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**STATE OF MINNESOTA
IN COURT OF APPEALS
A04-717**

Dead Lake Association, Inc.,
Appellant,

vs.

Otter Tail County,
Respondent,

R. Murray Partnership, LLP,
Respondent.

**Filed February 1, 2005
Reversed and remanded
Halbrooks, Judge**

Otter Tail County District Court
File No. C7-03-630

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Considered and decided by Halbrooks, Presiding Judge, Randall, Judge, and Klaphake,

Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant Dead Lake Association, Inc. challenges the district court's grant of summary judgment to respondents Otter Tail County (county) and R. Murray Partnership, LLP (developer), arguing that the county erred by not requiring an environmental-impact statement (EIS) for a proposed development project. Appellant maintains that the county's approval of the development (1) failed to consider the numerous impacts that the project would have on the environment and (2) was based, at least in part, on the developer's failure to submit information on the existence of high levels of groundwater nitrates. Because we conclude that the county was arbitrary and capricious in its failure to adequately evaluate the effects of increased boating activities on the lake and improperly mitigated the regulation of such effects, we reverse and remand to the county for preparation of an EIS.

FACTS

The material facts are not in dispute. In November 2002, the developer submitted an application to the county for a conditional-use permit (CUP) for the proposed construction of the Blue Heron Bay Project (the project or the development). As originally envisioned, the project consisted of a cluster development on Dead Lake with 151 residential-use dwelling units^[1] and limited additional commercial uses. The project also includes plans for a general store, a restaurant, two swimming pools, a marina, common mooring facilities, and an access road.

Dead Lake has been classified by the Minnesota Department of Natural Resources (DNR) as a natural-environment lake (NEL), meaning that it is "shallow . . . with limited capacities for assimilating the impacts of development and recreational use." Minn. R. 6120.3000, subp. 1a (A) (2003). According to the DNR, Dead Lake has about 36.3 miles of shoreline and a maximum depth of 65 feet. But because 83% of the lake is less than 15 feet deep, its mean depth is only 9.5 feet. In order to assess the potential environmental impacts of the project, the

county tabled the CUP application and ordered the completion of an environmental-assessment worksheet (EAW).

In January 2003, the county completed the final EAW for the project. The EAW is 22 pages in length and includes 18 exhibits. It discusses a number of the potential environmental effects of the proposed project and provides information on the project magnitude, permits and approvals required, land use, fish and wildlife concerns, impacts on water resources, water use, erosion and sedimentation, water quality, wastewater, geologic hazards and soil conditions, traffic, and other pollution concerns. The EAW explains how the project will be subject to approximately 17 permits by the local, state, and federal government. The document concludes that “[r]easonable mitigation measures are proposed which may reduce or eliminate the potential for significant environmental impacts.”

Required publication and public notice were given, and the county’s planning commission entertained public review and comments pursuant to Minn. R. 4410.1500, .1600 (2003). Several governmental agencies commented on the project, including the DNR, the U.S. Fish and Wildlife Service (USFWS), and the Minnesota Pollution Control Agency (MPCA). The DNR recommended that an EIS “should be ordered because of the potential for significant adverse effects on the aquatic resources of the lake.” (Emphasis omitted.) The DNR made this recommendation because the lake “is very shallow, the project is in one of the more sensitive shallow areas of the lake, it is of large size, and the increased boat traffic has the potential to have significant adverse impacts on the fish and wildlife habitat.” But the DNR also highlighted ten “design features that tend to reduce [environmental] impacts when compared to typical shoreline development that occurs on many Minnesota lakes.”

The USFWS concurred in recommending an EIS, “[g]iven the potential for adverse environmental impacts related to the project.” More specifically, it explained, “[t]he sensitivity of shallow water bodies to relatively small amounts of pollutants combined with the scope of the project may have significant detrimental effects on water quality in Dead Lake.”

In response to numerous comments and information submitted, the county planning commission held public meetings for the purpose of determining whether an EIS was necessary for the project. Based on the evidence and testimony presented at the public hearings responding to the EAW, the planning commission determined that an EIS was not necessary for the project. The planning commission prepared findings of fact to support its negative declaration and concluded that the development project "does not have potential for significant environmental effects." It recommended that the county's board of commissioners (the board) order a negative declaration that an EIS would not be necessary for the project to move forward.

The board then reviewed and considered the planning commission's recommendation, and ultimately determined that there was no potential for significant environmental effects with a proposed mitigation plan in place. On April 1, 2003, the board issued a final negative EIS declaration. Within a month, it approved the CUP with a number of conditions, as recommended by the planning commission.^[2]

After the negative EIS declaration was issued but before wastewater-treatment-system permits were issued by the MPCA, the developers advised that high levels of nitrates existed in the groundwater, well above the 10 parts per million permitted by state and federal regulations. *See* Minn. R. 4720.0350 (2003) (incorporating 40 C.F.R. § 141.11 (2003) (regulating maximum content levels for inorganic chemicals such as nitrates)). This newly discovered information was not part of the record considered by the board.

Pursuant to Minn. Stat. § 116D.04, subd. 10 (2004), appellant sought judicial review of the board's negative declaration under the Minnesota Environmental Policy Act (MEPA).^[3] In response, respondents moved for summary judgment, seeking to dismiss appellant's amended complaint. The district court granted respondents' motion and dismissed appellant's complaint, concluding that "[t]here is substantial evidence in the record to support the [f]indings and [d]ecisions of [the board] in its determination that no EIS was required or necessary for the project [at] issue." It further determined that the board did not act in an arbitrary or capricious manner

in denying appellant's request for an EIS and that the board considered all of the potential problems inherent in the project. This appeal follows.

DECISION

Appellant challenges the county board's negative declaration, which determined that an EIS for the proposed development would not be necessary. Despite appellant's argument to the contrary, our standard of review is well established.^[4] When reviewing a district court's summary judgment affirming an agency's negative declaration regarding the need for an EIS, we focus "on the proceedings before the decision-making body . . . , not the findings of the [district] court." *Iron Rangers for Responsible Ridge Action v. Iron Range Res.*, 531 N.W.2d 874, 879 (Minn. App. 1995) (quotation omitted), *review denied* (Minn. July 28, 1995). "Agency decisions are reversed only when they reflect an error of law, the findings are arbitrary and capricious, or the findings are unsupported by substantial evidence." *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 730 (Minn. App. 1997) (quotation omitted), *review denied* (Minn. Oct. 31, 1997); *see also* Minn. Stat. § 14.69 (2004) (codifying the standard of review).

This court has previously explained when administrative rulings are arbitrary and capricious:

An agency's decision is arbitrary and capricious if the agency relied on factors the legislature never intended it to consider, if it entirely failed to consider an important aspect of the problem, if it offered an explanation for the decision that runs counter to the evidence, or if the decision is so implausible that it could not be ascribed to a difference in view or the result of agency expertise.

Pope County Mothers v. Minn. Pollution Control Agency, 594 N.W.2d 233, 236 (Minn. App. 1999). In addition, "substantial evidence" means:

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.

White, 567 N.W.2d at 730. If the county engaged in reasoned decision-making, this court will affirm even if it may have reached a different conclusion had it been the fact-finder. *Id.* This court will intervene only where there is a “combination of danger signals [that] suggest the agency has not taken a ‘hard look’ at the salient problems,” *Pope County Mothers*, 594 N.W.2d at 236 (alteration in original) (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977)), and the decision lacks “articulated standards and reflective findings.” *White*, 567 N.W.2d at 730 (quotation omitted). While this is true, we are also mindful of the fact that “[t]he role of a court in reviewing the sufficiency of an agency’s consideration of environmental factors is a limited one” *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 465 (Minn. 2002) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 555, 98 S. Ct. 1197, 1217 (1978)).

Appellant argues that the board ignored a variety of evidence in the record and improperly determined that the potential for significant environmental impacts was subject to further permitting and regulatory control when it issued a negative declaration that further environmental study was not necessary. Preliminarily and for contextual purposes, we note that an EAW is a “brief document prepared in worksheet format which is designed to rapidly assess the environmental effects which may be associated with a proposed project.” Minn. R. 4410.1000, subp. 1 (2003). An EAW is intended to help determine if a proposed project will require an EIS, and if so, to help define its scope. *Id.* “Where there is potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed [EIS] prepared by the responsible governmental unit.” Minn. Stat. § 116D.04, subd. 2a (2004); *see also* Minn. R. 4410.1700, subp. 1 (2003) (requiring an EIS for projects that have the “potential for significant environmental effects”). In determining whether a proposed project has the potential for significant environmental effects, the responsible governmental unit (RGU) must consider four factors:

- A. type, extent, and reversibility of environmental effects;

- B. cumulative potential effects of related or anticipated future projects;
- C. the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority; and
- D. the extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.

Minn. R. 4410.1700, subp. 7 (2003).

In an EAW guidebook, the Minnesota Environmental Quality Board explains that “[t]he third criterion is frequently the main justification for why an EIS is not required. Projects often have impacts that could be significant if not for permit conditions and other aspects of public regulatory authority.” Minn. Env’tl. Quality Bd., *EAW Guidelines: Preparing Environmental Assessment Worksheets* 3 (Feb. 2000). The administrative rules define “mitigation” as:

- A. avoiding impacts altogether by not undertaking a certain project or parts of a project;
- B. minimizing impacts by limiting the degree of magnitude of a project;
- C. rectifying impacts by repairing, rehabilitating, or restoring the affected environment;
- D. reducing or eliminating impacts over time by preservation and maintenance operations during the life of the project;
- E. compensating for impacts by replacing or providing substitute resources or environments; or
- F. reducing or avoiding impacts by implementation of pollution prevention measures.

Minn. R. 4410.0200, subp. 51 (2003). If the RGU determines that a proposed project does not have the potential for significant effects, it will issue a negative declaration and an EIS will not be required. *See* Minn. R. 4410.1700, subp. 3 (2003).

Given our deferential standard of review in examining the decisions of administrative agencies, we have often refrained from ordering an EIS once an RGU has made a negative declaration. But in *Trout Unlimited, Inc. v. Minn. Dep’t of Agric.*, 528 N.W.2d 903 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995), we reversed the Commissioner of Agriculture’s

negative declaration for a proposed irrigation project bordering a trout stream and remanded for preparation of an EIS. In that case, as here, several government agencies expressed concern about the proposed irrigation project. *Id.* at 905-06. We ultimately reversed the RGU's negative declaration because of the cumulative effects of future projects and the potential impact of chemigation and fertigation on the stream. *Id.* at 908. As to the potential environmental impact of chemigation and fertigation, the RGU recognized the significant impact that irrigation chemicals could have on the nearby stream, but deferred or mitigated regulation of such impacts to future permitting processes. *Id.* at 908-09. In reversing the RGU, we explained the flaw in its decision not to require an EIS:

[T]he irrigation project would go forward without an EIS and in the event significant environmental effects did occur, the [RGU] would then rely on monitoring or restrictive permitting procedures to reduce or eliminate those deleterious effects. The very purpose of an EIS, however, is to determine the potential for significant environmental effects *before* they occur. By deferring this issue to later permitting and monitoring decisions, the [RGU] abandoned [its] duty to require an EIS where there exists a potential for significant environmental effects.

Id. at 909 (quotation omitted) (emphasis in original). In *Trout Unlimited*, we therefore concluded that the RGU erred when it relied on future regulatory efforts to control or remedy potential environmental problems when the EAW failed to adequately identify and analyze the expected problems. *Id.*

The record before us suggests that the county similarly erred when it concluded that “[t]here are adequate and appropriate state and local regulations governing the activities of this project that will limit and control the environmental effects.” Appellant attacks the board's findings on a number of grounds, including: (1) the project description and magnitude, (2) the reduction in the number of units and boat slips, (3) the cluster-development design of the project, (4) future commercial uses, (5) boating impacts, and (6) docking facilities. We need not address each of appellant's concerns here and instead focus only on the county's determination

regarding the environmental effects of increased boating activities.

While not determinative of the need for an EIS, the expert recommendations of specialized governmental agencies can be helpful in highlighting the deficiencies in an EAW. In a letter to the county, the DNR highlighted that “[b]oat traffic in shallow lakes or in shallow portions of lakes has been conclusively established by numerous well-done studies to cause a number of potentially serious impacts. *The EAW did not contain an evaluation of the likelihood of occurrence of [boat traffic] impacts, or a description of them.*” (Emphasis added.) The DNR then listed a number of impacts that can occur from increased boat traffic, including: (1) disruption of bottom sediments from propeller and other turbulence, (2) an increase in phosphorous concentrations, (3) damage to emergent and submergent aquatic vegetation in shallow areas, (4) wake-caused disturbances of over-water bird nesting and shorelines, and (5) disturbance of water-bird and waterfowl species. The USFWS also expressed its concerns, “[g]iven the potential for adverse environmental impacts related to the project.” Specifically, it explained that “the sensitivity of shallow water bodies to relatively small amounts of pollutants combined with the scope of the project may have significant detrimental effects on water quality in Dead Lake.” The county, however, concluded that it could mitigate any significant adverse effects by implementing certain boating recommendations of the DNR and by its concurrent authority with the DNR to “mitigate the environmental effects of boating through their ongoing regulatory authority” to enact boating restrictions on the lake.

It is true that the county and DNR have statutory authority to regulate boat usage on Minnesota lakes. *See* Minn. Stat. § 86B.201 (2004) (permitting political subdivisions to adopt regulations relating to the use of waters of the state); Minn. R. 6110.3400 (2003) (giving the DNR jurisdiction to regulate a body of water when so requested by a political subdivision of the state). For example, a county board may, among other things:

- (5) . . . limit the types and horsepower of motors used on the body of water;
- (6) limit the use of the body of water at various times and the use

- of various parts of the body of water;
- (7) regulate the speed of watercraft on the body of water and the conduct of other activities on the body of water to secure the safety of the public and the most general public use; and
 - (8) contract with other law enforcement agencies to police the body of water and its shore.

Minn. Stat. § 86B.205, subd. 5 (2004).

But the county failed to explain how it would implement such boating regulations. While the county did not “entirely fail[] to consider an important aspect of the problem” in the EAW, it did “offer[] an explanation for the decision that [ran] counter to the evidence” in deferring this issue to its own authority to impose boating restrictions on the lake at some point in the future without complete information. *Pope County Mothers*, 594 N.W.2d at 236. Accordingly, it was arbitrary and capricious for the county to rely on some nebulous “ongoing regulatory authority” in the form of its own ability to enact restrictions that did not yet exist at the time of the negative declaration when the effects of the increased boat usage had not yet been adequately addressed. In this respect, the proposed mitigation measure that the county and DNR “have the ability to mitigate the environmental effects of boating through their ongoing regulatory authority” was inadequate as nothing “more than mere vague statements of good intentions.” *Iron Rangers*, 531 N.W.2d at 881 (citing *Audobon Soc’y v. Dailey*, 977 F.2d 428, 435-36 (8th Cir. 1992)). Moreover, we fail to see how the county will be able to impose any kind of meaningful boating restrictions with plans for more than 100 new boat slips on an extremely shallow lake when the effects of the increased boating activity have not yet been meaningfully studied and the county failed to adequately articulate how it would effectively use its regulatory authority to mitigate the possible environmental impact of the project. The finding of the county that it could mitigate the potential for significant environmental effects was therefore unsupported by substantial evidence in the record. *White*, 567 N.W.2d at 730.

As the supreme court has made clear, “preparing an EAW, making the decision whether the EAW requires an EIS, and the ultimate preparation of an EIS are essentially an information

gathering and analytical process.” *Minn. Ctr. For Envtl. Advocacy*, 644 N.W.2d at 468 (citing Minn. Stat. § 116D.04, subds. 1a(c), 2a (2000)). In interpreting the National Environmental Policy Act (NEPA)—the federal equivalent of MEPA—the U.S. Supreme Court has explained, “[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S.Ct. 1835, 1846 (1989) (emphasis added). We determine that the adverse environmental effects of the project here *have not* been adequately identified and evaluated in sufficient detail. We therefore reverse and remand for a more complete study of the environmental consequences of the proposed development on Dead Lake, fully examining each of the issues originally raised in the EAW, but with particular attention paid to that which was virtually absent in the EAW—the impact of increased boating activities. See Minn. R. 4410.2300 (2003) (listing the content requirements of an EIS).

Finally, appellant also argues that this case must be reversed and remanded to the county for further review because the developer failed to disclose to the county that high levels of groundwater nitrates existed in Dead Lake. According to appellant, “when the MPCA imposed a 10 parts per million nitrate limit on effluent, the developer immediately responded by stating that it already knew of the existence of nitrates in the ground water at the level of 40 parts per million.” Appellant claims that this already high level of nitrates will only be exacerbated by (1) the lateral flow of wastewater, resulting in a discharge of nutrient-rich water into the lake; (2) “daylighting,” or the pushing of nitrate-contaminated water into the lake; and (3) phosphates that will be discharged from the lake sediment caused by an increase in boat usage. But given our decision to require an EIS, we need not address this issue and order that the county consider this information as well when completing the EIS.

Given our restrictive standard of review, we do not reach our conclusion lightly and emphasize that this decision is based on the peculiar factual circumstances of this particular

case, where a most important component of the effects of this development—the effects of increased boating usage—was not adequately analyzed at the EAW stage of environmental review. Moreover, we do not substitute our judgment for that of the county's. But if judicial review is to mean anything, the judiciary must require RGUs to adequately analyze the potential for significant environmental effects in the EAW and ensure that such effects can be properly mitigated by the ongoing regulatory authority of other governmental agencies before issuing negative declarations denying further environmental review. While we agree with our observation in *White* that “[i]t is difficult to imagine a situation where there would not be additional information that could be included in an EAW,” given the heightened public-water classification of Dead Lake as a natural-environment lake and the potential for significant environmental effects caused by increased boating activity on the lake as a result of this project, it is necessary for the county to further study the effects of increased boating activity by way of an EIS. 567 N.W.2d at 735. We therefore reverse and remand to the county for preparation of an environmental-impact statement.

Reversed and remanded.

[1] The number of residential dwelling units has since been reduced to 139.

[2] Appellant has since challenged the board's approval of the CUP in a separate action. *See Dead Lake Ass'n v. Otter Tail County*, No. A03-750, 2004 WL 422570 (Minn. App. Mar. 9, 2004), *review granted* (Minn. May 26, 2004). This court reversed and remanded, concluding that “the county failed to make adequate findings on its decisions to grant the CUP” and directing the board to “make a record indicating the basis for its decision.” *Id.* at *1, *4. The supreme court granted review and oral argument was heard on November 30, 2004, on the issue of whether the CUP violated state regulations regarding cluster development on natural-environment lakes.

In its third case before the Minnesota appellate courts, appellant also challenges the MPCA's grant of a permit for a wastewater-treatment system for the project. *See Dead Lake Ass'n v. Comm'r of Minn. Pollution Control Agency*, No. A04-483.

Finally, we understand that the Minnesota Center for Environmental Advocacy (MCEA) has instituted a third-party MERA action in the district court to further challenge this development project.

[3] Appellant originally filed a complaint under both MEPA and MERA, but later voluntarily

dismissed the MERA claim with prejudice. But as mentioned in footnote 2, a third party has recently filed a lawsuit against the developer under MERA.

[4] Appellant argues for a heightened standard of review of “greater caution, and less deference” to the responsible governmental units when they “reject[] the advice and warnings presented by [] agencies charged with protecting the environment[.]” But appellant cites no authority supporting this new standard, and we decline to adopt it.

