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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1629**

In the Matter of the Determination of the Need for an
Environmental Impact Statement for the
Lower Pool 2 Channel Management Study:
Boulanger Bend to Lock and Dam 2
Maintenance Project in
Washington and Dakota Counties, Minnesota

**Filed June 4, 2018
Remanded
Worke, Judge**

Minnesota Department of Natural Resources

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

UNPUBLISHED OPINION

WORKE, Judge

Relator challenges respondent's negative declaration on the need for an environmental-impact statement (EIS). Because respondent's record of decision (ROD) contains insufficient findings to permit meaningful appellate review, we remand.

FACTS

Relator PAS Associates, Ltd. (PAS) owns more than 2,000 acres of Grey Cloud Island (the island), which lies in the Mississippi River. The island contains a water-filled mining pit with an estimated capacity of more than 10 million cubic yards (the lake). In June 2017, the U.S. Army Corps of Engineers (the Corps) proposed a project to excavate and construct two new rock sill training structures in an effort to improve the navigation channel around the island (the proposed project). The Corps prepared an environmental assessment (EA) under federal law in which it estimated that 306,000 cubic yards of material would be dredged from the river. The EA stated that “[t]he dredged material would be placed in an inactive mining pit in Lower Grey Cloud Island,” and included a map identifying two locations for disposal, both of which appear to fall within a body of water at one end of the island. It is not clear if the pit referenced in the EA is the lake.

In addition, the Corps is developing a Dredge Material Management Plan (DMMP) with respect to the same area addressed by the proposed project. The Corps predicts that the DMMP will require additional dredging from the river, resulting in several million cubic yards of material for disposal (the future project).

On June 26, 2017, respondent Minnesota Department of Natural Resources (DNR) circulated the Corps’ EA in place of an EAW. *See* Minn. R. 4410.1300 (2017). A 30-day public review-and-comment period began on June 26 and concluded on July 26, 2017. PAS submitted several comments and asserted that agency action based on the EA would be an error of law, unsupported by substantial evidence, and arbitrary and capricious.

In September 2017, the DNR issued its ROD in which it made numerous findings of fact and conclusions of law and responded to public comments to the EA. The DNR concluded that the disposal of dredged material for the proposed project would be consistent with the current and existing approved management plan, which was evaluated in a 1997 EIS. In a section of the ROD analyzing the proposed project's potential effects on aquatic species, the DNR stated that "[t]he dredged material would be placed in the waterlogged mining pit created by recent aggregate mining on Lower Grey Cloud Island." The DNR clarified that "[t]he pit has an estimated capacity of over 10 million cubic yards, so the estimated 300,000 cubic yards generated by the proposed project would not significantly change the nature of the existing mine pit." It is not clear if the pit referenced in the ROD is the lake. The DNR concluded that the proposed project "d[id] not have the potential for significant environmental effects" and declared that an EIS was not required. PAS initiated this appeal by petition for writ of certiorari.

D E C I S I O N

PAS argues that we should reverse the DNR's negative declaration because the DNR (1) failed to analyze or discuss the potentially significant environmental effects of disposing of dredged material in the lake, and (2) unlawfully segmented its environmental review of the proposed project and the future project rather than analyzing both in a single environmental-review document. This court reverses agency decisions "when they reflect an error of law, the findings are arbitrary and capricious, or the findings are unsupported by substantial evidence." *Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) (*CARD*). We must determine whether the

agency took a “hard look” at the problems involved and whether it “genuinely engaged in reasoned decision-making.” *Id.* (quotation omitted). But this court does accord substantial deference to the agency’s decision. *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977).

An agency’s decision is arbitrary and capricious if the agency

- (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that [conflicts with] the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency’s expertise.

CARD, 713 N.W.2d at 832. A decision is also arbitrary and capricious if it represents the agency’s “will and not its judgment.” *Markwardt v. State, Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977).

Substantial evidence includes “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.” *CARD*, 713 N.W.2d at 832 (quotation and quotation marks omitted). A decision is not supported by substantial evidence if there is a “combination of danger signals which suggest the agency has not taken a hard look at the salient problems and the decision lacks articulated standards and reflective findings.” *In re Claim for Benefits by Meuleners*, 725 N.W.2d 121, 123 (Minn. App. 2006) (quotation omitted).

The Minnesota Environmental Policy Act (MEPA), Minn. Stat. §§ 116D.01-.11 (2016), requires that governmental agencies considering taking action on a project must first consider environmental consequences. *CARD*, 713 N.W.2d at 823. Under MEPA,

there are two main types of environmental review: project-specific review, in which a project is reviewed by the responsible governmental unit (RGU) to determine whether it has the potential to cause significant environmental effects; and generic review, which examines types of projects not adequately reviewed on a case-by-case basis. *Id.*; Minn. R. 4410.1000, .3800 (2017). With a project-specific review, the RGU must first prepare an EAW, which 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); Minn. R. 4410.1000. If the RGU determines that a project has “the potential for significant environmental effects,” the RGU must issue a “positive declaration” indicating that an EIS must be completed. Minn. R. 4410.1700, subps. 1, 3 (2017).

To determine whether a project has the potential for significant environmental effects, the RGU must consider: (1) the “type, extent, and reversibility of environmental effects”; (2) “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.” *Id.*, subp. 7 (2017).

PAS raises numerous arguments for why this court should reverse the DNR’s negative declaration, but each of these arguments relies on the premise that the Corps intends to dispose of dredged material in the lake. The DNR asserts that each of these arguments fails because PAS conflates the proposed and future projects. The DNR claims

that the disposal site for the proposed project is not the lake, but is instead Shiely Pit, a 15-acre upland area adjacent to the lake.

The record contains conflicting statements concerning the proposed project's intended disposal site. The Corps' draft EA contains figure 5-3, which indicates that dredged material will be placed in two areas that both appear to fall within a lake at the southeast corner of the island. The Corps' final EA also states that the dredged material will be placed in an inactive mining pit on the island and contains figure 5-3 as well. Conversely, the record also contains a series of emails from August 2017 between the Corps and the DNR that contradict the Corps' EAs. In one email, the Corps considered a public comment discussing an upland 56-acre area as a potential disposal site instead of the lake. The Corps stated that "the 56 acre upland site is not part of the project. The Corps has a 15 acre upland area available that was approved as part of the CMMP (Channel Maintenance Management Plan)." In a later email, the Corps stated that the site referenced in its EA for disposal of dredged material is Shiely Pit, not the lake.

The DNR's ROD contains similar contradictory statements concerning the planned disposal site. The ROD states that "[t]he dredged material would be placed in the waterlogged mining pit created by recent aggregate mining on Lower Grey Cloud Island. The pit is a water-filled depression created by excavating in a previously upland area." The ROD also states that "[t]he pit has an estimated capacity of over 10 million cubic yards, so the estimated 300,000 cubic yards generated by the proposed project would not significantly change the nature of the existing mine pit." In an apparent contradiction, however, the ROD also states that "[t]he existing 15-acre portion of the mine pit that is

currently utilized for dredge material disposal was reviewed in the 1997 EIS.” The DNR also conceded at oral argument that the ROD contains contradictory statements concerning the location of the proposed project’s disposal site.

The DNR did not make a clear finding as to whether the Corps intends to dispose of approximately 300,000 cubic yards of dredged material in the lake. Identifying the intended disposal location is essential to determining whether an EIS is required for the proposed project. Without a specific factual finding on this issue, we cannot determine whether the DNR took the “hard look” required or whether the DNR’s decision to analyze the proposed project and future project separately was arbitrary and capricious. *See CARD*, 713 N.W.2d at 832. We conclude that the DNR’s findings are insufficient to permit meaningful appellate review. *See Interstate Power Co. v. Nobles Cty. Bd. of Comm’rs*, 617 N.W.2d 566, 577 (Minn. 2000) (stating that the supreme court has previously remanded cases to “afford an opportunity to provide findings sufficient to enable judicial review”). We therefore remand to the DNR for additional findings.

Remanded.