This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1417
A20-1418

In the Matter of the Decision on the Need for an Environmental Impact Statement
for the Proposed Barrick Family Farms, LLP - Lockhart 25 Project
Lockhart Township Norman County, Minnesota (A20-1417),

and

In re Minnesota Pollution Control Agency's Issuance of a
General Animal Feedlot National Pollutant Discharge
Elimination System Permit to Barrack Family Farms, LLP -
Lockhart 25 Project (A20-1418).

Filed August 23, 2021
Affirmed; motions denied
Segal, Chief Judge

Minnesota Pollution Control Agency

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Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In these consolidated certiorari appeals, relator Minnesota Center for Environmental Advocacy (MCEA) challenges the decisions of respondent Minnesota Pollution Control Agency (MPCA) not to require an environmental impact statement (EIS) and to issue a National Pollutant Discharge Elimination System (NPDES) permit for a proposed feedlot. The MCEA argues that the MPCA failed to adequately consider the potential environmental effects of the feedlot on nearby calcareous fens, a rare type of wetland that has specific protection under Minnesota law, Minn. Stat. § 103G.223 (2020), and consequently the decisions must be reversed. Because the project proposer, respondent Barrick Family Farms, LLP (Barrick), was required to apply to the Minnesota Department of Natural Resources (DNR) for a groundwater-appropriation permit to operate the feedlot and the applicable statute and rules require a rigorous analysis by the DNR of potential environmental effects on the calcareous fens, we conclude that the MPCA did not err in deferring that analysis to the DNR's permitting process and in issuing a negative declaration on the need for an EIS and granting coverage under the state's NPDES permit for feedlots. We therefore affirm.

FACTS

In January 2020, Barrick applied to the MPCA for a permit necessary to operate a new feedlot in Norman County (the feedlot). The feedlot would include two confinement barns, two sheds, a stormwater infiltration basin, a driveway, and a well. Barrick applied

for coverage under the state's general NPDES permit for feedlots (NPDES permit).[1] Because the feedlot would contain over 1,000 animal units,[2] it was subject to a mandatory environmental assessment worksheet (EAW) to be prepared by the MPCA as the responsible governmental unit. Minn. R. 4410.4300, subp. 29 (2019). In addition, Barrick was required to and did apply for a groundwater-appropriation permit from the DNR to construct and operate a well for the feedlot.

On July 20, 2020, the MPCA published the EAW for the feedlot, released a public notice of its intent to approve coverage of the feedlot under the state's NPDES permit, and opened a 30-day public comment period to run through August 19, 2020. The EAW included a preliminary well-construction assessment (the well assessment) prepared by the DNR as part of its review of Barrick's application for a groundwater-appropriation permit. In the well assessment, the DNR noted that "[o]ne or more calcareous fen wetlands are within 5 miles of [the] proposed well location" and that "[a] permit application to use

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[1] According to the MPCA, an NPDES permit for feedlots is "a permit issued by the MPCA as required by federal law for the purpose of regulating the discharge of pollutants from point sources into waters of the United States from concentrated animal feeding operations (CAFOs) as defined by federal law." Owners and operators of certain feedlots may apply for coverage under the MPCA's NPDES permit; if the MPCA determines that a feedlot is covered under its NPDES permit, then the feedlot must be constructed and operated in accordance with the conditions of that permit.

[2] An "animal unit" is "a unit of measure used to compare differences in the production of animal manure that employs as a standard the amount of manure produced on a regular basis by a slaughter steer or heifer for an animal feedlot or manure storage area." Minn. Stat. § 116.06, subd. 4a (2020). The statute assigns a multiplication factor for each type of animal; the total number of animal units is calculated by multiplying the number of each type of animal by its respective multiplication factor and totaling the results. *Id.* Here, the feedlot would contain over 16,000 hogs of varying size, which under the statutory formula would result in a total of over 3,000 animal units.

groundwater near calcareous fen wetlands must be evaluated so the project does not drain, alter or degrade those wetlands." The well assessment further indicated that an aquifer test may be required to determine the impact the well would have on the calcareous fens.

The record contains information prepared by the DNR explaining the importance of calcareous fens to the ecosystem. The DNR describes calcareous fens as "rare and distinctive peat-accumulating wetlands" that "depend on a constant supply of upwelling groundwater rich in calcium and other minerals." Because the fens are dependent on a constant supply of groundwater, a decrease in the groundwater supply can significantly impact, or destroy, calcareous fens. A natural-heritage review specialist with the DNR identified three calcareous fens within a two-mile radius of the feedlot. Due to their importance to biodiversity, calcareous fens have specific protection under Minnesota law, and "may not be filled, drained, or otherwise degraded, wholly or partially, by any activity, unless the commissioner [of natural resources], under an approved management plan, decides some alteration is necessary." Minn. Stat. § 103G.223(a). Based on this statutory protection, the DNR noted that "[i]f an impact to the calcareous fens is found, [the] DNR is unlikely to issue a water appropriation permit."

On July 30, 2020, the MCEA requested that the MPCA extend the public comment period. The request indicated that the DNR was requiring an aquifer test as part of Barrick's application for a groundwater-appropriation permit, and that the testing was underway but had not yet been completed. The MCEA therefore requested that "the MPCA wait for the completion of the [aquifer] pumping test . . . and then extend the comment period for 30 days after the DNR's analysis of the pumping test is released to the public."

The MPCA extended the public comment period for an additional 30 days "to allow public review of results from a pending aquifer test." However, the aquifer test was not completed within this time frame. The MCEA therefore requested an additional extension of the public comment period.

On September 17, 2020, the MPCA sent a letter to interested parties stating that the public comment period would end the next day, but that the MPCA would, in agreement with Barrick, "delay the finalization of the Findings of Fact documents and the decision on the need for an [EIS] until the [DNR] has communicated the final results of the aquifer pump test to the MPCA." Five days later, the MPCA sent a follow-up letter to the interested parties clarifying that Barrick had not agreed to the extension and that the previous letter had been in error. Without agreement from Barrick to an additional extension, the MPCA could not extend the public comment period under the provisions of the Minnesota Environmental Policy Act (MEPA), Minn. Stat. §§ 116D.01-.11 (2020).[3]

The MPCA determined that there was no need for an EIS, explaining in its findings of fact, conclusions of law, and order, that "there are no potential significant environmental effects reasonably expected to occur from [the feedlot]." With regard to the potential impact of the feedlot on the nearby calcareous fens, the MPCA noted in its findings that the DNR had required Barrick to conduct an aquifer test as part of its groundwater-appropriation permitting process. The MPCA further noted that, if the test revealed the

[3] MEPA allows the responsible governmental unit (here, the MPCA) to grant one 30-day extension of the public comment period. Minn. Stat. § 116D.04, subd. 2a(d). Any further extensions require agreement of the project proposer (Barrick). *Id.*

potential for a negative impact on the fens, the DNR would either mandate adequate mitigation measures or would deny the permit.

After citing to the statutory requirement for a groundwater-appropriation permit, the MPCA stated:

> The DNR water appropriation permit, if issued, will require the project proposer to address and mitigate any potential groundwater impacts, if any, to the fens and nearby domestic wells. All potentially significant environmental effects, if any, confirmed through the aquifer test will be addressed and mitigated by DNR's ongoing regulatory authority through its water appropriation permit process.

The MPCA's order included responses to the three comments received during the public comment period, which were submitted by the MCEA, the DNR, and a private citizen. All three comments raised concerns about the potential impact on the calcareous fens. For example, the DNR noted in its comment that the "proposed wells are less than 4 miles away from the Agassiz-Olson WMA calcareous fen" and cautioned that "[h]igh capacity groundwater pumping has the potential to reduce water levels in these groundwater-fed wetlands if they are hydrologically connected."

The MPCA responded to the comments, stating that it

> does not need to wait for the aquifer test results in order to determine if there is a potential for significant effects [because] . . . [a]ll potential environmental effects, if any, confirmed through the aquifer test will be addressed and mitigated by DNR's ongoing regulatory authority through its water appropriation permit process. . . . [And] the DNR will include mitigation measures in the water appropriation permit, if necessary[.] . . . However, if the aquifer test reveals impacts cannot be mitigated, DNR will not issue a water appropriations permit for the project.

The MPCA therefore issued a negative declaration on the need for an EIS and granted the request for coverage under the NPDES permit. These certiorari appeals follow.[4]

DECISION

The MCEA argues in these appeals that the EAW was based on inadequate information and that the MPCA's negative declaration on the need for an EIS and the issuance of the NPDES permit must be reversed. Specifically, the MCEA claims that (1) the MPCA failed to include an adequate assessment of water resources available for appropriation in the EAW as required by Minn. Stat. § 116D.04, subd. 16 (subdivision 16); (2) the MPCA lacked sufficient information necessary to make a reasoned decision without the results of the aquifer test and was therefore required to make a positive declaration concerning the need for an EIS under Minn. R. 4410.1700, subp. 2a (2019); and (3) the negative declaration was arbitrary and capricious because it failed to consider the environmental impact of the proposed feedlot on the calcareous fens and to identify mitigation efforts that are specific and reasonably expected to be effective under Minn. R. 4410.1700, subp. 7(C) (2019).

[4] The report on the aquifer test was eventually completed on December 14, 2020, and the DNR issued Barrick a groundwater-appropriation permit on February 18, 2021. Barrick submitted the report and other documents relating to the DNR permitting process in its addendum. The MCEA moved to strike the documents as outside the record. Barrick then requested that this court take judicial notice of the DNR documents and moved to submit additional documents relating to the legislative history of Minn. Stat. § 116D.04, subd. 16. We take judicial notice that the aquifer test was completed and groundwater-appropriation permit granted, but otherwise limit our review to the record as submitted to the MPCA. We therefore deny the motion to supplement the record and deny the motion to strike Barrick's addendum as unnecessary.

In our analysis, we first summarize the applicable standard of review, provide a brief overview of the environmental review process, and then address the arguments asserted by the MCEA.

Standard of Review

On appeal, the decisions of the MPCA "enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 463 (Minn. 2002) (quotation omitted). "A determination whether significant environmental effects result from [a] project is primarily factual and necessarily requires application of the agency's technical knowledge and expertise to the facts presented." *Id.* at 464. But an agency's decision is not entitled to deference if it reflects an error of law that is subject to de novo review, the findings are arbitrary or capricious, or the findings are unsupported by substantial evidence. *See* Minn. Stat. § 14.69 (2020).

A decision is arbitrary and capricious if it

> (1) is based on factors that the legislature did not intend for the [responsible governmental unit] to consider; (2) entirely fails to address an important aspect of the problem; (3) offers an explanation that is counter to the evidence; or (4) is so implausible that it could not be explained as a difference in view or the result of the [responsible governmental unit]'s decision-making expertise.

Friends of Twin Lakes v. City of Roseville, 764 N.W.2d 378, 381 (Minn. App. 2009).

A party challenging an agency's decision on the need for an EIS "has the burden of proving that its findings are unsupported by the evidence as a whole." *Id.* This court's

role "when reviewing agency action is to determine whether the agency has taken a 'hard look' at the problems involved, and whether it has 'genuinely engaged in reasoned decision-making.'" *Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) (*CARD*) (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977)).

Overview of the Environmental Review Process

MEPA provides for two levels of environmental review—an EAW and an EIS. *In re Enbridge Energy*, 930 N.W.2d 12, 20 (Minn. App. 2019). An EAW is a "brief document which is designed to set out the basic facts necessary to determine whether an [EIS] is required for a proposed action." Minn. Stat. § 116D.04, subd. 1a(c). Although not required for all proposed actions, an EAW was required for Barrick's proposed feedlot under Minn. R. 4410.4300, subp. 29(A).

An EAW is prepared by the responsible governmental unit, in this case the MPCA, and is followed by a public comment period. Minn. Stat. § 116D.04, subd. 2a(d). After the comment period, the responsible governmental unit must issue a decision on whether an EIS is needed. *Id.* "An EIS is an exhaustive environmental review that the party proposing the project must conduct at its own expense." *CARD*, 713 N.W.2d at 824. An EIS must be prepared if the proposed project has the "potential for significant environmental effects." Minn. Stat. § 116D.04, subd. 2a(a). But if the responsible governmental unit concludes that the proposed project does not have the potential for significant environmental effects, it shall issue a "negative declaration" on the need for an EIS. Minn. R. 4410.1700, subps. 1, 3 (2019). The responsible governmental unit must

base its decision "on the information gathered during the EAW process and the comments received on the EAW." *Id.*, subp. 3.

There are four criteria that a responsible governmental unit must analyze when determining whether a proposed project has the potential for significant environmental effects: (1) the "type, extent, and reversibility of environmental effects"; (2) the "cumulative potential effects"; (3) "the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority"; and (4) "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 (2019). With this as background, we will turn to an analysis of the three arguments asserted by the MCEA in this appeal.

1. Requirement to Include an Assessment of the Water Resources Available for Appropriation

The MCEA's first argument is that the negative declaration must be reversed because the MPCA failed to include an adequate "assessment of the water resources available for appropriation" as required by subdivision 16. The MCEA claims that under the plain meaning of the word "assessment," the MPCA was required to include a more thorough review as part of its EAW. Specifically, the MCEA argues that, to comply with subdivision 16, the MPCA was required in this case to wait for and review the results of the aquifer test before making a decision on the need for an EIS.

The MPCA counters that an EAW is generally a "brief document which is designed to set out the basic facts necessary to determine whether an [EIS] is required for a proposed

action," Minn. Stat. § 116D.04, subd. 1a(c), and that the well assessment satisfied its obligations under subdivision 16. The MPCA further asserts that it properly deferred a more thorough analysis to the DNR's groundwater-appropriation permitting process. The MPCA points to the MEPA provision that "[t]o the extent practicable and so as not to conflict with other requirements of this section, the board shall not require, unless necessary, information in an [EAW] for a proposed action when the information is also required as part of any necessary permitting process for the proposed action."[5] Minn. Stat. § 116D.04, subd. 15 (subdivision 15). The MPCA thus argues that it was not necessary for it to consider the results of the aquifer test as part of the EAW because it would be duplicative of the "necessary permitting process" of the DNR to obtain a permit for the proposed well. We agree.

In this case, Barrick was required to and did apply for a groundwater-appropriation permit from the DNR. Minn. Stat. § 103G.287 (2020). A complete groundwater-appropriation permit application must include the following:

> (1) a water well record . . . information on the subsurface geologic formations penetrated by the well and the formation or aquifer that will serve as the water source, and geologic information from test holes drilled to locate the site of the production well;
> (2) the maximum daily, seasonal, and annual pumpage rates and volumes being requested;
> (3) information on groundwater quality in terms of the measures of quality commonly specified for the proposed

[5] The rules governing the environmental-review process similarly provide that the process is designed to "delegate authority and responsibility for environmental review to the governmental unit most closely involved in the project" and "eliminate duplication." Minn. R. 4410.0300, subp. 4(C), (E) (2019).

> water use and details on water treatment necessary for the proposed use;
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> (4) the results of an aquifer test completed according to specifications approved by the commissioner. The test must be conducted at the maximum pumping rate requested in the application and for a length of time adequate to assess or predict impacts to other wells and surface water and groundwater resources. The permit applicant is responsible for all costs related to the aquifer test, including the construction of groundwater and surface water monitoring installations, and water level readings before, during, and after the aquifer test; and
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> (5) the results of any assessments conducted by the commissioner under paragraph (c).

Id., subd. 1(a). The DNR may waive any of the application requirements above "if the information provided with the application is adequate to determine whether the proposed appropriation and use of water is sustainable and will protect ecosystems, water quality, and the ability of future generations to meet their own needs." *Id.*, subd. 1(b). Here, the well assessment revealed significant concerns about the potential for environmental effects and the DNR mandated an aquifer test. The aquifer test was thus a required component of a "necessary permitting process for the proposed action." Minn. Stat. § 116D.04, subd. 15. As such, a full assessment would be completed by the DNR and, under subdivision 15, the MPCA acted appropriately by deferring to the DNR's permitting process and thereby avoiding duplication.

The MCEA contests this conclusion. Focusing on the phrase in subdivision 15 that it is to be applied "so as not to conflict with other requirements of this section," the MCEA argues that deferral was not appropriate under subdivision 15 because it conflicts with the water-assessment requirement of subdivision 16. We are not persuaded. If we were to

interpret subdivision 16 as broadly as the MCEA proposes, we would be required to ignore subdivision 15's prohibition on duplication. In interpreting statutory provisions, we are instructed to "interpret statutes as a whole, and the words and sentences therein are to be understood in the light of their context." *Floding v. Gillespie (In re Dakota County)*, 866 N.W.2d 905, 909 (Minn. 2015) (quotations omitted).

Here, the DNR, as the MPCA noted in the order, "exercises ongoing regulatory authority and oversight over the permitting of water appropriations for this project." And, depending on the results of the aquifer test, any "impacts to the calcareous fen[s] . . . will be mitigated by [the] DNR, through its water appropriation permit process." In response to the MCEA's comments to the EAW, the MPCA further noted that "if the aquifer test reveals impacts [that] cannot be mitigated, [the] DNR will not issue [the permit]." Thus, we conclude that the assessment of water resources conducted by the MPCA satisfied its obligations under subdivision 16.

2. Requirement that EIS be Prepared if Available Information is Insufficient

We now turn to the MCEA's second argument, that the MPCA lacked necessary information and was thus required by Minn. R. 4410.1700, subp. 2a, to issue a positive declaration on the need for an EIS. That rule provides that when a responsible governmental unit lacks "information necessary to a reasoned decision about the potential for, or significance of, one or more possible environmental impacts," but such information could be obtained, the responsible governmental unit must either make a positive declaration that an EIS is necessary or postpone the decision if possible. Minn. R. 4410.1700, subp. 2a. The MCEA argues that the aquifer test was "necessary to a reasoned

decision" about the potential environmental effects on the calcareous fens and that the MPCA was thus required by the rule to issue a positive declaration on the need for an EIS.[6] As discussed above, however, because of the rigorous review process and strict statutory protections for calcareous fens, the MPCA could properly defer review of the potential impacts on the calcareous fens to the DNR's permitting process. We therefore conclude that the MPCA did not violate Minn. R. 4410.1700, subd. 2a, under the facts presented here.

3. Alleged Failure to Address an Important Aspect of the Problem and Identify Mitigation Efforts

The MCEA's final argument is that the MPCA's declaration was arbitrary and capricious because the MPCA failed to adequately address the issue of the impact of the well's groundwater appropriation on the calcareous fens and failed to identify mitigation efforts that are specific and reasonably expected to be effective. As noted above, a decision is arbitrary and capricious if the agency "fails to address an important aspect of the problem." *Friends of Twin Lakes*, 764 N.W.2d at 381.

With regard to the alleged failure to address the impact on the calcareous fens, the MCEA points to the well assessment and the MPCA's acknowledgment that the assessment demonstrated that "there is a potential for significant environmental effects for this project." The MCEA thus maintains that the MPCA failed to address this potential impact. This argument, again, is simply a repeat of the MCEA's objection to the MPCA's deferral

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[6] The MPCA could not postpone the decision, as noted above, because Barrick opposed any additional extension of time for the public comment period. *See* Minn. Stat. § 116D.04, subd. 2a(d).

to the DNR and its groundwater-appropriation permit review process. For the same reasons outlined above, we conclude that the MPCA recognized and addressed the potential impacts on the calcareous fens in the order and did not act arbitrarily or capriciously by deferring a more thorough assessment to the DNR. As previously noted, the DNR would be required to deny the groundwater-appropriation permit if impacts on the calcareous fens could not be mitigated.

The MCEA next argues that the MPCA erred because it failed to identify any specific mitigation efforts to protect the calcareous fens as required by Minn. R. 4410.1700, subp. 7(C). The applicable section of that subpart provides that, in considering "the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority[, the responsible governmental unit] 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." Minn. R. 4410.1700, subp. 7(C).

In support of its argument, the MCEA relies on language in the supreme court's opinion in *CARD*, to the effect that the responsible governmental unit may not rely on "vague statements of good intentions"; the mitigation efforts must be specific, targeted, and certain to appropriately mitigate the environmental effects. *CARD*, 713 N.W.2d at 834-35. This case does not, however, present the scenario that the supreme court warned against in *CARD*, where the MPCA "did not bother to investigate environmental effects because it . . . could later pass regulations if any environmental harm occurred." *Id.* at 835. Here, as the MPCA noted, there are strict statutory protections already in place specifically for calcareous fens. *See* Minn. Stat. § 103G.223.

The sole environmental concern identified by the MCEA in this appeal is the effect that groundwater appropriation may have on the calcareous fens. The regulation of groundwater appropriation and the protection of calcareous fens both fall squarely within the authority of the DNR. Minnesota law explicitly provides that calcareous fens "may not be filled, drained, or otherwise degraded, wholly or partially, by any activity" unless approved by the commissioner of the DNR in limited circumstances and based on a calcareous fens management plan. *Id.* Minnesota law therefore provides very specific protection for calcareous fens and charges the DNR with ensuring that protection. A proposed activity must have zero impact on a calcareous fen unless the commissioner of natural resources approves a plan specifically targeted at calcareous-fen management.[7] The DNR itself stated that if the feedlot were to impact the calcareous fens, it was extremely unlikely that the permit would be granted. We thus conclude that the MPCA "has properly examined [the] project and determined that specific measures can be reasonably expected to deal with the identifiable problems the project may cause." *CARD*, 713 N.W.2d at 835.

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[7] We note the MCEA's contention that the DNR's ongoing regulatory review may not be sufficient to protect the calcareous fens because, once an impact is noticed, it might be too late. This argument, however, is based on speculation and is outside the scope of this appeal. *See Iron Rangers for Responsible Ridge Action v. Iron Range Resources*, 531 N.W.2d 874, 881 (Minn. App. 1995) (noting that when there are "uncertainties, the court must assume that the agency or [responsible governmental unit] has exercised its discretion appropriately"), *review denied* (Minn. July 28, 1995).

The record therefore supports the MPCA's reliance on the DNR to mitigate any potential impact on the calcareous fens. Accordingly, the MPCA properly issued a negative declaration on the need for an EIS and granted coverage under the NPDES permit.

Affirmed; motions denied.