STATE OF MICHIGAN

COURT OF APPEALS

SIERRA CLUB,

Petitioner-Appellant,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent-Appellee,

and

DETROIT EDISON COMPANY,

Respondent/Intervening-Appellee.

UNPUBLISHED
November 21, 2013

No. 308072
Ingham Circuit Court
LC No. 11-000353-AA

SIERRA CLUB,

Appellant,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY and INTERIM DIRECTOR OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY,

Appellees,

and

DETROIT EDISON COMPANY,

Intervening Appellee.

No. 314152
Ingham Circuit Court
LC No. 12-000604-AA

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

In Docket No. 308072, petitioner, Sierra Club, appeals as of right the trial court's order affirming the decision of respondent, the Department of Environmental Quality, to issue Permit to Install No. 93-09A, which modifies Detroit Edison Company's power plant. In Docket No. 314152, petitioner appeals as of right the trial court's order affirming respondent's decision to issue Permit to Install No. 93-09B. We affirm.

I. FACTUAL BACKGROUND

The Detroit Edison Company (Detroit Edison) operates a coal-fired power plant in Monroe County. The power plant consists of four separate boiler units. In December 2010, respondent issued Permit to Install No. 93-09A, authorizing a modification of the power plant. The modifications would result in improved fuel usage and reduce net emissions of nitrogen oxides (NO_x), particulate matter less than 2.5 microns ($PM_{2.5}$), and sulfur dioxide (SO_2). These reductions corresponded to over a 75 percent decrease in NO_x emissions, over a 55 percent decrease in $PM_{2.5}$ emissions, and over a 90 percent decrease in SO_2 emissions.

Petitioner challenged the issuance of the permit, alleging that respondent failed to impose the appropriate one-hour emissions limitations for SO_2 and NO_2, respectively, and violated Mich Admin Code R 336.1901 (Rule 901) in failing to consider the impact of $PM_{2.5}$ emissions on public health. The trial court affirmed respondent's decision to issue the permit. The trial court found that respondent properly applied its scientific expertise in finding that the hourly emission limits of NO_2 and SO_2 would not result in a violation of the law. The trial court further noted that no law required respondent to use one-hour averages to establish hourly emission limits for NO_2 and SO_2. Also, in regard to $PM_{2.5}$, the trial court concluded that respondent did not violate Rule 901 because the proposed modifications would protect public health by decreasing net PM emissions.

In March 2012, respondent issued Permit to Install No. 93-09B that was substantially similar to the first permit except that it reduced the required stack height of the five diesel generators. Petitioner again challenged the issuance of the permit, asserting the same basic arguments, and argued that respondent's calculation allowed for the possibility that at any given hour the power plant could emit SO_2 and NO_x in excess of the permitted levels. The trial court again affirmed respondent's decision to issue the permit, relying largely on its previous decision. Petitioner now appeals on several grounds in this consolidated appeal.

II. STANDARDS OF REVIEW

In *City of Romulus v Michigan Dep't of Environmental Quality*, 260 Mich App 54, 62; 678 NW2d 444 (2003), this Court recognized that we apply "multiple standards of review in an appeal from a circuit court's review of an administrative agency's decision." While great deference is accorded to the circuit court's review of factual findings, substantially less deference, if any, is accorded to the circuit court's decisions on matters of law. *Id.* When reviewing the circuit court's decision:

> This Court's review is limited to determining whether the circuit court misapprehended or grossly misapplied its review of the agency's factual findings. The circuit court's review of the DEQ's factual findings is limited to determining

whether the decision was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, or was clearly an abuse of discretion. Evidence is competent, material, and substantial if a reasoning mind would accept it as sufficient to support a conclusion. Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views. To determine whether an agency's decision is arbitrary, the circuit court must determine if it is without adequate determining principle, . . . fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned. Capricious has been defined as: Apt to change suddenly; freakish; whimsical; humorsome.

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We must also determine whether the lower court applied correct legal principles[.] The circuit court's review of an administrative agency's decision on a matter of law is limited to determining whether the decision was authorized by law. An agency's decision that is in violation of statute or constitution, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious, is a decision that is *not* authorized by law and must be set aside. [*Id.* at 62-64 (quotation marks, brackets, and citations omitted) (emphasis in original).]

III. $PM_{2.5}$ CONCENTRATION & EMISSIONS

Petitioner first argues that respondent failed to conduct an analysis of the power plant's $PM_{2.5}$ emissions on air quality because it would have revealed violations. Thus, petitioner concludes that the trial court erred in affirming respondent's decision to issue the permits under these circumstances. We disagree.

The federal Clean Air Act requires the Environmental Protection Agency (EPA) to set National Ambient Air Quality Standards (NAAQS) for various emissions that are considered air pollutants. 42 USC 7409; *Wolverine Power Coop v DEQ*, 285 Mich App 548, 555; 777 NW2d 1 (2009). "The corresponding Michigan statutes are codified in part 55 of Michigan's Natural Resources and Environmental Protection Act (NREPA)." *Id.* at 555. Included as air pollutants are sulfur dioxide (SO_2), nitrogen dioxide (NO_x), and particulate matter less than 2.5 microns ($PM_{2.5}$). "Under the Clean Air Act's program designed to prevent the significant deterioration of air quality, a major facility that emits air pollution must obtain a permit before it can install a modification." *Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App 79, 90; 832 NW2d 288 (2013).

Petitioner first invokes MCL 324.5505(5), which states that when a permit is issued, it:

shall include terms and conditions necessary to assure compliance with all applicable requirements of this part, the rules promulgated under this part, and the

> clean air act, including those necessary to assure compliance with all applicable ambient air standards, emission limits, and increment and visibility requirements pursuant to part C of title I of the clean air act, 42 USC 7470 to 7492, at each location[.]

Part C of the CAA states that a "permit may issue only if a source will not cause, or contribute to, air pollution in excess of any . . . maximum allowable increase or maximum allowable concentration for any pollutant or any NAAQS." *Alaska Dep't of Environmental Conservation v EPA*, 540 US 461, 473; 124 S Ct 983; 157 L Ed 2d 967 (2004) (quotation marks and citation omitted).

Petitioner argues that because the power plant, as modified, could contribute to an existing NAAQS violation for $PM_{2.5}$, respondent erred in issuing the permits and in failing to conduct an analysis of the power plant's $PM_{2.5}$ emissions on air quality. Yet, this argument overlooks that respondent conducted an analysis of the $PM_{2.5}$ emissions from the power plant itself, and determined that the proposed modification would result in a decrease of about 55 percent of $PM_{2.5}$ emissions. Thus, petitioner's argument that the permit should not have issued under these circumstances would lead to the absurd result of forbidding a modification in a nonattainment area even if the modification would reduce net emissions. See *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 44; 672 NW2d 884 (2003) ("Statutes should be construed to avoid absurd consequences[.]").

The purpose of Part C of the CAA is to protect air quality, and the permits issued in the instant matter will reduce $PM_{2.5}$ concentrations and thereby will improve the condition of the air. 42 USC 7470. Further, to the extent that Monroe County already violates the NAAQS for $PM_{2.5}$, this source "will not cause, or contribute to" air pollution in excess of the NAAQS. 42 USC 7475(a)(3).[1] While petitioner also cites Mich Admin Code R 336.1207(1)(b), which prohibits respondent from issuing a permit when "[o]peration of the equipment for which the permit is sought will interfere with the attainment or maintenance of the air quality standard for any air contaminant," the permits in this case will aid in the attainment of the air quality standard because they allow decreased emissions.[2] See *Natural Resources Defense Council*, 300 Mich App at 90 (the Department has the authority to promulgate rules that are aimed at complying with the CAA).

[1] Furthermore, petitioner's argument is inconsistent with 42 USC 7471, which aims at preventing "significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable." Respondent's actions also are consistent with 42 USC 7503(c), for nonattainment areas, as the permits enable Detroit Edison to decrease $PM_{2.5}$, emissions.

[2] The permits are likewise consistent with Mich Admin Code R 336.1207(1)(a), as the same reasons apply and do not support a finding that "[t]he equipment for which the permit is sought will not operate in compliance with the rules of the department or state law."

Petitioner further contends that respondent's actions violated Mich Admin Code R 336.1901 (Rule 901), which reads as follows:

> Notwithstanding the provisions of any other department rule, a person shall not cause or permit the emission of an air contaminant or water vapor in quantities that cause, alone or in reaction with other air contami-nants, either of the following:
>
> > (a) Injurious effects to human health or safety, animal life, plant life of significant economic value, or property.
> >
> > (b) Unreasonable interference with the comfortable enjoyment of life and property.

However, even assuming that Rule 901 applies, respondent did not violate the rule. As noted above, respondent enabled the reduction of any existing injury or unreasonable interference with life or property, as the permits reduce $PM_{2.5}$ emissions by 55 percent. Therefore, we conclude that the trial court applied correct legal principles and did not misapprehend or grossly misapply respondent's factual findings.

IV. SO_2 and NO_2

Petitioner next argues that respondent's determination that each one-hour NAAQS for NO_2 and SO_2 would be protected by the limits imposed in the permits was arbitrary and capricious.

"Arbitrary means fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance, and capricious means apt to change suddenly, freakish or whimsical[.]" *Michigan Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 141; 807 NW2d 866 (2011) (quotation marks and citation omitted). In the instant case, respondent assumed for its calculations that the boiling units would constantly operate over a 24-hour period for every day of the year, which greatly overstated the the actual emissions of the power plant as modified. Respondent also assumed that all other sources in the area would constantly emit SO_2 and NO_x. Given these conservative assumptions, respondent determined that each one-hour NAAQS for SO_2 and NO_2 would not be violated. Thus, respondent engaged in "exactly the sort of determination best entrusted to an agency's expertise." *Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App at 93 (emphasis omitted).

Petitioner, however, contends that respondent's analysis was flawed because the permits could allow emissions of SO_2 or NO_x at any given hour in excess of the NAAQS because respondent calculated the emissions on an average basis over a longer period of time. Thus, petitioner contends that respondent did not really consider the "maximum" the power plant could emit at any given hour. However, petitioner has failed to raise any binding authority that

requires respondent to calculate rates in the manner suggested.[3] Furthermore, the facts of this case do not support a finding that respondent erred. As noted above, the permits allow for modifications that will reduce overall NO_x emissions by over 75 percent and SO_2 emissions by over 90 percent. Thus, respondent's approval of the permits is consistent with the purpose of the CAA, which is to reduce pollutants. 42 USC 7470. Finally, we note that petitioner is requesting this Court to reconsider the figures and percentages used by respondent in determining NAAQS compliance, and "the judiciary has neither the expertise nor the resources to engage in a factintensive review[.]" *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 702 n 5; 614 NW2d 607 (2000).[4]

V. CONCLUSION

Because the trial court correctly concluded that the permits issued in these cases did not violate the CAA, reversal is not warranted. We affirm.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Michael J. Riordan

[3] While petitioner cites the EPA's Guidance Concerning the Implementation of the 1-hour SO_2, the EPA stated that such guidance does not bind state and local governments or permit-applicants as a matter of law. Furthermore, the statements petitioner highlights only indicate that averaging over a 24-hour period "may" not be protective of the NAAQS in certain circumstances.

[4] Because we agree with respondent that the lower court did not err, we decline to address the alternate grounds of affirmance based on res judicata. *Jackson v Detroit Medical Ctr*, 278 Mich App 532, 539 n 4; 753 NW2d 635 (2008).