STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1692

In the Matter of the Decision on the Petition Requesting the
Preparation of an Environmental Assessment Worksheet
on the Proposed Full Circle Organics/Good Thunder
Compost Facility in Lyra Township, Blue Earth County, Minnesota.

Filed June 3, 2013
Affirmed
Halbrooks, Judge

Minnesota Pollution Control Agency

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Lori Swanson, Attorney General, Ann E. Cohen, Assistant Attorney General, St. Paul, Minnesota (for respondent Minnesota Pollution Control Agency)

Full Circle Organics, LLC, Minneapolis, Minnesota (respondent)

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Relators challenge a decision by respondent Minnesota Pollution Control Agency (MPCA) not to require environmental review in relation to the construction of a source-

separated compost facility. Because the MPCA's decision is supported by substantial evidence and is not arbitrary or capricious, we affirm.

FACTS

This case arises out of the construction by respondent Full Circle Organics, LLC, of a source-separated compost facility in the City of Good Thunder (the project). The facility processes source-separated organic compostable materials (SSCM), including food waste, non-recyclable paper, plant materials, and animal bedding.

A solid-waste permit from the MPCA was among the approvals required for the project. Upon receiving Full Circle's application for the permit, the MPCA noticed a public-comment period, during which it received eight comments and a petition to hold a contested-case hearing. Following the close of the public-comment period, the MPCA scheduled a meeting of its Citizens' Board to consider whether to hold a contested-case hearing and whether to grant the permit. One day before the scheduled hearing, the Minnesota Environmental Quality Board (EQB) received a citizen petition seeking an environmental-assessment worksheet (EAW) in relation to the project. Relators Sandra Speck and Curtis Speck were among more than 100 citizens who signed the petition. Upon becoming aware of the EAW petition, the MPCA tabled consideration of the contested-case hearing petition and permit approval pending resolution of the EAW issue.

The petition raised numerous environmental issues regarding the project, including concerns about: (1) stormwater runoff and the potential for ground-water contamination; (2) the structure of the building, which has a fabric roof; (3) odors emanating from the facility; (4) the release of airborne pollution and its impact on surrounding air quality;

(5) pests and rodents; (6) the ability of surrounding roads to handle the increased traffic and pollution that would be caused by this traffic; (7) the absence of natural buffers around the facility site; (8) the lack of an environmental study on the impacts of source-separated composting; and (9) the incompatibility of the facility with existing land uses. The petition attached a statement from two of the petitioners attesting to the drainage problems near the facility site; numerous photographs of the facility site; excerpts from MPCA's draft permit and responses to comments received about the permit; excerpts from a geotechnical report prepared in connection with the project; articles about potential risks of composting facilities; a PowerPoint presentation from the Compost Council of Canada; and a copy of the Minnesota Supreme Court's decision in *Sletten v. Ramsey County*, 675 N.W.2d 291 (2004).

The EQB forwarded the petition to the MPCA, the responsible government unit (RGU) in relation to the project, for a determination of whether an EAW should be prepared. At a subsequent Citizens' Board meeting, MPCA staff made a presentation and recommended denying the petition for an EAW, denying the petition for a contested-case hearing, and issuing the permit. MPCA staff expressed their opinions that (1) the project did not meet any of the regulatory thresholds for mandatory completion of an EAW or environmental-impact statement (EIS) and (2) the environmental concerns raised by petitioners had been addressed through the permitting process, the petitioners had not demonstrated that the project, as conditioned by the permit, "may have the potential for significant environmental effects" and thus "the criteria for ordering the preparation of an EAW [were] not met." The Citizens' Board voted 5-1 to deny the petition for an EAW

and unanimously to deny the request for a contested-case hearing and approve the permit. This appeal follows.

D E C I S I O N

"A person aggrieved by a final decision on the need for an environmental assessment worksheet [or] the need for an environmental impact statement . . . is entitled to judicial review of the decision . . . ." Minn. Stat. § 116D.04, subd. 10 (2012). Since a 2011 legislative amendment, challenges to environmental-review determinations have been properly asserted directly to this court by petition for writ of certiorari. *See* 2011 Minn. Laws ch. 4, § 8, at 60 (amending Minn. Stat. § 116D.04, subd. 10, to allow for direct appeal to this court). We determine whether environmental-review decisions are unreasonable, arbitrary or capricious, or unsupported by substantial evidence. *Watab Twp. Citizen Alliance v. Benton Cnty. Bd. of Comm'rs*, 728 N.W.2d 82, 89 (Minn. App. 2007), *review denied* (Minn. May 15, 2007).

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

Id. The burden is on the party challenging an agency decision to demonstrate that the decision is arbitrary and capricious. *Minn. Ctr. for Envtl. Advocacy v. Comm'r of Minn. Pollution Control Agency*, 696 N.W.2d 95, 100 (Minn. App. 2005).

The necessity for environmental review is governed by rules adopted by the EQB pursuant to the Minnesota Environmental Protection Act (MEPA). *See* Minn. Stat.

§ 116D.04, subd. 2a(a) (2012) (directing board to establish categories for which EAWs and EISs are and are not required). Environmental review is mandatory if a project meets certain thresholds articulated in the rules. Minn. R. 4410.4300 (listing projects requiring an EAW), .4400 (listing projects requiring an EIS) (2011). Environmental review may also be required if a petition, signed by more than 100 citizens, demonstrates that "there may be potential for significant environmental effects." Minn. Stat. § 116D.04, subd. 2a(c) (2012); *see also* Minn. R. 4410.1100 (2011) (governing petition process).

Relators argue that this project exceeds the thresholds for mandatory environmental review and, alternatively, that the MPCA erred by denying their petition for an EAW. We address each argument in turn.

I.

Relators assert that the MPCA is required to perform an environmental review because the project exceeds the thresholds in the environmental-review rules for construction of mixed municipal solid-waste compost facilities. *See* Minn. R. 4410.4300, subp. 17(E) (requiring EAW for such a facility with a capacity of 50 or more tons per day); Minn. R. 4410.4400, subp. 13(D) (requiring EIS for such a facility with a capacity of 500 or more tons per day).[1] The MPCA argues that the rules governing mixed municipal solid-waste composting facilities do not apply to the project. We agree.

[1] Relators separately argue that an EIS and an EAW are required under the rules. But if an EIS is required under the rules, an agency is not required to also conduct an EAW. *See* Minn. R. 4410.4300, subp. 1 (requiring EAW for projects meeting thresholds in rule, unless an EIS is required under Minn. R. 4410.4400).

The environmental-review rules incorporate a statutory definition of "mixed municipal solid waste." Minn. R. 4410.0200, subp. 52 (2011) (incorporating definition in Minn. Stat. § 115A.03, subd. 21). That statute provides:

> (a) "Mixed municipal solid waste" means garbage, refuse, and other solid waste from residential, commercial, industrial, and community activities that the generator of the waste aggregates for collection, except as provided in paragraph (b).
>
> (b) Mixed municipal solid waste does not include auto hulks, street sweepings, ash, construction debris, mining waste, sludges, tree and agricultural wastes, tires, lead acid batteries, motor and vehicle fluids and filters, *and other materials collected, processed, and disposed of as separate waste streams.*

Minn. Stat. § 115A.03, subd. 21 (2012) (emphasis added). Because this statutory definition does not encompass SSCM, we conclude that the MPCA did not err in concluding that the regulatory thresholds for mixed municipal solid waste composting facilities do not apply to the project.

Relators argue that the MPCA acted in an arbitrary and capricious manner by requiring Full Circle to comply with permitting rules for solid-waste composting facilities but not applying environment-review rules for the same type of facilities. Relators cite to definitions of "compost facility" and "composting" in Minn. R. 7035.0300, subps. 19-20 (2011). But these definitions are part of the MPCA's permitting rules, not the EQB's environmental-review rules. And, as the MPCA points out, its rules governing permitting for solid-waste composting facilities expressly apply to "source separated compostables." Minn. R. 7035.2836, subp. 1 (2011). Because of the different definitions in the relevant rules, we reject the argument that the MPCA acted in an arbitrary and capricious manner

by applying its own permitting rules governing solid-waste composing facilities but not the EQB's environmental-review thresholds for mixed municipal solid-waste composting facilities. *See, e.g.*, *Moreno v. City of Minneapolis*, 676 N.W.2d 1, 7 (Minn. App. 2004) ("A decision is unreasonable, or arbitrary and capricious when it is based on whim or . . . devoid of articulated reasons." (quotation omitted)).

II.

Relators assert that the MPCA acted in an arbitrary and capricious manner by applying the wrong legal standard in determining whether to grant the citizen petition. Under MEPA, the MPCA is required to prepare an EAW if the citizen petition demonstrates that "there *may be* potential for significant environmental effects." Minn. Stat. § 116D.04, subd. 2a(c) (emphasis added). This standard is distinguishable from the standard for requiring an EIS; an EIS is required when "there *is* potential for significant environmental effects." Minn. Stat. § 116D.04, subd. 2a (2012) (emphasis added); *see also Carl Bolander & Sons v. City of Minneapolis*, 502 N.W.2d 203, 207 (Minn. 1993) (emphasizing lower EAW standard).

Relators argue that the MPCA applied the higher EIS standard in determining whether to require an EAW, citing to statements made by MPCA staff during the Citizens' Board meeting that the petition did not demonstrate, with respect to various environmental concerns, "the potential for significant environmental effects." MPCA staff did, however, use the correct phraseology in summarizing their remarks, opining that "the evidence presented by the petitioners does not demonstrate that the proposed project *may have* the potential for significant environmental effects and the criteria for

ordering the preparation of an EAW are not met." And the suggested staff resolution on which the Citizens' Board voted, which was read into the record, also contained the correct standard: that the evidence did "not demonstrate that the proposed project *may have* the potential for significant environmental effects." We also note the significant experience that the MPCA and its Citizens' Board have in addressing environmental-review matters. *See, e.g.*, Minn. R. 4410.4300, subps. 4 (designing MPCA as RGU for petroleum refineries), 5 (fuel conversion facilities), 8 (transfer facilities), 9 (underground storage facilities), 13 (paper or pulp processing mills), 15 (air pollution), 16 (hazardous waste), 17 (solid waste), 18 (waste water). We are confident that, despite the few misstatements of the standard in the record, the Citizens' Board is familiar with and applied the correct standard for determining whether to require an EAW. Accordingly, we reject relators' assertion that the MPCA applied the higher EIS standard in determining the need for an EAW.

Relators also argue that the MPCA is required to prepare an EAW in response to their petition because it was made in good faith and is not frivolous.[2] But a petition for an EAW must be supported by "material evidence," meaning "such evidence as is admissible, relevant, and consequential to determine whether the project may have the potential for significant environmental effects." *Watab*, 728 N.W.2d at 90. "Allegations of vague or generalized fears and concerns are therefore not sufficient under the statute." *Id.* Moreover, in determining whether an EAW is warranted, an RGU properly considers

[2] Relators rely on an unpublished decision from this court in support of this argument, but unpublished decision are not precedential. Minn. Stat. § 480A.08, subd. 3(c) (2012).

"the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority[.]" *Id.* (citing Minn. R. 4410.1700, subp. 7 (2005)); *see also* Minn. R. 4410.1100, subp. 6 (requiring RGU to take into account factors of rule 4410.1700, subp. 7 in determining whether to require EAW in response to citizen petition).

The citizen petition raised multiple generalized environmental concerns, but provided very little material evidence to support those concerns. The statement from Victor and Brenda Wilcox is based on their personal observation of drainage problems in the area. The portions of the draft permit reflect the MPCA's deferral of approval of the stormwater-mitigation measures and the requirements imposed to control odors, air quality, and stormwater. The portion of the MPCA's comments attached to the petition describes the expected flow of stormwater at the facility under the conditions of the permit. The portions of the engineering report that were submitted with the petition reflect the limitations of that report—that it does not cover geoenvironmental concerns, that long-term monitoring of water levels was not done, and that the studies conducted were "not intended to explore for the presence or extent of environmental contamination"—and the fact that the soils at the site have poor drainage properties. The articles attached to the petition highlight some of the risks of composting facilities, including aspergillus mold. The PowerPoint presentation from the Compost Council of Canada describes best practices for composting facilities. And the *Sletten* decision

addressed Ramsey County's immunity defenses to claims that it negligently operated a yard-waste facility between 1984 and 1996.[3] *See* 675 N.W.2d at 294.

MPCA staff considered each of the environmental concerns raised and explained to the Citizens' Board why those concerns were adequately addressed by the conditions of the solid-waste permit. MPCA staff further assured the Citizens' Board that the MPCA would be able to police the conditions of the permit. Relators do not explain how the MPCA's decision not to require an EAW is contrary to this substantial evidence but merely reassert the environmental issues that the MPCA concluded were adequately addressed by the conditions of the permit. On this record, we cannot conclude that the MPCA's decision not to require an EAW is contrary to the substantial evidence or that the MPCA acted arbitrarily and capriciously by denying the petition.

Affirmed.

[3] The only commonality that we can discern between this case and the *Sletten* case is the concern raised in both cases about aspergillus mold. The nature of the facility and the underlying circumstances in *Sletten* were different than those addressed by the MPCA in this case. Moreover, because *Sletten* is not an environmental-review case, it provides no guidance to us in deciding this case.