

STATE OF MICHIGAN
COURT OF APPEALS

SIERRA CLUB and NATURAL RESOURCES
DEFENSE COUNCIL,

UNPUBLISHED
March 14, 2013

Petitioners-Appellants,

v

No. 309843
Ingham Circuit Court
LC No. 11-001027-AA

DEPARTMENT OF ENVIRONMENTAL
QUALITY and DEPARTMENT OF
ENVIRONMENTAL QUALITY/DIRECTOR,

Respondents-Appellees,

and

WOLVERINE POWER SUPPLY
COOPERATIVE, INC.,

Intervenor-Appellee.

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Petitioners appeal as of right from an order of the circuit court affirming the decision of respondent, the Michigan Department of Environmental Quality (MDEQ) to issue Permit No. 317-07 (“permit”) allowing intervenor Wolverine Power Supply Cooperative, Inc. to construct a 600 Megawatt coal-fired power plant in Rogers City, Michigan. We dismiss the appeal as moot.

I. BASIC FACTS AND PROCEDURAL HISTORY

Wolverine is a not-for-profit, electricity generation and transmission cooperative serving rural portions of northern and western Michigan. It first applied for a permit to construct the facility on September 26, 2007. Wolverine’s permit application called for a clean-coal, steam electric power plant, consisting of two solid, fuel-fired Circulating Fluidized Bed (CFB) boilers capable of generating 600 megawatts of electricity. The two proposed CFB boilers will be capable of burning several different types of fuel, including coal, petroleum coke, and biomass.

Because the facility will emit air pollutants such as mercury, hydrogen chloride, particulate matter (PM), and Hazardous Air Pollutants (HAPs), Wolverine was required to obtain a permit from the MDEQ under the federal Clean Air Act (CAA), 42 USC 7401 *et seq.*, which is

implemented in Michigan through the Natural Resources and Environmental Protection Act (NREPA), MCL 324.5501 *et seq.* Under the CAA, the United States Environmental Protection Agency (EPA) is required to set national emission standards for HAPs (NESHAPs) based on “maximum achievable control technology” (MACT) for a new source of pollution. 42 USC 7412(d), (g). In simple terms, a MACT standard establishes the best emission controls achievable in practice by similar sources of pollution. 40 CFR 63.43(d)(1). If the EPA has not yet promulgated NESHAPs for a particular category source (i.e., coal-fired power plants), § 112(g) of the CAA requires the applicable state permitting agency (in this case the MDEQ) to develop specific HAP emission standards for any proposed facility in that category, based on a case-by-case MACT analysis. 42 USC 7412(g). Once the EPA finalizes NESHAPs applicable to the new facility, those limitations supersede the HAP emission standards set by the state permitting agency. 40 CFR 63.44(a). At the time Wolverine submitted its permit application, the EPA had not yet issued NESHAPs for electric generating units (EGUs) or coal-fired power plants. Therefore, the MDEQ was required to set HAP emission standards for the facility based on its own case-by-case MACT analysis.

On April 13, 2011, the MDEQ provided Wolverine a draft permit¹ with HAP emission standards based on a case-by-case MACT analysis it had previously conducted. During the public comment period, petitioners and other interested parties voiced concerns regarding the propriety of the MDEQ’s case-by-case MACT analysis and the HAP emission standards set by the agency. Then, just one month before the MDEQ issued a final version of the permit, the EPA published proposed (not finalized) NESHAPs applicable to the facility, based on the EPA’s own MACT analysis. 76 Fed Reg 24.976 (May 3, 2011). As a result, the EPA submitted a comment in the administrative record highlighting the proposed rule, and requesting that the MDEQ “ensure that any applicable requirements are reflected in the permit.”

The MDEQ issued the permit to Wolverine on June 29, 2011. In it, the MDEQ set HAP emission standards based on its own case-by-case MACT analysis rather than the NESHAPs contained in the EPA’s proposed rule. The MDEQ stated that the EPA’s new rule “has only been proposed and is not final yet[,]” and further stated that it does not utilize proposed rules in its permits because they “may change and then the permit would need to be modified.”

On September 26, 2011, petitioners challenged the MDEQ’s issuance of the permit, arguing that the agency conducted a flawed MACT analysis, and thereby set improper HAP emission standards for the facility. On February 12, 2012, roughly seven months after the MDEQ issued the permit, the EPA finalized the NESHAPs for EGUs and coal-fired power plants in a rule known as the “Mercury and Air Toxics Standards” (MATS). 77 Fed Reg 9304 (Feb 16, 2012). In response, the MDEQ and Wolverine argued that the MATS rule supersedes the permit’s less stringent HAP emission standards, and thereby moots petitioners’ challenge of the MDEQ’s case-by-case MACT analysis. At the same time, the MDEQ and Wolverine challenged

¹ A “draft permit” is a draft of a permit which is proposed to be issued by the MDEQ, provided before public notice and comment, which contains applicable standards and limitations as well as other proposed conditions or restrictions. See 1999 AC, R 323.2102.

the MATS rule in federal court. *Wolverine Power Supply Coop, Inc., v US EPA*, No. 12-1195 (US App DC, 2012).

After a hearing on the issue, the lower court affirmed the MDEQ's issuance of the permit. The lower court did not specifically address the legal issues petitioners now present on appeal, nor did it specifically address whether petitioners' challenge is moot.

II. MOOTNESS

We hold that petitioner's appeal is moot. The principal duty of this Court is to hear actual cases and controversies. See *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002). As such, we will not decide moot issues that have no practical legal effect on the controversy before us. *Id.* A case is moot when it presents "nothing but abstract questions of law which do not rest upon existing facts or rights." *Gildemeister v Lindsay*, 212 Mich 299, 302; 180 NW 633 (1920).

Petitioners argue that the EPA has voluntarily stayed application of the MATS rule pending reconsideration rulemaking. Petitioners further argue that the MDEQ and Wolverine are currently challenging the propriety of the MATS rule in federal court. Should the MATS rule be invalidated, the HAP emissions limitations contained in the permit will govern. Therefore, petitioners argue, the HAP emission standards contained in the permit remain controlling, and this Court can provide meaningful relief by remanding for a proper case-by-case MACT analysis.

The EPA specifically stated that its decision to stay application of the MATS rule was effective only until November 2, 2012. 77 Fed Reg 45967. Petitioners cite no authority establishing that the EPA has continued the stay past that date, and we cannot assume that the EPA's NESHAP for coal-fired power plants will be struck down, amended, or otherwise changed, sometime in the future. This Court's judgments are to be based upon "*existing* facts or rights." See *Gildemeister*, 212 Mich at 302. At present, the EPA's NESHAP controls, making the HAP emission standards contained in the permit irrelevant and inapplicable. See *Attorney Gen v Pub Serv Comm*, 269 Mich App 473, 485; 713 NW2d 290 (2005) ("An issue is moot if an event has occurred that renders it impossible for the court to grant relief.").

Unless and until the EPA actually strikes down or amends its NESHAP for coal-fired power plants, or the MATS rule is invalidated,² the issues petitioners raise on appeal are moot. Therefore, we dismiss petitioners' appeal.

Dismissed as moot.

/s/ Stephen L. Borrello
/s/ Michael J. Kelly
/s/ Mark T. Boonstra

² The MDEQ argues that this case is moot regardless of what happens in the litigation pending in federal court. We need not address that contention at this time.