

*This opinion is nonprecedential except as provided by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
A26-0043**

Resolution Denying Petition for Environmental Assessment
Worksheet for Fischer Pit Expansion Project.

**Filed August 3, 2026
Reversed and remanded
Schmidt, Judge**

Vermillion Township
Resolution No. 25-12

Kyle S. Willems, James C. Kovacs, Bassford Remele, P.A. Minneapolis, Minnesota (for
relators Lisa Girgen and Rick Girgen)

Stephanie A. Angolkar, Andrew A. Wolf, Iverson Reuvers, Bloomington, Minnesota (for
respondent Vermillion Township)

Matthew S. Duffy, Mary Cate S. Cicero, Monroe Moxness Berg P.A., Minneapolis,
Minnesota (for respondent Pine Bend Paving Inc.)

Considered and decided by Beane, Presiding Judge; Smith, Tracy M., Judge; and
Schmidt, Judge.

NONPRECEDENTIAL OPINION

SCHMIDT, Judge

Relators Lisa and Rick Girgen challenge respondent Vermillion Township's
decision that an environmental assessment worksheet (EAW) is not needed in connection
with a proposed mine. Relators argue that the township: (1) erred by determining that the
proposal did not trigger a mandatory EAW, and (2) acted arbitrarily and capriciously by
denying a citizens' petition for an EAW. We reverse and remand.

FACTS

Respondent Pine Bend Paving Inc. operates a mine in Vermillion Township. The mining site has been in operation since the 1980s and mines approximately 29 acres.

Pine Bend applied to the township for an interim-use permit to operate a new mining and processing facility (the proposed mine) adjacent to the existing mine. The application also requested that the site be rezoned from residential and agricultural to a designation that would allow for mining. The proposed mine would consist of a 42-acre property, 33 acres of which would be used for mineral extraction.

Throughout the application process, the township worked with a consulting firm named WSB. WSB's community planner submitted a memorandum about the application to the township stating that a mandatory EAW¹ is not required, but noted that the "expansion of an existing mine may merit consideration of a discretionary [EAW]."

The township held a public hearing during which they discussed an EAW not being mandatory and issues related to blasting and drainage. After the hearing, Pine Bend filed an engineering supplement to the application, which addressed blasting, drainageway options, and groundwater protection. The WSB engineer noted that any of the proposed drainageways would require "modeling to confirm if there are any floodplain impacts."

The Dakota County wetland coordinator issued a wetland-determination letter that identified one potential wetland within the site of the proposed mine. That same day, a

¹ 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) (2024).

water-resources engineer from the Vermillion River Watershed Joint Powers Organization recommended to WSB that the application be updated to meet the statutory requirements of the Wetland Conservation Act because of the potential wetlands on the proposed site.

The township held a special public meeting to discuss the engineering supplement and the wetland-determination letter. At the meeting, residents raised concerns regarding blasting, seismograph monitoring, structural damage to houses, property values, groundwater protections, a reclamation plan, and a stormwater prevention plan.

The Girgens, who live adjacent to the proposed mine, and other citizens petitioned² the Environmental Quality Board to request that an EAW be prepared for the proposed mine. The board sent the petition to the township after determining that the township was the responsible governmental unit to decide whether an EAW was necessary.

WSB issued a responsive memorandum to the citizens' petition, which recommended that no EAW be completed. The memorandum concluded that the proposed mine "will be subject to review and ongoing oversight through Vermillion Township as well as other local and State regulatory authorities[,]” and that “existing review, approval, and ongoing oversight processes are expected to identify, control, and if necessary, mitigate for potential environmental impacts, including those outlined in the citizen petition.”

² The full petition and its attachments are not part of the appellate record as the town did not include it in the administrative record. The record only contains the signature pages of the citizens' petition, which referred to the proposed mine as the “Fischer Gravel Pit Expansion Project” and “the proposed expansion of the aggregate mining operation in Vermillion Township.” The Girgens did not move to correct or supplement the record under Minn. R. App. P. 110.05.

Pine Bend also issued a responsive memorandum to the citizens' petition, which argued against an EAW because the proposed mine did not meet the requirements for a mandatory EAW under the administrative rules. *See* Minn. R. 4410.4300, subp. 12(B) (2025) (mandating preparation of EAW when a project "will excavate 40 or more acres of land to a mean depth of ten feet or more during its existence"). The memorandum also stated that the citizens' petition failed to provide material evidence that the proposed mine had the "potential for significant environmental effects because of the ongoing public regulatory authority and the mitigative measures that have been proposed" by Pine Bend.

The township held its final hearing on the application and thereafter issued Resolution No. 25-12 rejecting the citizens' petition. The resolution concluded that an EAW was not mandatory under the administrative rules. It further determined that a discretionary EAW was unnecessary because the proposed mine "will be subject to review and ongoing oversight through Vermillion Township as well as other local, State, and Federal regulatory authorities[,] . . . [which] are expected to identify, control, and if necessary, mitigate for potential environmental impacts including those outlined in the citizen petition." The township also found that the evidence presented by the citizens' petition failed to demonstrate that the proposed mine "will have the potential for significant environmental effects." The township also passed resolutions rezoning the site of the proposed mine and approving the interim-use permit.

This certiorari appeal follows.

DECISION

The Girgens challenge the township's decision to allow the proposed mine to proceed without first completing an EAW. Before addressing the specifics of the Girgens' challenge, we offer a brief overview of the applicable law.

Under the Minnesota Environmental Policy Act, the Environmental Quality Board adopts rules governing the necessity for environmental review. *See* Minn. Stat. § 116D.04, subd. 2a(b) (2024); Minn. R. 4410.0200–.6500 (2025). The appropriate responsible governmental unit determines the level of environmental review required for a given project. *See* Minn. R. 4410.0200, subps. 75–76 (defining responsible governmental unit).

An EAW or an environmental impact statement is mandatory if a project meets certain thresholds. Minn. R. 4410.4300 (requiring EAW), .4400 (requiring environmental impact statement), .4600 (exempting projects). An EAW is also required if the evidence accompanying a petition signed by more than 100 citizens demonstrates “there may be potential for significant environmental effects.” Minn. Stat. § 116D.04, subd. 2a(e) (2024).

Our review of a certiorari appeal is limited. We must affirm if the township engaged in “reasoned decision[-]making” even if we may have reached a different result. *Cable Commc’ns Bd. v. Nor-West Cable Commc’ns P’ship*, 356 N.W.2d 658, 669 (Minn. 1984). We will reverse if (1) the decision reflects an error of law, (2) the findings are arbitrary and capricious, or (3) the findings are unsupported by substantial evidence. *Citizens Advoc. Resp. Dev. v. Kandiyohi County Bd. of Comm’rs*, 713 N.W.2d 817, 832 (Minn. 2006)).

Whether a decision reflects an error of law is a question that we review de novo. *See Minnesotans for Resp. Recreation v. Dep’t of Nat. Res.*, 651 N.W.2d 533, 538 (Minn.

App. 2002) (“The interpretation of statutes and rules and the application of statutes and rules to undisputed facts are both questions of law that we review de novo.”). Whether a decision is arbitrary and capricious requires us to assess whether the decision:

[a] relied on factors the legislature never intended it to consider, [b] if it entirely failed to consider an important aspect of the problem, [c] if it offered an explanation for the decision that runs counter to the evidence, or [d] if the decision is so implausible that it could not be ascribed to a difference in view or the result of agency expertise.

Pope Cnty. Mothers v. Minn. Pollution Control Agency, 594 N.W.2d 233, 236 (Minn. App. 1999). Whether a decision is supported by substantial evidence consists of reviewing the record for: “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.” *Citizens Advoc. Resp. Dev.*, 713 N.W.2d at 832 (quotation omitted).

The Girgens’ certiorari appeal raises numerous issues. We first address the Girgens’ arguments that the township improperly determined that the proposed mine constituted an expansion of an existing mine, rather than treating the two mines as a “connected action.” Within that analysis, we address the Girgens’ argument that even if the township properly analyzed the proposed mine as an expansion, the decision was, nonetheless, arbitrary and capricious as being unsupported by substantial evidence. Second, we combine the multiple remaining issues that the Girgens raise into one issue. In doing so, we decline to address many of the issues because we determine that the township applied the incorrect legal standard when denying the petition for an EAW.

I. The township did not err in determining that the proposed mine would be an expansion of the existing mine.

The Girgens argue that the township's decision should be reversed because (A) the proposed mine constituted a "connected action" and (B) the proposed mine was not an expansion. We address each argument in turn.

A. The "connected action" argument is forfeited and fails.

The Girgens argue that the township erred by analyzing the proposed mine as an expansion of an existing mine, rather than treating the two mines as a "connected action." If viewed as a connected action, the Girgens contend that the combined mined acreage exceeds the threshold for a mandatory EAW. *See* Minn. R. 4410.4300, subp. 12(B).

The Girgens, however, raised the connected-action argument for the first time on appeal. A party may neither raise a new issue on appeal, nor "obtain review by raising the same general issue litigated below but under a different theory." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *In re A.D.*, 883 N.W.2d 251, 261 (Minn. 2016) (quoting *Thiele* in certiorari appeal). The connected-action argument is forfeited.

The connection-action argument also fails because the Girgens did not meet their statutory burden to present material evidence to support their petition for an EAW on these grounds. *See* Minn. Stat. § 116D.04, subd. 2a(e). Because they failed to assert a connected-action theory before the township, it follows that the Girgens did not meet their burden to present material evidence in support of a theory they never raised. *See Kristufek v. City of Breezy Point*, No. A06-1220, 2007 WL 1674557, at *6 (Minn. App. June 12, 2007) (affirming because there was no evidence presented to show that an EAW

was mandatory).³ Thus, the connected-action argument fails because the Girgens did not carry their burden to prove that the proposed mine constituted a “connected action” such that the proposed mine required an EAW.

B. The township’s “expansion” decision was not based on legal error, arbitrary and capricious, or unsupported by substantial evidence.

The Girgens argue that the township’s decision to classify the proposed mine as an “expansion” was (1) an error of law and (2) unsupported by the evidence. We disagree.

First, the township did not commit any errors of law when it decided that the proposed mine constituted an “expansion.” The administrative rules define project “expansion[s]” as “an extension of the capability of a facility to produce or operate beyond its existing capacity.” Minn. R. 4410.0200, subp. 28. Here, the township found that Pine Bend operated an existing mine on the adjacent property to the south of the proposed mine. The township found that the proposed mine “will allow for expansion of an existing mine with an existing haul route and infrastructure that is already present in the vicinity.” The township’s classification of the proposed mine as an “expansion” was not erroneous.

The township also did not err as a matter of law when analyzing whether the proposed mine triggered the threshold for a mandatory EAW. The township determined that an EAW was not required because the existing mine had been in operation for more than three years before the application was submitted. Given this determination, the rule did not require the original mine to be included in the size calculation for whether an EAW was mandated. *See* Minn. R. 4410.4300, subp. 1(B). Because the proposed mine would

³ We cite *Kristufek* for its persuasive value. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c).

excavate 33 acres, the township correctly determined that an EAW was not required because the proposed mine was below the 40-acre threshold that mandates an EAW. *See id.*, subp. 12(B). Thus, the township did not err in determining that the “expansion” did not meet the threshold for a mandatory EAW.

Second, the township’s decision is supported by substantial evidence. The proposed mine had consistently been treated as an expansion. The initial application presented the proposal as an expansion of an existing mine. The township’s consultants assessed the proposed mine as an expansion. Even the signature pages on the citizens’ petition called the proposed mine an expansion. The record also reflects that the site of the proposed mine is adjacent to the existing mine and will share operations such as crushing, stockpiling, recycling, loading, and hauling. The record contains more than a scintilla of evidence. Therefore, the township’s decision is supported by substantial evidence.

II. The township erred by applying the wrong standard for determining whether the petition demonstrated a basis to require an EAW.

The Girgens argue that the township’s decision to deny their petition for an EAW was arbitrary and capricious because material evidence shows that the proposed mine may have the potential for significant environmental effects. The Girgens assert that the most significant issues that were arbitrarily dismissed by the township included: the lack of modelling to manage the drainageway; the identification of a potential wetland on the site and relevant studies being pushed off to the future; and concerns about blasting and its effects on human health. Because we conclude that the township erred by applying the wrong standard in assessing these concerns, we remand to the township.

The statute provides that an EAW must be prepared for a project when material evidence demonstrates that “there *may be* potential for significant environmental effects.” Minn. Stat. § 116D.04, subd. 2a(e) (emphasis added). The township, however, determined that “the evidence presented fails to demonstrate the [proposed mine] *will have* the potential for significant environmental effects.” (Emphasis added.) The legal error in the township’s analysis turns upon the distinction between “may be” and “will have.”

The legislature did not define “may” as used in this statute. We turn to the dictionary. *See McBee v. Team Industries, Inc.*, 26 N.W.3d 847, 853 (Minn. 2025) (using dictionary to determine a word’s common usage). The American Heritage Dictionary defines “may” as “used to express possibility or probability: *It may rain this afternoon.*” *The American Heritage Dictionary of the English Language* 1086 (5th ed. 2018). The dictionary defines “will” as (1) “used to indicate simple futurity: *They will appear later*” and (2) “used to indicate likelihood or certainty: *You will regret this.*” *Id.* at 1982.

Applying these dictionary definitions, we conclude that the township’s use of “will have” improperly imposed a certainty standard on the Girgens’ petition. The correct scrutiny that must be given to the Girgens’ petition is a less-certain standard: whether the petition demonstrated that the proposed mine has the *possibility* of the “potential for significant environmental effects.” Minn. Stat. § 116D.04, subd. 2a(e) (“there *may be* potential for significant environmental effects” (emphasis added)).

The more-certain standard that the township applied would come later in the process should the township, on remand, determine that an EAW is necessary. Whether the proposed mine *will have* the “potential for significant environmental effects” is a question

that must be answered when assessing whether an environmental impact statement is needed, which occurs after an EAW is completed. *See* Minn. Stat. § 116D.04, subd. 2a(a) (2024) (requiring an environmental impact statement when “there is potential for significant environmental effects”); *see also* *Citizens Advoc. Resp. Dev.*, 713 N.W.2d at 825 (“[i]f, after reviewing the EAW, the [responsible governmental unit] decides that the project does have the potential for significant environmental effects, the [responsible governmental unit] is required to issue a positive declaration indicating that an [environmental-impact statement] must be completed” (quotation omitted)).

Here, the township applied the higher standard too early in the process. On remand, the township must first assess the Girgens’ petition under the correct standard. Minn. Stat. § 116D.04, subd. 2a(e). If the township determines that an EAW is necessary, it will then use the completed EAW to determine whether the proposed mine will have the potential for significant environmental effects. *Id.*, subd. 2a(a). Thus, we conclude that the township erred in applying the wrong standard when it assessed the potential for significant environmental effects at this earlier stage.

Given the application of the incorrect standard, we cannot meaningfully review the Girgens’ appellate arguments that the township’s decision was arbitrary and capricious or unsupported by substantial material evidence. As such, we reverse and remand the matter to the township to apply the correct legal standard to the citizens’ petition and to issue a revised decision. *See In re PolyMet Mining, Inc.*, 965 N.W.2d 1, 12 n.14 (Minn. App. 2021) (noting that remand is consistent with separation-of-powers concerns underlying limited review on certiorari), *rev. denied* (Minn. Sept. 30, 2021); Minn. Stat.

§ 14.69, subd. (d) (2024) (authorizing remand in certiorari review when petitioners' substantial rights were affected by "other error[s] of law"); *In re A.D.*, 883 N.W.2d at 258 ("Remand is appropriate to permit further evidence to be taken or additional findings to be made in accordance with the applicable law." (quotation omitted)). The township has the discretion to decide whether to reopen the record to permit additional evidence.

Reversed and remanded.