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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1358**

Fred Wescott as Representative of the Responsible Rural Land Use Coalition,
Relator,

vs.

Wabasha County Board of Commissioners,
Respondent.

**Filed June 26, 2017
Affirmed
Bjorkman, Judge**

Wabasha County Board of Commissioners
Resolution No. 2016-184

John A. Abress, Mark E. Utz, Wendland Utz, Ltd., Rochester, Minnesota (for relator)

Jason J. Kuboushek, Brian P. Taylor, Iverson Reuvers Condon, Bloomington, Minnesota
(for respondent)

Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Relator challenges respondent's decision that an environmental-assessment worksheet is not needed with respect to a proposed agronomy center, arguing that the decision is arbitrary and capricious, is not supported by substantial evidence, and that

respondent failed to consider material evidence that the project may have the potential for significant environmental effects. We affirm.

FACTS

On May 20, 2016, John and Lucille Sell applied for a conditional-use permit (CUP) to construct and operate an agronomy center in Elgin (the project). The land is currently zoned for agricultural uses, and has been used for row-crop production. The application indicated that the agronomy center would be operated by Progressive Ag Center, LLC, and would provide products and services for agricultural operations in southeastern Minnesota. During the first phase of the project, the agronomy center would store and distribute dry crop-nutrient products. During the later phases, operations would expand to include storage and distribution of anhydrous ammonia, liquid crop nutrients, seed, and crop-protection products. The application states the project would meet all local and regional building codes, and meet or exceed Minnesota Department of Agriculture (MDA) requirements.

On July 11, relator Fred Wescott as Representative of the Responsible Rural Land Use Coalition (Wescott), submitted a citizen petition to the Environmental Quality Board (EQB) requesting that an environmental-assessment worksheet (EAW) be completed for the project. The petition alleges that the land is particularly sensitive and that the project has the potential to cause significant environmental impacts, including potential release of hazardous chemicals, decreased air quality, increased traffic, noise, stormwater runoff, odors, possible theft of anhydrous ammonia, and negative impact on wildlife. The EQB

determined that respondent Wabasha County Board of Commissioners (the county board) is the responsible government unit (RGU) to evaluate the petition.

On July 22, Wabasha County Zoning Administrator Kevin Krause issued a report recommending that the county board deny the EAW request. Krause noted that the petition identifies valid concerns about the area's drinking water, but cites little to no evidence that the project would have a significant effect on water quality. He observed that Wescott's submission reveals that the majority of the nitrates currently present in the area groundwater result from row-crop agriculture. The project will reduce the amount of land dedicated to row-crop production. Krause further noted that the MDA and the Minnesota Pollution Control Agency (MPCA) would ensure the project does not pose a significant environmental risk through licensing and permitting regulations. Krause ultimately concluded that the EAW petition did not demonstrate the project has the potential for significant environmental effects.

On July 26, the county board conducted a public hearing on the petition. Krause explained that the petition and supporting documents identify generalized concerns about the project's impact on the environment but do not provide evidence linking any aspect of the project to those concerns. And he again stressed that any environmental concerns would be mitigated by ongoing regulatory oversight by the MDA, MPCA, and Wabasha County. After hearing comments from members of the public, including Wescott, the county board voted to issue a negative declaration on the need for an EAW. Krause sent Wescott a notice of the county board's decision the next day. On August 2, the county board approved the CUP application. The CUP requires the operator to abide by all

representations and commitments in the application, ensure delivery trucks and customers cover loads, provide dust control for portions of the gravel driveway, and not store ammonium nitrate. Wescott appeals by writ of certiorari.

DECISION

An EAW may be required if a citizen petition demonstrates that, because of the nature and location of a proposed project, “there may be potential for significant environmental effects.” Minn. Stat. § 116D.04, subd. 2a(c) (2016); *see also* Minn. R. 4410.1100 (2015) (governing petition process). Final decisions on whether to require an EAW are appealable to this court by certiorari. Minn. Stat. § 116D.04, subd. 10 (2016). Under this deferential standard of review, we consider whether an RGU’s decision reflects an error of law, is arbitrary or capricious, or is unsupported by substantial evidence. *Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm’rs*, 713 N.W.2d 817, 832 (Minn. 2006).

Wescott argues that the county board’s decision not to require an EAW is arbitrary and capricious and unsupported by substantial evidence.

An agency’s decision is arbitrary or capricious if the agency (a) relied on factors the legislature never intended it to consider, (b) entirely failed to consider an important aspect of the problem, (c) offered an explanation for the decision that runs counter to the evidence, or (d) rendered a decision so implausible that it could not be ascribed to a difference in view or the result of agency expertise.

Watab Twp. Citizen All. v. Benton Cty. Bd. of Comm’rs, 728 N.W.2d 82, 89 (Minn. App. 2007), *review denied* (Minn. May 15, 2007). In determining whether a decision is supported by substantial evidence, we consider whether the agency has taken a “hard look”

at the salient issues and engaged in reasoned decision-making. *Id.* (quotation omitted). Substantial evidence is: “1. Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2. More than a scintilla of evidence; 3. More than some evidence; 4. More than any evidence; and 5. Evidence considered in its entirety.” *Minn. Ctr. for Env'tl. Advocacy v. Comm'r of Minn. Pollution Control Agency*, 696 N.W.2d 95, 105 (Minn. App. 2005) (quotation omitted). The party challenging an agency decision has the burden of proof. *Id.* at 100.

In deciding whether a project has the potential for significant environmental effects, the county board was required to consider:

A. [the] type, extent, and reversibility of environmental effects;

B. [the] cumulative potential effects. The RGU shall consider the following factors: whether the cumulative potential effect is significant; whether the contribution from the project is significant when viewed in connection with other contributions to the cumulative potential effect; the degree to which the project complies with approved mitigation measures specifically designed to address the cumulative potential effect; and the efforts of the proposer to minimize the contributions from the project;

C. the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority. The RGU may rely only on mitigation measures that are specific and that can be reasonably expected to effectively mitigate the identified environmental impacts of the project; and

D. the extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.

Minn. R. 4410.1700, subp. 7 (2015). It is undisputed that the county board addressed all of these factors. And Wescott does not challenge any of the county board's findings. Rather, he argues that the county board overlooked material evidence in the record demonstrating the project has the potential for significant environmental effects. We are not persuaded.

The threshold question under the EAW statute is “whether there is material evidence that the project may have the potential for significant environmental effects.” *Watab*, 728 N.W.2d at 90. Material evidence means “such evidence as is admissible, relevant, and consequential to determine whether the project may have the potential for significant environmental effects.” *Id.* Vague and generalized fears and concerns do not constitute material evidence. *Id.*

Wescott submitted a 58-page petition with 182 pages of attachments. Many of the concerns reflected in these materials relate to the potential environmental effects if a spill or leak occurred at the facility or during transit to or away from the facility. But the petition does not present any evidence suggesting such spills or leaks are likely to occur. The supporting documents describe spills and leaks that have occurred at unrelated facilities run by other companies in different locations. Wescott's assertion that “something could go wrong . . . because accidents do happen” is the type of vague and generalized concern that does not meet the material-evidence threshold under the statute. *Id.* Moreover, the county board properly considered “the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority.” Minn. R. 4410.1700, subp. 7(C). The county board noted that environmental effects are subject to mitigation by the

ongoing public regulatory authority of the MDA, MPCA, Minnesota Department of Natural Resources, and the county. *See Friends of Twin Lakes v. City of Roseville*, 764 N.W.2d 378, 382 (Minn. App. 2009) (stating caselaw supports the use of “regulatory oversight as a means of preventing significant environmental effects”). The petition contains no evidence that these regulations will not sufficiently address any potential negative environmental effects.

The petition also cites several generalized concerns that are allayed by project-specific evidence presented to the county board by the CUP applicant. For example, the petition alleges that the land is particularly vulnerable because the region contains karst landscapes. Karst landscapes form when limestone and dolomite are dissolved by rainwater, leaving the drinking water wells in the area susceptible to contamination. But the record defeats this contention. A geotechnical evaluation performed at the location of the project shows the landscape is, in fact, “very dense.” Wescott also singles out the negative impact of increased traffic related to the project. But Wabasha County Highway Engineer Dietrich Flesch reviewed the projections for the increased traffic volume and determined the location of the project “me[t] the requirements of the Highway Department without any warranted road improvements.” Additionally, potential air quality effects will be mitigated by the requirements that trucks be loaded in an enclosed area and must be covered before leaving the facility.

Finally, Wescott argues an EAW should be completed because the agronomy center will eventually handle anhydrous ammonia. EAWs are required for facilities that are capable of storing 100,000 gallons or more of anhydrous ammonia. Minn. R. 4410.4300,

subp. 10(C) (2015). At the public hearing, the county board confirmed with the CUP applicant that the facility will store less than 100,000 gallons of anhydrous ammonia. And the county board noted during the hearing that a revised CUP would be required if the applicant wanted to expand to store over 100,000 gallons in the future. The possibility that larger amounts of anhydrous ammonia may be stored at the facility in the future does not warrant an EAW at this time.

We appreciate Wescott's concerns about the impact on the air, water, wildlife, and neighboring farms. And we assume he and other members of the public will notify the county board or the regulatory entities if the CUP conditions are violated. But at this junction, Wescott has not established material evidence of potential significant environmental effects associated with the project. On this record, we conclude that substantial evidence supports the county board's decision. And because the county board applied the appropriate factors and thoroughly considered Wescott's petition, its decision that an EAW is unnecessary is neither arbitrary nor capricious.

Affirmed.