stat. § 14.44 requires, i.e., shortly after DNR issued the first permit under Chapter 6132. Minnesota Statutes § 14.44's "plain language" includes no "statute of limitation," nor has this Court interpreted the law to find one. *See Fryberger v. Twp. of Fredenberg*, 428 N.W.2d 601, 605 (Minn. App. 1988) (noting it found "no Minnesota case in which the timeliness of review under . . . section 14.44 [of] the Administrative Procedure Act[] was at issue.") This Court has not prohibited other parties from challenging rules long after adoption so long as the application threatened the parties' rights. *See Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, No. A12-0950, 2012 WL 6554544, at *6 (Minn. App. Dec. 17, 2012) (Court declined to hear a challenge to a rule adopted in 1973, not because of a "statute of limitations," but because the petitioners failed to show more than a "mere possibility of an injury," i.e., the case lacked the required threatened application, among other bases). *See also Minnesota Educ. Ass'n v. Minnesota State Bd. of Educ.*, 499 N.W.2d 846, 848 (Minn. App. 1993) (proposed interpretation was not a threatened application). Because Minn. Stat. § 14.44 requires a threatened application, it may be many years before such a threatened application occurs when an agency adopts a rule—as DNR did here—before projects existed that required application of the rule.

CONCLUSION

Nonferrous mineral mining has the potential to impact Minnesota's natural resources and the lives of Minnesotans, such as Petitioners' members, who value such resources. Chapter 6132 lacks enforceable procedures and standards—mandated by statute and the Minnesota Constitution—that would ensure that Petitioners and this Court can protect those resources. For these reasons, the Court should grant the relief requested by Petitioners in this declaratory judgment action and declare Chapter 6132 invalid.

Dated: March 6, 2019

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of *Minn. R. Civ. App. P. 132.01*, subds. 1 and 3, for a brief produced with a proportional spaced font size of 13 pt. The length of this brief is 10,655 words. This brief was prepared using Microsoft Word 2010.

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