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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0904

In the Matter of the Improper Inclusion
of Certain Water Courses within
Public Waters Inventory Maps for 71 Counties.

Filed April 23, 2018
Appeal dismissed
Peterson, Judge

Minnesota Department of Natural Resources

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Considered and decided by Peterson, Presiding Judge; Ross, Judge; and Larkin, Judge.

U N P U B L I S H E D   O P I N I O N

PETERSON, Judge

In this certiorari appeal, relator challenges the respondent agency's order directing the removal of certain watercourses from public waters inventory maps. We dismiss the appeal for lack of jurisdiction.

FACTS

In 1979, the Minnesota Legislature directed the commissioner of the Minnesota Department of Natural Resources (the DNR) to inventory the waters of each county and make a preliminary designation of all public waters and wetlands and send a list and a map of the designated waters and wetlands to each county board for its review and comment. 1979 Minn. Laws ch. 199, § 7, at 336-37. The legislature defined "public waters" and "wetlands." 1979 Minn. Laws ch. 199, §§ 2-3, at 334-35. The legislature also set forth specific procedures for compiling the public waters inventory (PWI) lists and maps, which included public meetings, notices, reviews, hearings, appeals, revisions, and publication procedures. 1979 Minn. Laws ch. 199, § 7, at 336-37. The commissioner is required to maintain a PWI map for each county, and, when a map is revised, send a notification or map to the auditor of the affected county. *See* Minn. Stat. § 103G.201(a) (2016).

When the commissioner performed the original PWI, approximately 640 miles of watercourses that fit within the definition of public waters were designated on the PWI maps as public ditches. On the PWI maps, these watercourses were designated by heavy dashed lines, which combined the symbols for public waters—a heavy dark line—with the symbol for public ditches—a dashed line, because it was believed that they were part of public ditch systems and were also altered natural watercourses within the statutory definition of "public waters." Public ditches were assumed to be under the authority of public drainage authorities. *See* Minn. Stat. § 103E.005, subds. 9, 12 (2016) (defining "drainage authority" to include "the board or joint county drainage authority having

jurisdiction over a drainage system or project" and "drainage system" to include ditches). These watercourses with dual designation were not included on the PWI lists.

In 2015, the legislature enacted legislation to protect public waters and water quality by establishing buffer zones between bodies of water and land-based activities. 2015 Minn. Laws 1st Spec. Sess. ch. 4, art. 4, § 79, at 2054-58 (codified as amended at Minn. Stat. § 103F.48 (Supp. 2017)). The legislation established different widths of mandatory buffer zones, the widest of which was for zones next to public waters. Minn. Stat. § 103F.48, subd. 3(a)(1). The legislature directed the commissioner to establish and maintain maps of the buffer zone areas. Minn. Stat. § 103F.48, subd. 1(d). The buffer-zone law was amended in 2017 to define "public waters" as "public waters that are on the public waters inventory as provided in section 103G.201." 2017 Minn. Laws ch. 93, art. 2, § 105, at 704 (codified at Minn. Stat. § 103F.48, subd. 1(i)).

In the course of establishing the buffer-zone maps, the DNR noticed that the watercourses with dual designation on the PWI maps had not been included on the PWI lists. The DNR believed that some landowners had not received notice that watercourses on their land were designated as public waters because they were not included on the PWI lists, and as a result, the landowners may have failed to object to the original designation of these watercourses as public waters. The DNR concluded that this resulted in errors in the original PWI.

The commissioner has authority to revise the PWI map for each county "as needed, to . . . correct errors in the original inventory." 2005 Minn. Laws ch. 138, § 1, at 1168 (codified at Minn. Stat. § 103G.201(e)(2)(i) (2016)). In March 2017, the DNR began

examining how to convert watercourses improperly labeled as public ditches to watercourses designated as public waters. After a preliminary review, the DNR believed that some of the disputed watercourse segments should remain as public waters but some should not; the DNR decided to use a process in which all of the disputed segments would be removed from the PWI maps, after which the DNR would "evaluate a smaller portion of the segments that might warrant adding back to the PWI [maps]." There were 559 disputed segments totaling about 670 miles.

Following this internal investigation, the commissioner adopted findings of fact, conclusions of law, and an order directing "revisions to the relevant PWI maps in order to correct errors in the original inventory process." The revisions removed certain watercourses from the county PWI maps and from the buffer-zone maps. On the same date, April 13, 2017, the DNR administrative group issued an explanation and directives to staff. All of the actions surrounding the removal of the watercourses were taken within the DNR; persons and entities were notified of the DNR's actions only after the commissioner signed the order. The DNR held no public meetings and did not solicit comments.

On May 16, 2017, relator Minnesota Center for Environmental Advocacy (MCEA) requested by formal letter that the DNR revoke its order and give relator an opportunity to comment on its actions. The DNR denied this request on June 8, 2017. On June 9, 2017, relator, by writ of certiorari, challenged the DNR's decision. This court sought further briefing to determine whether it has jurisdiction to hear this certiorari appeal.

DECISION

Appellate jurisdiction is a question of law subject to de novo review. *Howard v. Svoboda*, 890 N.W.2d 111, 114 (Minn. 2017). "Certiorari is an extraordinary remedy only available to review judicial or quasi-judicial proceedings and actions; conversely, it is not available to review legislative or administrative actions." *Minn. Ctr. for Envtl. Advocacy v. Metro. Council*, 587 N.W.2d 838, 842 (Minn. 1999) (*MCEA*) (quotation omitted); *see also Honn v. City of Coon Rapids*, 313 N.W.2d 409, 414 (Minn. 1981) (stating that certiorari is used to permit "review [of] the proceedings of a tribunal exercising judicial or quasi-judicial functions . . . [but] is not appropriate to review legislative acts").

The supreme court has recognized three indicia of quasi-judicial actions: "(1) investigation into a disputed claim and the weighing of evidentiary facts; (2) application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim." *MCEA*, 587 N.W.2d at 842. In contrast, a quasi-legislative action "affect[s] the rights of the public generally," rather than individually. *Anderson v. County of Lyon*, 784 N.W.2d 77, 81 (Minn. App. 2010), *review denied* (Minn. Aug. 24, 2010). An agency exercises a legislative function "by balancing competing concerns and choosing among public policy alternatives." *Meath v. Harmful Substance Comp. Bd.*, 550 N.W.2d 275, 280 (Minn. 1996) (Anderson, J., concurring specially).

The commissioner's order bears indicia of legislative action. The decision did not arise out of an investigation into a disputed claim; there was no identified party opposing the action and offering competing evidence. MCEA argues that the DNR reacted to comments or complaints, but "such opposition does not convert a legislative decision-

making process into a quasi-judicial process involving the consideration of a disputed claim." *Anderson*, 784 N.W.2d at 82 (quotation marks omitted). The DNR undertook an investigation; but an investigation that weighs costs and priorities and even "favorable and unfavorable public input" is legislative action. *Id.*

The commissioner's order did not involve the application of facts to a prescribed standard. The order reflects a policy choice of how to deal with the potential of multiple individual lawsuits arising from errors in the original PWI in light of the new buffer-zone law. The order does not create a decision binding on the legal rights of any party; it establishes a process for examining and determining rights.

Because the challenged order is a quasi-legislative action that is not reviewable by certiorari, we dismiss this appeal.

Appeal dismissed.