This opinion is nonprecedential except as provided by Minn.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
A20-0960

In the Matter of the Determination of the Need for an Environmental Impact Statement for the Nolte Family Irrigation Project in the Township of North Germany, Wadena County, Minnesota.

Filed May 24, 2021
Affirmed
Smith, Tracy M., Judge

Minnesota Department of Natural Resources

Jamie Lynn Konopacky (pro hac vice), Environmental Working Group, Minneapolis, Minnesota; and

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Frank Bibeau, Deer River, Minnesota; and

Paul Blackburn, Honor the Earth, Callaway, Minnesota (for amici curiae Honor the Earth and Pine Point Tribal Community Members)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this certiorari appeal, relators challenge the decision of the Minnesota Department of Natural Resources (DNR) not to order an environmental impact statement (EIS) for a proposed agricultural project known as the Nolte Family Irrigation Project. Relators argue that the decision is erroneous, arbitrary and capricious, and not supported by substantial evidence because it determines that the project (1) is not part of a phased action and (2) does not have the potential for significant environmental effects. We affirm.

FACTS

Respondent Tim Nolte operates a family farm in Wadena County. He and his family have been farming there for decades. He seeks to convert 303 acres of former timberland to irrigated agricultural land for row crop production and livestock grazing. As part of the project, Nolte applied for three groundwater-appropriation permits from the DNR to operate the irrigation systems. The three wells to be used in these irrigation systems would collectively pump around 100 million gallons of water per year from two aquifers. The two aquifers are connected to a shallow aquifer that provides drinking water to nearby residents, and that shallow aquifer connects to the nearby Redeye River.

The project sits within the Pineland Sands area in central Minnesota. The Pineland Sands area is around 770 square-miles of surficial glacial outwash deposit that has historically been used for timber production but, more recently, has been transitioning into irrigated agriculture, sparking environmental concerns.

R.D. Offutt's Operations in the Pineland Sands Area

The property at issue in Nolte's application is property that he had recently purchased from R.D. Offutt—one of the largest potato producers in the country. R.D. Offutt's expansion into the Pineland Sands area drove much of the increase in irrigated agriculture in the area over the previous several decades, leading to various environmental effects to private wells, forests, rivers, and lakes.

Most pertinent to this appeal is an expansion effort by R.D. Offutt in 2014 and 2015. In those years, R.D. Offutt submitted applications for 21 groundwater-appropriation permits and 33 preliminary well assessments. A preliminary well assessment is a precursor to a groundwater-appropriation permit. R.D. Offutt sought groundwater-appropriation permits to enable the conversion of approximately 7,000 acres of pine forest, historically managed for timber production, into irrigated farming.

In February 2015, the DNR ordered a discretionary environmental assessment worksheet (EAW) for R.D. Offutt's proposed expansion. R.D. Offutt appealed the decision but then withdrew all of its preliminary-well-assessment requests and three of its water-appropriation-permit requests. The DNR evaluated the project as revised and, in June 2015, again ordered a discretionary EAW. R.D. Offutt then withdrew the majority of its pending water-appropriation-permit applications, leaving five applications remaining. In November

2015, a group of citizens petitioned for an EAW to be prepared in connection with the remaining five applications. The DNR denied their petition. By the time the DNR denied the citizen petition, only two of these applications were still pending and the DNR determined the two pending applications did not have the potential for significant environmental effects.[1]

In May 2018, another group of citizens petitioned for an EAW regarding R.D. Offutt's operations. At that time, R.D. Offutt had three new water-appropriation-permit applications pending before the DNR and had sought to amend four existing water-appropriation permits. The DNR intended to grant the 2018 citizen petition, but, when the DNR informed R.D. Offutt of its decision, R.D. Offutt withdrew its pending water-appropriation-permit applications. After withdrawing these applications, R.D. Offutt only had four permit-amendment requests pending with the DNR. The DNR determined that the proposed amendments did not warrant an EAW. That decision was not appealed.

Nolte's Purchase of Land from R.D. Offutt

In May 2017, Nolte entered into a contract for deed with R.D. Offutt to purchase the property that is at issue in the Nolte project. The original contract for deed required Nolte to "improve the Property by whatever means necessary to make it useful for potato production" and to lease the property back to R.D. Offutt. In December 2017, Nolte submitted his application for the Nolte project to the DNR. The three groundwater-

[1] The DNR, however, did express some concern about the environmental impact of expanded irrigated agriculture in the Pineland Sands area and proposed a study with various state agencies as well as R.D. Offutt to address its concerns. Due to a lack of funding, however, the DNR never completed the study.

appropriation permits that Nolte sought corresponded to three of R.D. Offutt's 54 previously submitted applications.

In May 2018, the parties amended their contract for deed to remove the clause requiring improvement of the property and lease-back to R.D. Offutt. A warranty deed was properly recorded on August 12, 2019, conveying title of the land to Nolte, reflecting no further interest in the property on the part of R.D. Offutt.

The EAW and Public Comments

In June 2019, a citizens' group, including relators Toxic Taters, the Minnesota Well Owners Organization, the Northern Water Alliance, the Environmental Working Group, and a local organic farmer, petitioned the DNR to conduct an EAW for the Nolte project. They argued that the expansion would lead to decreased water availability in the area, increased pesticide exposure for nearby homes and water resources, and increased nitrate levels in the soil and water. The DNR granted the petition in August 2019. In issuing its decision to prepare an EAW, the DNR separated the Nolte project from R.D. Offutt—meaning that the DNR analyzed the environmental effects of the Nolte project only.

While preparing the EAW for the Nolte project, the DNR sought input from the Minnesota Pollution Control Agency (MPCA), the Minnesota Department of Agriculture (MDA), and the Minnesota Department of Health (MDH). The DNR also solicited information from Nolte. As part of this process, the DNR ordered a partial aquifer test, which is not typically part of the EAW process. The DNR-designed test required Nolte to pump one of the three project wells and did not require monitoring of surface water resources, including the nearby Redeye River. The DNR used the results from the project

well that was pumped to model the project's anticipated impact caused by the other two project wells. Nolte completed this test around a week before the DNR published the EAW.

The DNR conducted two periods of interagency review of the proposed EAW. Each agency raised different concerns. The MDH was particularly concerned with pesticide use and the potential risk of pesticide drift into local homes. The MDH also expressed concern that certain pesticides could leach into the groundwater. Finally, the MDH flagged potential decline in the water quality of nearby wells and the water quantity in nearby surface water resources. Reviewing officials at the DNR also expressed concern about pesticide use—in particular, noting that the draft EAW needed to include more specificity on the use, aggregation, and risks of particular chemicals at the project site. Similarly, the MPCA expressed concern about nitrate surface water contamination in the Straight River.

The DNR released the EAW for the Nolte project on April 6, 2020. During the 30-day public comment period following the EAW's publication, the DNR received 98 comments, and, of those, 18 were deemed substantive.

The Record of Decision

On June 18, 2020, after reviewing the comments, the DNR released its record of decision (ROD). In it, the DNR determined that an EIS was not required for the Nolte project because the project "**does not** have the potential for significant environmental effects."

Relators appeal the DNR's decision.

DECISION

Relators assert two primary challenges to the DNR's decision that an EIS is not required for the Nolte project. First, they argue that the DNR did not properly evaluate the Nolte project because it wrongly determined that the Nolte project is a stand-alone project. They contend that the Nolte project is part of a phased action with a larger expansion effort by R.D. Offutt and that the DNR's determination to the contrary is not based on substantial evidence, is arbitrary and capricious, and is legally erroneous. Second, they argue that, for a number of reasons, the DNR's determination that the Nolte project does not have the potential for significant environmental effects is not based on substantial evidence, is arbitrary and capricious, and legally erroneous. Before turning to relators' arguments, we begin with an overview of the governing environmental law and our standard of review.

I. Minnesota Environmental Policy Act and Standard of Review

The Minnesota Environmental Policy Act (MEPA), Minn. Stat. §§ 116D.01-.11 (2020), provides for two levels of environmental review of proposed actions—an EAW and an EIS. An EAW is a "brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for a proposed action." Minn. Stat. § 116D.04, subd. 1a(c). Persons concerned about the environmental effects of a proposed action may petition for an EAW. *Id.*, subd. 2a(e). The responsible governmental unit (RGU) must grant the petition if the petitioners demonstrate that there "may be potential for significant environmental effects." *Id.* The RGU prepares the EAW. Minn. R. 4410.1400 (2019).

The EAW informs the decision whether to order a second level of environmental review—an EIS. "An EIS is an exhaustive environmental review that the party proposing the project must conduct at its own expense." *Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs*, 713 N.W.2d 817, 824 (Minn. 2006) (*CARD*) (citations omitted). If an RGU determines that a project has "the potential for significant environmental effects," the RGU must issue a "positive declaration" requiring the completion of an EIS. Minn. R. 4410.1700, subps. 1, 3 (2019). If the RGU concludes that the proposed project does not have the potential for significant environmental effects, it must issue a "negative declaration" on the need for an EIS. *Id.*, subp. 3. The RGU must base its decision "on the information gathered during the EAW process and the comments received on the EAW." *Id.* The RGU must "maintain a record, including specific findings of fact, supporting its decision." *Id.*, subp. 4 (2019). Here, the DNR acted as the RGU, and it issued a negative declaration regarding an EIS.

On appeal, the decisions of administrative agencies "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) (citing Minn. Stat. § 14.69 (2000)). "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.

However, this deference does not apply if the agency's decision reflects an error of law, the findings are arbitrary and capricious, or the findings are unsupported by substantial evidence. *See* Minn. Stat. § 14.69 (2020) (identifying bases for reversing or modifying an administrative agency decision). A decision is arbitrary and capricious if it

> (1) is based on factors that the legislature did not intend for the RGU 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 RGU's decision-making expertise.

Friends of Twin Lakes v. City of Roseville, 764 N.W.2d 378, 381 (Minn. App. 2009) (citing *CARD*, 713 N.W.2d at 832). A decision is based on substantial evidence if "the agency has adequately explained how it derived its conclusion" and "that conclusion is reasonable on the basis of the record." *Matter of NorthMet Project Permit to Mine Application Dated Dec. 2017*, No. A18-1952, 2021 WL 1652768, at *11 (Minn. Apr. 28, 2021) (*NorthMet Project*).

A party challenging the DNR's decision on the need for an EIS "has the burden of proving that its findings are unsupported by the evidence as a whole." *Friends of Twin Lakes*, 764 N.W.2d at 381. "Our 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.'" *CARD*, 713 N.W.2d at 832 (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977)).

We turn to relators' arguments.

II. The DNR's determination that the Nolte project is not part of a "phased action" in connection with R.D. Offutt is reasonable, supported by the evidence, and consistent with MEPA.

Relators first argue that the DNR's decision must be reversed because the Nolte project is part of a "phased action" with R.D. Offutt's 7,000-acre expansion into the Pineland Sands area and the entire phased action therefore should have been considered in determining the need for an EIS.

"Phased actions" must be evaluated by the DNR as a single project in determining the need for an EIS. *See* Minn. R. 4410.1700, subp. 9 (2019).

> "Phased action" means two or more projects to be undertaken by the same proposer that a RGU determines:
>
> A. will have environmental effects on the same geographic area; and
> B. are substantially certain to be undertaken sequentially over a limited period of time.

Minn. R. 4410.0200, subp. 60 (2019). A "project" is defined by Minnesota regulations as a "governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly." Minn. R. 4410.0200, subp. 65 (2019). "Governmental action," in turn, is defined by MEPA to mean "activities, including projects wholly or partially conducted, permitted, assisted, financed, regulated or approved by units of government." Minn. Stat. § 116D.04, subd. 1a(d). Interpreting these definitions together, this court has explained that a "project" for purposes of MEPA is "a definite, site-specific action that contemplates on-the-ground environmental changes." *Minn. for Responsible Recreation v. Dep't of Nat. Res.*, 651 N.W.2d 533, 539 (Minn. App. 2002). Whether a project exists depends on "both the definiteness of the location and the maturity of plans

for development." *In re Envtl. Assessment Worksheet for the 33rd Sale of State Metallic Leases*, 838 N.W.2d 212, 216 (Minn. App. 2013) (*Metallic Leases*), *review denied* (Minn. Nov. 26, 2013).

A. The DNR's determination that the Nolte project is not part of a "phased action" is based on substantial evidence.

The DNR determined that the Nolte project is not part of a phased action because it is not one of "two or more projects to be undertaken by the same proposer." Minn. R. 4410.0200, subp. 60. The DNR explained that information provided by Nolte "indicated that there is no existing agreement with [R.D. Offutt] to conduct agricultural practices" on the subject property and that environmental review cannot be premised on "speculation." It observed that any relationship between environmental effects of the proposed project and the environmental effects of other agricultural operations is "properly addressed as part of [cumulative potential effects]."

Relators argue that substantial evidence does not support the DNR's decision. They contend that the Nolte project is part of R.D. Offutt's 7,000-acre expansion plan, reflected in the 54 permit applications that it sought (including for the three wells related to the Nolte project), and is being "directed" by R.D. Offutt. They emphasize that Nolte purchased his land from R.D. Offutt and that their contract initially required Nolte to lease the land back to R.D. Offutt, and they cite R.D. Offutt's initial involvement in Nolte's application. Relators assert that the environmental effects of both "projects" would pertain to the same geographic area—the Pineland Sands area—and that R.D. Offutt's efforts are substantially certain to be undertaken over time because R.D. Offutt submitted detailed plans and

specifications for future stages of irrigated farming when it applied for the 54 permits and because R.D. Offutt has built infrastructure to support future stages.

The DNR counters that substantial evidence supports the decision that the Nolte project is not part of a phased action. It argues that there is no 7,000-acre R.D. Offutt "project" because the expansion plan that relators rely on was abandoned by R.D. Offutt when it withdrew most of its 54 permit applications during environmental review and relators' "speculation" about R.D. Offutt's future plans does not make those plans a "project." In addition, the DNR argues that substantial evidence supports the determination that Nolte is not the "same proposer" as R.D. Offutt, noting that the lease-back requirement in the parties' original contract for deed was deleted, that Nolte represented to the agency he has no relationship with R.D. Offutt, and that Nolte's independence from R.D. Offutt is consistent with Nolte's long history of farming in the area and R.D. Offutt's representations that is divesting itself of property in the area because of environmental scrutiny.

Our review of the record persuades us that the DNR's determination that the Nolte project is not part of a phased action is based on substantial evidence. First, substantial evidence supports the determination there is not an expansion "project" of R.D. Offutt. After planning a 7,000-acre expansion into the Pineland Sands area, R.D. Offutt withdrew many of its permit applications. The 2014 and 2015 preliminary well assessments were withdrawn after the DNR ordered a discretionary EAW for the expansion in February 2015. And the majority of the 2014 and 2015 water-appropriation permits applications were withdrawn after the DNR ordered a discretionary EAW for the revised expansion in June 2015. R.D. Offutt executed smaller expansions in the years between these initial

applications and the Nolte project, but the DNR determined none warranted an EAW. Should R.D. Offutt decide to return to its planned 7,000-acre expansion of irrigated farming in the area, it would again need to seek permits and would be subject to environmental review. The record does not lack substantial evidence that R.D. Offutt's abandoned 7,000-acre expansion plan is not a definite, mature "project."

Our decision in *Metallic Leases* supports this conclusion. In that case, we concluded that the sale of metallic-mineral leases, without more, did not constitute a "project" under MEPA, triggering environmental review, because any future exploration and mining under the leases was "indefinite" and would require future approval and permits. 838 N.W.2d at 215, 217-18; *see also Iron Rangers for Responsible Ridge Action v. IRRRB*, 531 N.W.2d 874, 881-82 (Minn. App. 1995) (holding an agency cannot be compelled to prepare an EIS based on speculative data), *review denied* (Minn. July 28, 1995). Similarly, here, any future actions by R.D. Offutt to expand into the Pineland Sands area would be subject to new applications and approval by the DNR. Relators argue that *Metallic Leases* is distinguishable because the leases in that case were not linked to definite locations, whereas, here, the location of an expansion by R.D. Offutt is definite based on its past applications. But even if the location is definite, any plans by R.D. Offutt remain indefinite because R.D. Offutt would still need to apply for permits from the DNR to expand its irrigated-farming operations and would still be subject to environmental review.

Second, substantial evidence also supports the DNR's determination that R.D. Offutt and Nolte are not the "same proposer." It is true that Nolte purchased the land at issue from R.D. Offutt and that the original contract for deed included a clause requiring

Nolte to improve the property for potato production and lease it back to R.D. Offutt. But the contract for deed was amended in May 2018 to remove this clause, and the warranty deed executed in 2019 establishes that R.D. Offutt has no current interest in Nolte's property. In addition, in response to the DNR's inquiry, Nolte confirmed that he has no written contracts with anyone to farm his land. Finally, R.D. Offutt told the DNR that it was divesting itself of property in the Pineland Sands area because of regulatory scrutiny by the DNR and other environmental agencies. This evidence provides a sufficient basis for the DNR's determination that Nolte and R.D. Offutt are not the "same proposer."

On this record, the DNR's determination that Nolte's proposal is not part of a phased action consisting of two more projects by the same proposer is based on substantial evidence.

B. The DNR did not act arbitrarily and capriciously by considering Nolte's assurances.

Relators also argue the DNR's determination that the Nolte project is not part of a phased action is arbitrary and capricious because the DNR relied solely on Nolte's "fickle" word that he is not working with R.D. Offutt though the evidence shows otherwise. They emphasize that Nolte told the DNR that he might grow potatoes on the site and that his "unofficial" position was that it was "none of anyone's business how he and his family run their family farm." They also argue that Nolte faces substantial economic pressure to grow potatoes and that those pressures demonstrate that his project is part of a phased action with R.D. Offutt.

Relators' argument that the DNR's decision is arbitrary and capricious is essentially a reframing of their argument that the decision is not supported by substantial evidence. In the previous section, we cited the substantial evidence that supports the DNR's decision that the Nolte project is not part of a phased action with R.D. Offutt. Although there may be evidence in the record suggesting a contrary result, a court's "judgment concerning inferences to be drawn from the evidence should not be substituted for that of the agency." *Red Owl Stores, Inc. v. Comm'r of Agric.*, 310 N.W.2d 99, 104 (Minn. 1981). The DNR's determination is not arbitrary and capricious.

C. The DNR did not fail to look at on-the-ground project realities.

Finally, relators argue that the DNR erred as a matter of law by defining the Nolte project as a stand-alone project because the DNR did not look at "on-the-ground project realities" and instead focused on the agency review process. They observe that the definition of "project" in the Minnesota Rules states that "[t]he determination of whether a project requires environmental documents shall be made by reference to the physical activity to be undertaken and not to the governmental process of approving the project." Minn. R. 4410.0200, subp. 65. Relators argue that the DNR rejected R.D. Offutt's operations as a "project" by narrowly focusing on the DNR's 2018 decision not to require environmental review of R.D. Offutt's four permit-amendment requests and by failing to consider R.D. Offutt's previous 54 permit applications. In so doing, they argue, the DNR erroneously focused on the agency review process and not on the on-the-ground project realities.

We are not persuaded. The record reflects that the DNR looked to on-the-ground realities when distinguishing between the Nolte project and any R.D. Offutt expansion. The DNR evaluated the contract for deed and determined that it no longer included any land-lease language. And Nolte submitted his warranty deed showing his outright ownership of the land. Because Nolte owns the land—and has no agreement with R.D. Offutt to use the land—the DNR had a substantial basis for determining that the on-the-ground realities do not connect the Nolte project to any R.D. Offutt expansion effort.

In sum, based on our review of the record and the ROD, we conclude that the DNR took a "hard look" at whether the Nolte project was part of a phased action and engaged in reasoned decision-making. *CARD*, 713 N.W.2d at 832. And because we defer to the agency's reasonable interpretation of the facts, *cf. Red Owl Stores*, 310 N.W.2d at 104, the DNR did not err by determining that the Nolte project is separate from R.D. Offutt's expansion project and evaluating the Nolte project as a stand-alone project.

III. Relators' challenges to the DNR's determination that the Nolte project does not have the potential for significant environmental effects fail.

Relators next challenge the DNR's determination that the Nolte project does not have the potential for significant environmental effects. Under MEPA, an RGU must order an EIS if a project poses the potential for significant environmental effects. Minn. Stat. § 116D.04, subd. 2a(a). The Minnesota Rules identify four factors that an RGU must consider in determining whether a project has the potential for significant environmental effects: (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 environmental studies undertaken by public agencies or the project proposer." Minn. R. 4410.1700, subp. 7 (2019).

An RGU's evaluation of the four factors is "primarily factual and necessarily requires application of the agency's technical knowledge and expertise to the facts presented." *Minn. Ctr. for Envtl. Advocacy*, 644 N.W.2d at 464. The agency's decision is presumed correct and will not be disturbed unless it is "unsupported by substantial evidence in view of the entire record as submitted or was arbitrary and capricious." *Id.*

Relators assert six arguments challenging the DNR's determination that the Nolte project does not warrant an EIS. We address each in turn.

A. The Kraft Report

Relators first argue that the DNR erred as a matter of law by failing to consider a report by Dr. George Kraft, which was submitted as part of Environmental Working Group's public comments on the EAW. By rule, an RGU must "maintain a record" supporting its decision and "[t]he record must include specific responses to all substantive and timely comments on the EAW." Minn. R. 4410.1700, subp. 4.

Kraft is a hydrologist who researches "agricultural groundwater quality and quantity issues in sandy soils and glacial aquifer systems in the Northern Great Lake States." His report focuses on groundwater-quantity concerns, nitrate contamination of groundwater, and the effectiveness of mitigation efforts. The report asserts that the EAW failed to consider the cumulative environmental impact that the three wells will have on water

quantity—especially on connected water sources. The report asserts that Nolte's plan for the land will likely result in contamination of double to quadruple the ten-milligrams-per-liter statutory limit for nitrates in drinking water.

The DNR argues that it adequately addressed the issues raised by Kraft in his report, even if it did not address Kraft's report by name. It explains that, in the ROD, "[s]imilar comments were grouped together, each group was analyzed, and a single response to comment was developed for the category." While Kraft's name was never mentioned, the DNR points to the ROD's section on "water quality" and asserts that it responds to Kraft's report. In that section, the ROD discusses whether the project would "significantly contribute to any increase in nitrate concentration in nearby wells or cause those wells to exceed the drinking water standard of 10mg/L." It also states that "nitrate and pesticide groundwater contamination could originate beneath the cropped project site and could migrate offsite into deeper aquifers and discharge to wetlands, streams, and the Redeye River" but that "it is challenging to determine any measurable impact . . . of a Project of this limited size." These statements in the ROD indicate that the DNR at least considered and responded to the concerns in Kraft's report.

Relators challenge the adequacy of the DNR's response. They note that the ROD concludes that, "[g]iven the number of variables involved in predicting groundwater quality in the environmentally relevant area, it is unlikely that a modeling exercise would produce definitive results that could be relied upon in decision making." Relators argue that Kraft's report provides that modeling and therefore should have been considered. But relators' argument goes to the substance of the DNR's determination about reliable

modeling, and we defer to the DNR's technical knowledge and expertise. *See Minn. Ctr. for Envtl. Advocacy*, 644 N.W.2d at 464.

Relators also challenge the DNR's argument that it responded to the Kraft report by grouping it with the comments of another expert, geologist Jeffrey Broberg. Relators argue that, because the two experts have different qualifications and examined different aspects of the potential nitrate pollution of nearby groundwater, the ROD's discussion of Broberg's comments is not responsive to the issues raised by the Kraft report. But this argument again goes to the DNR's assessment and weighing of the evidence, and we defer to the DNR's technical knowledge and expertise. *See id.*

B. Water-Quality Effects

Relators next argue that the DNR's determination that effects on water resources will be "limited in extent, temporary, or reversible" and that "ongoing public regulatory authority" can address these effects is arbitrary and capricious. An agency's decision is arbitrary or capricious if it represents the agency's will, rather than its judgment. *Trout Unlimited, Inc. v. Minn. Dep't of Agric.*, 528 N.W.2d 903, 907 (Minn. App. 1995) (quotation omitted), *review denied* (Minn. Apr. 27, 1995).

Relators argue that the DNR improperly concluded that any modeling of groundwater quality would be unlikely to produce definitive results. They again point to Kraft's and Broberg's research and argue that the DNR, by ignoring the results of their studies in favor of conclusions "without supporting references," acted arbitrarily and capriciously. Relators also contend that the DNR was more interested in narrowing the

boundaries by which they needed to measure cumulative effects and in turn failed to analyze local groundwater-quality effects.

In response, the DNR points to several portions of the ROD that discuss various local impacts on water resources—including information from the aquifer test allowing the DNR to assess the risk to domestic wells and the Redeye River and the impact of required and voluntary mitigation strategies to help manage any future contamination.

The ROD determines that "[t]he proposed nitrate and pesticide contribution from the Project, as mitigated, would be minimal." In reaching this conclusion, the DNR analyzed the size of the project area, Nolte's certification under the Minnesota Agricultural Water Quality Certification Program (MAWQCP), other mandatory mitigation strategies, and several reports and analyses. This sort of weighing of evidence falls within the expertise of the DNR, and, thus, we defer to the agency's determinations. *See Minn. Ctr. for Envtl. Advocacy*, 644 N.W.2d at 463-64. We conclude that the DNR took a "hard look" at the evidence regarding water quality. *CARD*, 713 N.W.2d at 832

Relators also argue that the DNR acted arbitrarily and capriciously by disregarding other agencies' concerns and relying on mitigation measures rather than studying potential effects. They cite to our decision in *Trout Unlimited*, 528 N.W.2d 903. In that case, we reversed the MDA's decision not to require an EIS for a water-appropriation permit for a 97-acre irrigation project. *Id.* at 905-07. The MDA's decision was opposed by several other government agencies due to the potential impact of pesticides on a nearby creek. *Id.* at 908-09. In reaching its decision, the MDA determined that, because "[m]onitoring and permit conditions can identify significant impacts and modify or terminate the project if

necessary," an EIS was unnecessary. *Id.* at 909. We reversed, explaining, "The very purpose of an EIS . . . is to determine the potential for significant environmental effects *before* they occur. By deferring this issue to later permitting and monitoring decisions, the Commissioner abandoned his duty to require an EIS where there exists a 'potential for significant environmental effects.'" *Id.* Relators argue that, because of similarities here with the facts in *Trout Unlimited*—including the projects' region, the concerns of groundwater contamination, and the similar focus on mitigation—we should likewise reverse the agency's decision here.

But the DNR persuasively responds that this case is not like *Trout Unlimited.* Here, the DNR consulted with other agencies in the EAW process, but relators point to no opposition by those agencies to not ordering an EIS. In addition, here, unlike the agency in *Trout Unlimited*, the DNR did not defer analysis of potential environmental effects to post-project monitoring and permitting. Rather, this case is more like *Friends of Twin Lakes*, where we affirmed the decision not to order an EIS. 764 N.W.2d at 379. In that case, we distinguished *Trout Unlimited* because the city in *Friends of Twin Lakes*, rather than waiting to see if significant environmental effects occurred, instead incorporated measures "to prevent negative environmental effects before they occur." *Id.* at 382. Similarly, here, the EAW and ROD outline specific mitigation measures that the DNR concludes will prevent negative environmental effects from occurring. The DNR is not deferring environmental review until after the effects have occurred.[2]

[2] Relators raise another argument in their reply brief. Relying on the brief from amici Mattison and Otterson, relators argue that, by determining that an EIS is not required in

C. Public Comments on Mitigation Efforts

Relators next argue that the DNR did not take into account public comments regarding the efficacy of mitigation efforts and that the DNR's decision to rely on those efforts is arbitrary and capricious. Relators rely on Kraft's and Broberg's reports opining that the mitigation measures would be ineffective in preventing deterioration of groundwater quality. They contend that, because the DNR did not adequately assess the potential for groundwater deterioration, the DNR cannot rely on mitigation of these impacts as a basis for its decision not to order an EIS.

This argument is unpersuasive. The DNR did evaluate comments regarding the effectiveness of these mitigation strategies. For example, in responding to the Environmental Working Group's comment pointing to the study of the farming row crops in Byron Township in Cass County as evidence that mitigation will be ineffective, the ROD states that "[t]his study is providing important information to better understand cropping and nitrogen management practices that can minimize the loss of nitrogen below a crop root zone." The ROD states, "The Byron study provides some general reference regarding nitrogen concentration reductions that might be observed under similar fields. The behavior of nitrogen in the environment is, however, governed by a complex set of interrelated chemical and biological transformations." In response to Broberg's contention that the

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this case, the DNR changed its internal policy without explaining the reasoning behind the change in policy and that change in policy thus constitutes an arbitrary and capricious decision. Because relators did not raise this issue in their principal brief, it is outside the scope of their reply brief, and we decline to consider it. *See Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 887 (Minn. 2010). And we decline to address an issue raised only by an amicus. *See NorthMet Project*, 2021 WL 1652768, at *16.

mitigation strategies will only have "short-term ephemeral benefits," the ROD states that "nitrogen concentrations measured at one location should not be taken as a direct analog for what can be expected at another location." Relators' argument again asks us to reweigh the evidence, something we will not do. *See In re Appeal of Rocheleau*, 686 N.W.2d 882, 891 (Minn. App. 2004) ("The reviewing court is not to retry the facts or make credibility determinations." (quotation omitted)), *review denied* (Minn. Dec. 22, 2004).

D. Evidentiary Support for Proposed Mitigation Efforts.

Relators next assert that the DNR's determination regarding the sufficiency of proposed mitigation measures is not supported by substantial evidence. The DNR may consider "mitigation measures as offsetting the potential for significant environmental effects . . . if those measures are specific, targeted, and are certain to be able to mitigate environmental effects." *CARD*, 713 N.W.2d at 835. In evaluating the effect of mitigation measures, an RGU may consider current regulatory requirements and "whether mitigation measures may be applied by a regulatory authority." *Id.* at 834. Voluntary mitigation measures may also be considered. *Minn. Ctr. for Envtl. Advocacy*, 644 N.W.2d at 468.

Relators challenge the DNR's reliance on Nolte's MAWQCP certification. But voluntary mitigation efforts may be considered. And Nolte's certification is contingent on his following the University of Minnesota's recommended best management practices for fertilizer use. The certification also requires Nolte to implement a list of mitigation measures meant to protect the surrounding water quality. This condition is repeated in an agreement between Nolte and the Wadena Soil & Water Conservation District. Consideration of these conditions as mitigation measures was not improper.

Relators also argue, though, that the DNR's reliance on Nolte's MAWQCP certification is error because the certification is for Nolte's current farming operation, which does not include irrigated agriculture. But the terms of the certification require Nolte to inform the certifying agent of all land used for agricultural operation.

Relators also argue that the DNR did not adequately examine the efficacy of mitigation measures. Relators' argument again appears to compare the DNR's analysis to Kraft's report. Our role is to assess whether the DNR took a "hard look" at the evidence when coming to their conclusion and not to reweigh the evidence. *See CARD*, 713 N.W.2d at 832; *Rocheleau*, 686 N.W.2d at 891. Provided that the DNR "genuinely engaged in reasoned decision-making," we presume the DNR's conclusions are correct. *CARD*, 713 N.W.2d at 832 (quotation omitted). Substantial evidence in the record supports the DNR's conclusion. The EAW highlights Nolte's crop rotation as a mitigating measure for nitrates. And the ROD determines that Nolte's obligations under the MAWQCP certification and his agreement with the Wadena Soil & Conservation District will "reduce nitrogen losses" and "diminish the potential for cumulative effects to groundwater." We defer to the DNR's evaluation of the effectiveness of mitigation measures. *Id.*

E. Water-Quantity Effects

Relators next contend that the DNR erred by determining that that the Nolte project does not pose potentially significant water-depletion effects to residential wells, wetlands, and the nearby Redeye River.

Relators first contend that the DNR's decision violates Minn. R. 4410.1700, subp. 2a (2019), because necessary information is lacking that could be reasonably obtained.

Specifically, they contend that, because the DNR-designed aquifer pump test pumped only one well, the full impact of the project's impact on local groundwater quantities is not determined. They argue that a simultaneous aquifer pump test on all three wells must be run to be provide necessary information.

Rule 4410.1700, subp. 2a, provides that, if the RGU determines that it is lacking necessary but obtainable information to make a reasoned decision about the potential for environmental impacts, it must either make a positive declaration and include in the EIS studies to obtain the information or postpone the decision on the need for an EIS in order to obtain the lacking information. The question posed by relators' argument is whether the DNR improperly determined that additional information is necessary to make a reasoned decision.

Substantial evidence supports the determination that information was sufficient to make a reasoned decision. The DNR conducted an aquifer pump test and obtained modeling information from the test that identified potential water drawdown effects on nearby residential wells from the Nolte project. The DNR then took this information and included certain permitting restrictions in the EAW to prevent interference with residential wells. The ROD does defer some fact-finding for the water-appropriation permitting process. But the DNR did not ignore the potential significant environmental effects on residential wells arising from the Nolte project. *See Pope Cty. Mothers v. Minn. Pollution Control Agency*, 594 N.W.2d 233, 237 (Minn. App. 1999) (determining that the MPCA ignored the potential for significant environmental effects from hydrogen sulfide emissions by deferring the issue to later permitting). The aquifer test that was completed provided the

DNR with information to impose certain mitigation requirements meant to prevent water-quantity issues.

Moreover, as the DNR observes, any permit issued to Nolte is subject to modification through additional permitting conditions and cancellation if necessary. Minn. Stat. § 103G.315, subd. 11 (2020). And because the DNR can rely on mitigation measures applied through regulation, *see CARD*, 713 N.W.2d at 834, several of relators' concerns can be addressed through continuing regulation. Relators contend that this reasoning is flawed because the DNR cannot modify water-appropriation permits during the summer months unless "the authorized amount of appropriation endangers a domestic water supply." Minn. Stat. § 103G.271, subd. 3 (2020). But the DNR can cancel a water-appropriation permit "at any time" to protect the public interest with the recommendation of the supervisors of the Wadena Soil & Water Conservation District. *See* Minn. Stat. § 103G.315, subd. 11(a)-(b). Therefore, the DNR is correct that future regulatory authority allows the DNR to intervene in the event of unexpected environmental effects.

In sum, the DNR reasonably concluded that it had sufficient information and that an aquifer pump test on the remaining two wells was not necessary to make a reasoned decision whether to order an EIS in this case.

Relators also argue that Kraft's report shows that the DNR's initial analysis is incorrect and that the project will lead to "declines in aquifers, connected wetlands and the Redeye River." But the DNR did conduct a partial aquifer test that included modeling for potential Redeye River water decline when all of the irrigation wells are pumping. The modeling shows that the irrigation wells are not expected to impact nearby wetlands.

Again, this argument asks us to reweigh evidence, but we defer to the DNR's determination. *See CARD*, 713 N.W.2d at 832.

Finally, relators challenge the timing and design of the aquifer test that did occur. Their challenge relates to a subject matter that is squarely within the DNR's "expertise and [its] special knowledge in the field of [its] technical training, education, and experience." *Minn. Ctr. for Envtl. Advocacy*, 644 N.W.2d at 463 (quotation omitted). The DNR's decisions in crafting and executing that aquifer test is entitled to judicial deference. *See id.*

F. Pesticide Drift Effects

Finally, relators argue that the DNR failed to address comments regarding pesticide-drift effects, rendering its decision legally erroneous and arbitrary and capricious. Relators point to three comments in particular: Toxic Tater's comment highlighting a 2012 air-quality study of the Pineland Sands area showing that pesticide residues were common in the area, the Kraft report's discussion of negative consequences for aquatic and terrestrial invertebrates if pesticides leach into the groundwater, and agency comments encouraging a more site-specific pesticide risk evaluation of the Nolte project. The DNR argues that it responded to these comments and analyzed potential environmental and health risks that were tied to pesticide use.

The ROD "recognizes that off-target air movement of pesticides can present risks to humans and the environment" and identifies specific pesticides of concern. The ROD discusses the role of the federal Environmental Protection Agency (EPA) in regulating human exposure to pesticides. And it reports that experts from the MDA and the MDH reviewed the EPA's most recent bystander risk assessments and determined that "[n]o

unacceptable bystander inhalation risks were identified . . . based on the currently labeled uses and established buffers." The ROD also cross-references portions of the EAW. In the EAW, the DNR reiterates that the EPA's risk evaluations "ensure that use according to the label directions will not result in . . . unreasonable harmful effects on wildlife and the environment." Further, both the EAW and ROD state that all pesticides must be handled and applied by licensed applicators and include measures to avoid, minimize, or mitigate adverse effects, such as following the label requirements, safety sheets, and the MDA rules and permit programs. On this record, we determine that the DNR did not fail to respond to public comments on pesticide drift.

Relators also argue the DNR acted arbitrarily and capriciously in assessing the potential impact of pesticide use on nearby residents because it ignored studies confirming the association between pesticide exposure and non-Hodgkin's lymphoma and, in fact, "affirmatively lied in the ROD" by denying that association. Relators appear to be referring to the statement in the ROD that "Wadena County did have statistically significantly higher colorectal cancer and non-Hodgkin's lymphoma rates than the state rates but these cancers are not associated with the use of pesticides." But, regardless of the accuracy of that statement, the issue remains whether the agency's determination regarding the effect on residents from pesticide drift from the Nolte project is arbitrary and capricious. The ROD identifies the mitigation measures that will apply: following the EPA instructions and guidelines on pesticide use, and adherence to best management practices as required by Nolte's MAWQCP certification. The ROD determines that the "[r]isk to human health from off-site air movement is considered negligible - low." Despite relators' disagreement

with the conclusion, the DNR's decision is not "so implausible that it could not be explained as a difference in view or the result of the DNR's decision-making expertise." *Friends of Twin Lakes*, 764 N.W.2d at 381.

After reviewing the administrative record, we find none of relators' challenges to the DNR's decision not to order an EIS for the Nolte project persuasive and affirm the agency's decision.[3]

Affirmed.

[3] Although amici raise additional issues not raised by the relators, again, we generally do not decide issues raised solely by an amicus brief. *See League of Women Voters Minn.*, 819 N.W.2d at 645 n.7.