

*This opinion is nonprecedential except as provided by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
A22-0818**

In the Matter of the Decision on the Petition Requesting the Preparation of an
Environmental Assessment Worksheet for the Proposed W. Lorentz & Sons
Construction, Inc., Sioux Quartzite Quarry, Amboy Township, Cottonwood County,
Minnesota.

**Filed February 13, 2023
Affirmed
Slieter, Judge**

Minnesota Pollution Control Agency

Matthew C. Berger, Gislason & Hunter LLP, New Ulm, Minnesota (for relator W. Lorentz
& Sons Construction, Inc.)

Keith Ellison, Attorney General, Peter J. Farrell, Assistant Attorney General, St. Paul,
Minnesota (for respondent Minnesota Pollution Control Agency)

Considered and decided by Slieter, Presiding Judge; Reyes, Judge; and Frisch,
Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

Relator challenges respondent's decision to require an environmental-assessment worksheet (EAW) before adding a site to relator's existing permit for stormwater discharge. Because permit coverage for additional sites does not become effective until respondent issues a written modification of the permit, and because respondent's decision to require an EAW is supported by substantial evidence and not arbitrary and capricious, we affirm.

FACTS

Relator W. Lorentz & Sons Construction, Inc. (Lorentz) seeks to open a quarry in Amboy Township to mine and process Sioux Quartzite (the Graff quarry). The project site is located on Red Rock Ridge, which encompasses historic and culturally important sites, including the Jeffers Petroglyphs.

In June 2021, respondent Minnesota Pollution Control Agency (MPCA) issued to Lorentz National Pollution Discharge Elimination System/State Disposal System (NPDES/SDS) permit coverage for a sand and gravel pit in Nicollet County pursuant to Minnesota's general permit for nonmetallic mining (MNG49 permit or the permit). In October 2021, Lorentz submitted to MPCA a "site inventory report form" to add a site in Nicollet County to its MNG49 permit coverage. Eleven business days after Lorentz submitted the site inventory report form, MPCA issued a "revised notice of coverage" adding the second sand and gravel pit to Lorentz's permit.

On November 19, 2021, Lorentz submitted to MPCA a site inventory report form listing the Graff quarry in addition to the two existing sites in Nicollet County.¹ It attached to this form the "Phase I Cultural Resource Investigation of the Graff Quarry Project" (the phase I investigation), which was completed by In Situ Archeological Consulting in May 2021. MPCA reviewed the phase I investigation and asked Lorentz to develop an

¹ Lorentz previously attempted to obtain coverage for the Graff quarry pursuant to a different general permit, which is not relevant to this appeal. *See In re Contested Case Hearing Request by W. Lorentz & Sons Constr.*, No. A21-1359, 2022 WL 2659356, at *1 (Minn. App. July 11, 2022) (affirming revocation of coverage by Minnesota's general industrial-stormwater permit).

“archaeological monitoring plan and unanticipated discovery plan” (monitoring plan) for the site, in consultation with the Lower Sioux Indian Community Tribal Historic Preservation Office. In Situ developed a monitoring plan and Lorentz sent it to the Tribal Historic Preservation Office in the second week of March 2022, but the record contains no evidence that the tribal office provided any response to the monitoring plan.

On March 17, 2022, a citizen group petitioned to require an EAW for the Graff quarry. The petition alleged that the Graff quarry would threaten, among other environmental effects, “the loss of significant and irreplaceable historic and archaeological resources.” MPCA, as part of its review of the petition, asked the Minnesota Office of the State Archaeologist to review the phase I investigation and the monitoring plan. The state archaeologist responded with concerns regarding the adequacy of the phase I investigation and monitoring plan, including lack of consultation with the state archaeologist and Tribal Historic Preservation Office in the preparation of both documents.

On May 16, 2022, MPCA issued findings determining that the Graff quarry required an EAW because it had “the potential for significant environmental effects to historic and archaeological resources” and the potential for significant cumulative impacts to historic and archaeological resources. Lorentz appeals this determination by writ of certiorari.

DECISION

We review the decision to require an EAW pursuant to the Minnesota Administrative Procedure Act (MAPA), Minn. Stat. §§ 14.001-.69 (2022). Minn. Stat. § 116D.04, subd. 10 (2022); *see also Minn. Ctr. for Env’t. Advoc. v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn. 2002) (holding that MAPA applies “in an

area such as environmental review, uniquely involving application of an agency's expertise, technical training, and experience"). Relevant to this appeal, we may "reverse or modify" an agency decision if "the administrative finding, inferences, conclusion, or decisions are: . . . in excess of the statutory authority or jurisdiction of the agency; or . . . unsupported by substantial evidence in view of the entire record as submitted; or . . . arbitrary or capricious." Minn. Stat. § 14.69.

We first outline the overarching regulatory framework, then address Lorentz's arguments in turn.

Congress passed the Clean Water Act (CWA) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *In re Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738*, 763 N.W.2d 303, 308 (Minn. 2009) (quoting 33 U.S.C. § 1251 (2006)). One way the CWA accomplishes this goal is by authorizing states to implement permitting programs. *Id.* at 308-09.

MPCA has the authority pursuant to the Minnesota Water Pollution Control Act, Minn. Stat. §§ 115.01-.09 (2022), "to administer and enforce all laws relating to the pollution of any of the waters of the state," including issuing, reissuing, modifying, and denying permits "to prevent, control or abate water pollution." Minn. Stat. § 115.03, subd. 1(a), (e). This authority includes administration of the CWA permitting program and issuance of combined NPDES/SDS permits. Minn. Stat. § 115.03, subd. 5(a); Minn. R. 7001.1010 (2021).

The Minnesota Environmental Policy Act (MEPA), Minn. Stat. §§ 116D.01-11 (2022), exists "to force agencies to make their own impartial evaluation of environmental

considerations before reaching their decisions.” *Iron Rangers for Responsible Ridge Action v. Iron Range Res.*, 531 N.W.2d 874, 880 (Minn. App. 1995) (quoting *No Power Line, Inc. v. Minn. Env’t Quality Council*, 262 N.W.2d 312, 327 (Minn. 1977)), *rev. denied* (Minn. July 28, 1995). 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); *see also* Minn. R. 4410.0200, subp. 24 (2021). An environmental impact statement (EIS) is “an analytical rather than an encyclopedic document that describes the proposed action in detail” and analyzes environmental impacts, appropriate alternatives, mitigation methods, and unavoidable “economic, employment, and sociological effects” of the action. Minn. Stat. § 116D.04, subd. 2a(a); *see also* Minn. R. 4410.0200, subp. 26 (2021); *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm’rs*, 713 N.W.2d 817, 824 (Minn. 2006) (“An EIS is an exhaustive environmental review . . .”).

Residents and property owners in Minnesota may request preparation of an EAW by filing a petition containing the signatures of at least 100 Minnesota residents or property owners. Minn. Stat. § 116D.04, subd. 2a(e); Minn. R. 4410.1100, subp. 1 (2021). The responsible agency “shall order the preparation of an EAW if the evidence presented by the petitioners, proposers, and other persons or otherwise known to the [agency] demonstrates that, because of the nature or location of the proposed project, the project may have the potential for significant environmental effects.” Minn. R. 4410.1100, subp. 6 (2021); *see also Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 207 (Minn. 1993) (“The threshold requirement of this statute, however, is whether the project

may harm the environment.”). “Environment” is broadly defined as “land, air, water, minerals, flora, fauna, ambient noise, energy resources, and artifacts or natural features of historic, geologic, or aesthetic significance.” Minn. R. 4410.0200, subp. 23 (2021). MPCA found, and the parties do not dispute, that the petition alleged concerns related to artifacts of historic significance.

Lorentz first argues that MPCA’s decision to require an EAW is in excess of MPCA’s statutory authority because an EAW cannot be required after a permit is already approved. Second, Lorentz argues that, even if MPCA may consider the EAW petition, its conclusion to require the EAW is unsupported by substantial evidence and is arbitrary and capricious.

I. MPCA had the statutory authority to consider the petition for an EAW.

An EAW petition may only be considered if it is “submitted before the proposed project has received final approval by the appropriate governmental units.” Minn. Stat. § 116D.04, subd. 2a(e). Lorentz argues that the Graff quarry “was automatically added to the existing coverage under the MNG[49] Permit.” This occurred, Lorentz argues, when MPCA failed to deny coverage within ten days of receiving the site inventory report form that included the Graff quarry. And this, Lorentz argues, constituted final approval by MPCA. MPCA disputes this interpretation of the permit language and, instead, argues it must give affirmative approval before additional sites are covered by the permit. To

determine when coverage of additional sites becomes effective, we look to the terms of the permit.²

We begin with the language of the permit. *See U.S. Steel*, 954 N.W.2d at 576. The interpretation of unambiguous terms presents a question of law, which we review *de novo*. *Id.* If the terms of the permit are clear and unambiguous, we apply the plain language of the permit and give MPCA no deference. *See id.* The permit is ambiguous if it is susceptible to more than one reasonable interpretation. *Alexandria Lake*, 763 N.W.2d at 310. When determining whether ambiguity exists, we do not read words and phrases in isolation, but consider the permit “as a whole.” *Id.* (quotation omitted).

As part of its permitting authority, MPCA may issue general NPDES/SDS permits “to a category of permittees whose operations, emissions, activities, discharges, or facilities are the same or substantially similar.” Minn. R. 7001.0210, subp. 2 (2021); *see also* 40 C.F.R. § 122.28 (2022). The MNG49 permit is a general permit issued by MPCA which authorizes a variety of discharges, including, as relevant here, stormwater discharges from “crushed and broken stone . . . mining and quarrying areas.”

The MNG49 permit, which contains 253 general sections as well as six site-specific sections and one renewal section, provides that, “Owners and operators of a site or sites

² Lorentz argues that the general permit should be interpreted as a contract and MPCA argues that it should be interpreted as a regulation, and each rely on federal caselaw. Because we conclude that the permit language is unambiguous, and, because the standards for interpreting unambiguous contracts and regulations are the same, we need not decide which standard to apply. *Compare, e.g., Minn. Jud. Branch v. Teamsters Loc. 320*, 971 N.W.2d 82, 88 (Minn. App. 2022) (contracts), with *In re Reissuance of an NPDES/SDS Permit to U.S. Steel Corp.*, 954 N.W.2d 572, 576 (Minn. 2021) (*U.S. Steel*) (regulations).

with covered facility activities identified in this permit” are eligible for permit coverage upon submission of a “complete and approvable application.” Initial coverage becomes effective, pursuant to section 2.3.18 of the permit, “when the MPCA notifies [the permittee] in writing of this coverage.” Once a permittee has initial coverage, section 2.3.19 provides that:

Additional sites *may* be covered under this permit provided that the new site(s) meet all applicability criteria in [] this permit and that all information required by the Site Inventory Report Form is submitted to the MPCA at least 10 days prior to initiation of land-disturbing activities at the new site(s) or initiation of operation at a previously developed site.

(Emphasis added.) Finally, section 2.3.211, which governs permit modifications, prohibits “construct[ion], install[ation], modif[ication], or operat[ion] [of] the facility to be permitted” and “commence[ment] [of] an activity for which a permit is required by statute or rule until the agency has issued a written permit for the facility or activity,” except as provided by Minn. Stat. § 115.07, subs. 1, 3. That statute allows a person required to obtain an NPDES/SDS permit to “construct or install, prior to issuance of the permit, at the person’s own risk, a disposal system or any part thereof” provided that the action meets other criteria not applicable to this appeal. Minn. Stat. § 115.07, subd. 1(b).

The key phrase from section 2.3.19 is that additional sites “may be covered” if two conditions are met—namely, that the additional sites meet the applicable permit requirements, and all the required information is submitted at least ten days before land is disturbed at the site. Lorentz contends that “‘may’ . . . expresses the possibility that additional sites may become covered under the existing permit” if the listed conditions are

met. We agree that “may” expresses the possibility of coverage, but that does not answer when and how coverage becomes effective. To answer that question, we must look to section 2.3.211, which governs modifications of a permit. The section bars activity on the site “to be permitted . . . until the agency has issued a written permit for the facility or activity.” Section 2.3.211, therefore, plainly indicates that the permit may be modified to cover additional sites, but coverage for these additional sites is not effective until MPCA has issued a written modification of the permit to include the additional sites.

Thus, the permit “as a whole” allows a permittee to request coverage for additional sites based on its existing permit pursuant to section 2.3.19, but unambiguously states in section 2.3.211 that the additional sites are not covered by the permit until MPCA issues a written modification of the permit. In short, the two conditions set forth in 2.3.19 must also be read in conjunction with all other conditions to obtain a permit as provided for by the terms of the permit “as a whole.”

Lorentz argues that additional sites are added to a permit after the “ten-day waiting period” in section 2.3.19 so long as the site inventory report form is complete and MPCA does not “affirmatively find[] that the site does not satisfy the ‘applicability criteria’ in the permit.” Lorentz argues that this interpretation gives meaning to the language in section 2.3.18, which states that a permit is approved once MPCA provides written notification of initial coverage. We are not persuaded.

First, the ten-day waiting period in 2.3.19 limits a permittee’s activities, not MPCA’s time to review additional sites and make a coverage determination. Minn. Stat. § 115.07, subd. 1(b), allows a person to begin construction on a project which will require

an NPDES/SDS permit at their own risk before issuance of the permit. Section 2.3.19 gives the permittee a similar option to begin construction without jeopardizing the ability to add the site to an existing permit, but requires the permittee to wait at least ten days after applying for additional coverage to begin “land-disturbing activities” and remain eligible to add the site to the existing permit. Second, the fact that written approval is necessary for initial coverage pursuant to 2.3.18 and modification pursuant to section 2.3.211 does not render either provision meaningless. And the absence in section 2.3.19 of language requiring MPCA to provide written approval of additional sites is of no import because section 2.3.211 governs when modification of the permit becomes effective.

Because the permit, when read “as a whole,” requires approval from MPCA before the permit covers additional sites, and MPCA did not issue a permit modification to add the Graff quarry, the project had not received final approval when MPCA received the petition for an EAW. Thus, MPCA had the statutory authority to require the EAW. *See* Minn. Stat. § 116D.04, subd. 2a(e).

II. MPCA’s decision to require an EAW was supported by substantial evidence and was not arbitrary and capricious.

When determining whether to require an EAW, MPCA must determine if the evidence presented in the petition indicates that there “*may be potential* for significant environmental effects.” Minn. Stat. § 116D.04, subd. 2a(e) (emphasis added); *see also* Minn. R. 4410.1100, subp. 6. In making this determination, “the following factors shall be considered”: (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.” Minn. R. 4410.1700, subp. 7 (2021); *see also* Minn. R. 4410.1100, subp. 6 (requiring consideration of the factors listed in rule 4410.1700, subpart 7, when determining whether to grant a petition to require an EAW). We view an agency’s factual findings “in the light most favorable to the agency’s decision,” *Bd. Ord., Kells (BWSR) v. City of Rochester*, 597 N.W.2d 332, 336 (Minn. App. 1999), and defer to an “agency’s technical knowledge and expertise” when the analysis “is primarily factual.” *Minn. Ctr. for Env’t Advoc.*, 644 N.W.2d at 464.

MPCA’s decision contains 13 pages of detailed findings addressing these four factors. And we agree with Lorentz that, upon initial review, MPCA’s order includes many findings indicating that Lorentz, via its monitoring plan and the phase I investigation, has anticipated and mitigated the potential significant environmental effects. As an example, in its finding number 103, MPCA found that the monitoring plan “describes a clear and detailed process for identification and handling of potentially significant archaeological materials and burial sites . . . such that these materials and sites will be preserved and managed appropriately.” Furthermore, MPCA found, in finding 130, that the concerns it did have would be addressed by “the permit requirement for implementation of a final [monitoring plan].”

However, in other findings, MPCA found that, at the time it determined an EAW was required, unresolved issues with the monitoring plan and phase I investigation indicated that the Graff quarry may have the potential for significant effects on historic and

archeological resources. Namely, it found differences between the reported area of the quarry, the total area of the site, and the area surveyed in the phase I investigation; lack of input from the Tribal Historic Preservation Office on the phase I investigation and monitoring plan; failure of the monitoring plan to “address previously disturbed topsoil [and] . . . how materials of concern [will] be identified”; and additional deficiencies in the phase I investigation and monitoring plan noted by the state archaeologist. MPCA also determined that the Graff quarry may have the potential for significant cumulative effects on historic and archeological resources based on the site’s proximity to petroglyphs, petroforms, burial sites, and existing quarries.

A. Substantial Evidence

We may reverse or modify an agency decision if it is “unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 14.69(e). “Substantial evidence is defined as (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; or (5) the evidence considered in its entirety.” *In re Wazwaz*, 943 N.W.2d 212, 216-17 (Minn. App. 2020) (quoting *Cannon v. Minneapolis Police Dep’t*, 783 N.W.2d 182, 189 (Minn. App. 2010)), *rev. denied* (Minn. June 30, 2020). We view an agency’s factual findings “in the light most favorable to the agency’s decision.” *Bd. Ord., Kells (BWSR)*, 597 N.W.2d at 336.

Lorentz argues that MPCA’s determination that the Graff quarry may have the potential for environmental effects and cumulative environmental effects is unsupported by substantial evidence because the phase I investigation recommended no further action,

the topsoil had already been disturbed by “many years” of agricultural tillage, Lorentz consulted with the Tribal Historic Preservation Office by sending it the monitoring plan in March 2022, and there was no evidence of historic or archeological resources on the site despite petroforms and petroglyphs in the area.

As noted above, the state archaeologist reviewed the monitoring plan and expressed concerns about the lack of Tribal Historic Preservation Office or state agency input on the monitoring plan and phase I investigation, the difference between the area surveyed and the size of the site, the failure of the monitoring plan to assess the previously disturbed topsoil for artifacts, and lack of a clear chain of authority if artifacts are identified. Furthermore, MPCA found that the project had the possibility for cumulative environmental impacts because of its proximity to identified culturally and historically important sites and existing quarries. Lorentz disputes the significance of these findings, but not their accuracy.

Thus, the record viewed in its entirety and “in the light most favorable to the agency’s decision,” *id.*, presents more than a “scintilla of evidence” to support MPCA’s findings. *Wazwaz*, 943 N.W.2d at 216-17 (quotation omitted). Furthermore, the statute governing EAW petitions only requires that “there *may* be potential for significant environmental effects.” Minn. Stat. § 116D.04, subd. 2a(e) (2022); *see also Carl Bolander & Sons Co. v. City of Minneapolis*, 488 N.W.2d 804, 810 (Minn. App. 1992) (describing the standard for allowing an EAW petition as “minimal”), *aff’d*, 502 N.W.2d 203.

B. Arbitrary and Capricious

We may reverse or modify an agency decision if it is “arbitrary or capricious.” Minn. Stat. § 14.69(f). “An agency’s decision is arbitrary or capricious when it ‘represents the agency’s will and not its judgment.’” *In re Schmalz*, 945 N.W.2d 46, 54 (Minn. 2020) (quoting *In re Rev. of 2005 Ann. Automatic Adjustment of Charges for All Elec. & Gas Utils.*, 768 N.W.2d 112, 118 (Minn. 2009)). An agency decision is also arbitrary and capricious when it “runs counter to the evidence” or “is so implausible that it could not be explained as a difference in view or the result of the agency’s expertise.” *Id.* (quotation omitted); *see also In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001) (“[T]he agency’s conclusions are not arbitrary and capricious so long as a rational connection between the facts found and the choice made has been articulated.” (quotation omitted)).

Lorentz argues that requiring an EAW was arbitrary and capricious because MPCA “failed to articulate any rational connection between its factual findings regarding mitigation and its ultimate conclusion” that an EAW was necessary, and MPCA’s actions present “‘danger signals’ suggesting that the agency has not engaged in reasoned decision-making.”

As previously discussed, MPCA concluded that the type, extent, and reversibility of environmental effects, along with the cumulative potential effects of the Graff quarry indicated that an EAW was necessary, and this determination is supported by the record. Thus, two of the “factors” set forth in Minn. R. 4410.1700, subp. 7, for an agency to consider when determining the need for an EAW supported requiring an EAW. The facts

underlying MPCA's conclusion that an EAW is necessary center on information missing from the monitoring plan, so it is rational for MPCA to require further study, via an EAW, to fill those gaps and create a "final [monitoring] plan." MPCA found that the potential environmental effects would be anticipated, controlled, and mitigated by "implementation of a final [monitoring] Plan." Because a final monitoring plan suggests updates may be necessary if new information is discovered in the EAW, requiring an EAW is rational. *See Blue Cross & Blue Shield*, 624 N.W.2d at 277.

Furthermore, MPCA has acted diligently and promptly to determine whether the Graff quarry requires an EAW, and Lorentz's frustration with the Graff quarry not being permitted as quickly as its other sites is not a "danger signal[] that suggest[s] the agency has not taken a 'hard look' at the salient problems and 'has not genuinely engaged in reasoned decision-making.'" *Pope County Mothers v. Minn. Pollution Control Agency*, 594 N.W.2d 233, 236 (Minn. App. 1999) (quoting *Rsrv. Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977)). MPCA has followed the statutory deadlines for determining the need for an EAW, and the record shows no evidence of deliberate or inadvertent delay.

As we explained above in relation to MPCA's findings, the current monitoring plan provides a "clear and detailed process" which will preserve and manage historic artifacts encountered at the Graff quarry. The finalized plan will address outstanding concerns about the lack of comment by the Tribal Historic Preservation Office and information missing from the current monitoring plan. Any additions to the monitoring plan are to become part of the final approved permit. We defer to MPCA's knowledge and expertise

in its factual determination that an EAW will address the gaps in the monitoring plan prior to final permit approval. *See Minn. Ctr. for Env't Advoc.*, 644 N.W.2d at 464.

Affirmed.