2018 WL 1145736
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Court of Appeals of Minnesota.

IN RE BIG STONE COUNTY
REQUEST FOR REVIEW OF PUBLIC
WATERCOURSE—SECTION 13, T
123 N, 46W, ALMOND TOWNSHIP.

A17–1255
|
Filed March 5, 2018
|
Review Denied May 29, 2018

Minnesota Department of Natural Resources

Attorneys and Law Firms

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Considered and decided by Halbrooks, Presiding Judge; Connolly, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

REILLY, Judge

*1 In this certiorari appeal, relator-landowner Gary Haugen challenges a determination of the Minnesota Department of Natural Resources that an unnamed public watercourse in Big Stone County was properly included in the state's Public Waters Inventory, and dismissing relator's petition to remove the watercourse from the Public Waters Inventory as untimely and without substantive merit. We affirm.

FACTS

Relator Gary Haugen is a riparian landowner near an unnamed public watercourse located in Section 13 of Almond Township in Big Stone County south of Basin 306 (the Watercourse). In 1979, the Minnesota Department of Natural Resources (the DNR) conducted an inventory of the state's public waters and wetlands and made preliminary designations as to which bodies constituted public waters. The DNR designated these public waters on a Public Waters Inventory (PWI), and provided PWI lists and maps to each county. As part of this process, in December 1979, the DNR provided Big Stone County with a PWI list and map designating certain waters

and wetlands within Big Stone County as public waters. The Watercourse was included in this preliminary designation. The DNR advised Big Stone County that it had 90 days within which to review the DNR's materials, conduct a public information meeting, and present any recommendations regarding the PWI to the DNR.

Big Stone County held a public hearing on the DNR's preliminary designations in March 1980. Following the hearing, the DNR received a number of comments from county residents objecting to various aspects of the PWI. The DNR did not receive any objection to the placement of the Watercourse on the PWI. In June 1980, the DNR notified the Big Stone County Board of Commissioners that it had reviewed the public comments. The DNR listed the comments from Big Stone County residents with which it agreed, and changed the preliminary PWI to reflect those agreements.

On September 17, 1980, the DNR published a revised PWI list and map for Big Stone County in the official county newspaper. The revised PWI list and map again included the Watercourse. The notice invited anyone challenging a designation to "list the reason(s) why the particular public water or wetland does not meet the statutory ... definition [ ]" of a public water, and submit such challenge to the DNR within 90 days of the publication date. The statutory appeal period to challenge the inclusion of the Watercourse on the PWI commenced on September 17, 1980, and expired on December 16, 1980. The DNR did not receive any petitions related to the Watercourse during this 90–day petition period. In June 1984, the DNR published the final PWI list and map for Big Stone County. The PWI list and map identify the Watercourse as a public water.

In October 2014, relator and other riparian landowners applied for a permit to excavate the Watercourse. The DNR authorized the excavation but required the landowners to install a 50–foot–wide riparian buffer to comply with the county's zoning ordinance. The landowners challenged the buffer requirement, and, in November 2015, the DNR amended the permit to allow for a buffer of less than 50 feet. The landowners, with the exception of relator, withdrew their request for a contested-case hearing and completed the work authorized by the amended permit.

***2** In January 2016, the Big Stone County Board of Commissioners, the Big Stone County Soil and Water Conservation District Board of Supervisors, and the Upper Minnesota Watershed District Board of Managers petitioned the DNR to remove the Watercourse from the PWI on the ground that the DNR incorrectly designated the Watercourse as a public water. The DNR denied the request in May 2016, determining that "substantial evidence" supported the Watercourse's designation as a natural watercourse. The DNR concluded that the Watercourse was "properly included in the public water inventory" and denied the petition to remove the Watercourse from the PWI.

In August 2016, the Big Stone County Board of Commissioners and the Big Stone County Soil and Water Conservation District Board of Supervisors again requested that the DNR remove the Watercourse from the PWI. In November 2016, the DNR notified the county that it would not reopen its May 2016 determination.

In February 2017, relator requested that the DNR remove the Watercourse from the PWI. On July 17, 2017, the DNR issued findings of fact, conclusions of law, and an order denying relator's request to remove the Watercourse from the PWI. The DNR held that the challenge to the 1984 PWI determination was time-barred because petitioners failed to object to the designation of the Watercourse as a public watercourse before the December 16, 1980 expiration date. Furthermore, the DNR determined that substantial evidence in the record supported the original designation of the Watercourse as a public water.

Relator now appeals.

ANALYSIS

I. Standard of Review

"[D]ecisions 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[s] of their technical training, education, and experience." *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977). Our role as a reviewing court is to determine whether the agency has taken a "hard look" at the problems involved, and whether the agency "genuinely engaged in reasoned decision-making." *Id.* at 825 (quotations and citations omitted). We defer to an agency's factual findings, provided the findings are supported by substantial evidence. *Saif Food Mkt. v. Comm'r of Dep't of Health*, 664 N.W.2d 428, 430 (Minn. App. 2003). We will not disturb an agency's decision unless it reflects an error of law, the findings are arbitrary and capricious, or the findings are unsupported by substantial evidence. *Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006). If an agency engages in reasoned decision-making, we will affirm the agency's decision, 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). The party challenging an agency decision bears the burden of proving grounds for reversal. *In re Request for Issuance of SDS Gen. Permit*, 769 N.W.2d 312, 317 (Minn. App. 2009).

II. Statutory Background

The State of Minnesota, through its police power, "has been defining and protecting its public water resources since 1867." *In re Christenson*, 417 N.W.2d 607, 609 (Minn. 1987) (citing Minn. Laws 1867, ch. 40). In 1979, the Minnesota Legislature directed the DNR to conduct an inventory of the state's public waters and wetlands subject to the permit authority of the DNR. *Drum v. Minnesota Bd. of Water & Soil Res.*, 574 N.W.2d 71, 74 n.1 (Minn. App. 1998); Minn. Laws 1979, ch. 199, § 7 ("[T]he commissioner shall inventory the waters of each county and make a preliminary designation as to

which constitute public waters and wetlands. The commissioner shall send a list and map of the waters which he has preliminarily designated as public waters and wetlands in each county to the county board of that county for its review and comment."). These public waters are designated on the PWI, copies of which are then filed with the auditor of each county. *Drum*, 574 N.W.2d at 74 n.1; *see also* Minn. Stat. § 103G.201 (2016) ("The commissioner shall maintain a public waters inventory map of each county that shows the waters of this state that are designated as public waters under the public waters inventory and classification procedures prescribed under Laws 1979, chapter 199, and shall provide access to a copy of the maps."); *see also In re Christenson*, 417 N.W.2d at 609–11 (explaining inventory process). "Public waters" includes "natural and altered watercourses with a total drainage area greater than two square miles." Minn. Stat. § 103G.005, subd. 15(9) (2016).

*3 The legislature required the commissioner of natural resources, upon making his preliminary designations, to submit a preliminary PWI list and map to each county board. Minn. Laws 1979, ch. 199, § 7. The county boards were directed to conduct "at least one" public informational meeting within their respective counties to elicit public feedback on the proposed PWI. *Id.* Within 90 days of the public meeting, the county boards presented their recommendations to the commissioner, stating whether they disagreed with the inclusion of a particular waterway on the PWI. *Id.* The commissioner reviewed the recommendations of each county board and, within 30 days, notified the county whether its recommendations had been accepted or rejected. *Id.* The commissioner then filed a revised PWI list and map with each county recorder, who was required to "cause the list and map to be published in the official newspaper" of the county. *Id.* The published notice was required to include a statement that "any person or any county may challenge the designation of specific waters as public waters or wetlands" by "filing a petition for a hearing with the commissioner within 90 days following the date of publication." *Id.* Upon receipt of any such petition, the commissioner was required to hold a hearing in the nature of a contested-case hearing and issue findings of fact and conclusions of law. *Id.*

III. Relator's petition is time-barred.

We begin by addressing the DNR's assertion that relator's challenge to the 1984 PWI determination is time-barred because "the time to file a petition objecting to the designation of [the Watercourse] as a public water on the PWI expired on December 16, 1980" under a plain reading of Minnesota law. Statutory interpretation is a question of law subject to de novo review. *In re Minnesota Dep't of Nat. Res. Special Permit No. 16868*, 867 N.W.2d 522, 527 (Minn. App. 2015), *review denied* (Oct. 20, 2015).

Minnesota law required the DNR to conduct an inventory of the waters and wetlands in each county and make a preliminary designation as to which bodies constituted "public" waters and wetlands. *Drum*, 574 N.W.2d at 74 n.1. The DNR then provided

these preliminary designations to each county board, with instructions to conduct "at least one" public informational meeting to gather public feedback. Minn. Laws 1979, ch. 199, § 7. Following publication of the revised PWI list and map, any landowner challenging the designation of a body of water as a "public water" was required to petition for a hearing with the DNR commissioner within 90 days of the date of publication. *Id.*

Big Stone County received the DNR's preliminary PWI list and map in December 1979. The preliminary list included the Watercourse. The county held a public hearing within 90 days as required, and the DNR collected a number of comments objecting to certain aspects of the preliminary list. The DNR published a revised PWI list and map in an official newspaper for Big Stone County in September 1980, directing that any landowner challenging a designation should submit such challenge to the DNR within 90 days. The statutory time period expired in December 1980. It is uncontested that the designation of the Watercourse as a public water was not challenged by relator or anyone else within this statutory time period. Based on the plain and ambiguous language creating a 90–day statutory time period, the DNR therefore determined that relator's petition is time-barred. We agree. Given the plain language of the law, and mindful of the deference accorded to the DNR, *In re Minnesota Dep't of Nat. Res. Special Permit No. 16868*, 867 N.W.2d at 527, we conclude that the DNR's decision that the petition is statutorily time-barred must be affirmed.

Relator argues that the petition is not time-barred because the statute authorizes the DNR to revise the PWI to correct errors. The Minnesota legislature granted the DNR discretion to "revise the public waters inventory map of each county ... as needed, to ... correct errors in the original inventory." Minn. Stat. § 103G.201(e)(2)(i) (2016). Relator argues that the DNR is acting arbitrarily and capriciously by denying his request to revise the PWI under section 103G.201(e). Relator's argument ignores that the statute is permissively framed to provide that the commissioner "*may* revise" the PWI. Minn. Stat. § 103G.201(e)(2)(i) (emphasis added); *see also* Minn. Stat. § 645.44, subd. 15 (2016) (defining "may" as permissive rather than mandatory). A statute that uses the term "may" is "permissive and imports the exercise of discretion." *State ex rel. Klimek v. Sch. Dist. No. 70, Otter Tail Cty.*, 204 Minn. 279, 281, 283 N.W. 397, 398 (1939). While the legislature vested the DNR with the discretion to revise a PWI list to correct errors, it did not compel the DNR to do so, and section 103G.201(e) does not prevent application of the statutory time-bar here.

IV. Substantial evidence supports the DNR's decision.

***4** Because we determine that relator's petition is time-barred, we need not address the merits of the petition. Nevertheless, we determine that the DNR's decision is based on substantial evidence and is neither arbitrary nor capricious.

A reviewing court will uphold the DNR's decision if its factual findings are supported by substantial evidence and the decision is not arbitrary or capricious. *Citizens Advocating Responsible Dev.*, 713 N.W.2d at 832. Substantial evidence consists of: "(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." *Reserve Mining Co.*, 256 N.W.2d at 825. An agency's decision is arbitrary and capricious if the agency (1) relied on factors the legislature never intended it to consider; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation for the decision that runs counter to the evidence; or (4) rendered a decision so implausible that it could not be ascribed to a difference in view or the result of agency expertise. *Watab Twp. Citizen All. v. Benton Cty. Bd. of Comm'rs*, 728 N.W.2d 82, 89 (Minn. App. 2007), *review denied* (Minn. May 15, 2007).

Relator asserts that the DNR's decision is flawed because the Watercourse is an artificial—rather than public—watercourse. We disagree. "Public waters" include "natural and altered watercourses with a total drainage area greater than two square miles." Minn. Stat. § 103G.005, subd. 15(9). An "altered natural watercourse" is a "former natural watercourse that has been affected by artificial changes to straighten, deepen, narrow, or widen the original channel." *Id.*, subd. 3. An "artificial watercourse," by contrast, is a "watercourse artificially constructed by human beings where a natural watercourse was not previously located." *Id.*, subd. 5.

During the preliminary designation phase in 1980, the DNR reviewed the original 1871 plat map for the area, a public land survey from 1880, surveyor's field notes, aerial photographs of the area from 1938, 1955, and 1971, and a U.S. geological survey topographic map developed from 1971 aerial photographs. Using these tools, the DNR calculated the drainage area for the Watercourse as exceeding two square miles from the confluence point, and determined that the Watercourse met the statutory definition of a "public water." In response to relator's petition, the DNR verified the 1980 drainage-area calculation using "two separate modern methods," including the DNR's Watershed Suite (Level 8 Catchments) and the United States Geological Survey's StreamStats Application v. 4.1.3. The DNR also reviewed plat maps, surveyor notes, and aerial photographs to verify the "accuracy and appropriateness" of the 1984 PWI determination. The DNR verified its interpretation of these materials with two experts, who confirmed the DNR's findings. Based on its review, the DNR calculated that the drainage area of the Watercourse is 11.3 square miles—well in excess of the two-square-mile definition of a "public water."

Relator attempts to refute these findings by presenting materials from an engineering firm and county witnesses suggesting that the Watercourse was misclassified as a public water in the 1984 PWI determination.

The DNR rejected the engineering firm's findings on the grounds that they relied on unverifiable assumptions and were inconsistent with the historic evidence. The DNR likewise rejected correspondence from county witnesses, which failed to offer any substantive information bearing on the validity of the 1984 PWI determination. We discern no error in the DNR's determination that relator's evidence was not compelling because it ran counter to historical factual evidence present in plat maps, surveyor notes, and aerial photographs.

***5** In light of its review of historical documents from 1870, 1871, 1938, 1955, and 1971, the DNR determined that the Watercourse is a natural watercourse and is properly included on the PWI list and map as a public water. This determination is entitled to deference, particularly in light of the fact that this subject matter falls within the DNR's area of expertise. *See Reserve Mining Co. v. Herbst*, 256 N.W.2d at 824. The DNR's July 17, 2017 decision to uphold the 1984 PWI determination as it relates to the Watercourse is supported by substantial evidence in the record and is not arbitrary or capricious. *See Saif Food Mkt.*, 664 N.W.2d at 430. We therefore affirm the DNR's decision denying relator's petition.

V. Relator's other arguments fail.

Relator asserts additional arguments in support of his petition, claiming that (1) the DNR failed to provide proper notice to landowners in 1980; (2) changes in the law requiring a 50–foot buffer along the waterway constitutes a taking; and (3) a DNR excavation permit was not required because the Watercourse is not a public water. Relator's failure to raise these issues to the DNR in the first instance precludes appellate review now. *See E.N. v. Special Sch. Dist. No. 1*, 603 N.W.2d 344, 348 (Minn. App. 1999) (declining to address matters raised for the first time on appeal). This general rule extends to appeals from administrative decisions. *Id.* However, this court may, in its discretion, review any matter in the interest of justice. *Agra Resources Coop v. Freeborn Cty. Bd. of Comm'rs*, 682 N.W.2d 681, 684 (Minn. App. 2004). We determine that relator's other arguments fail on the merits.

First, relator argues that the DNR failed to notify landowners that large amounts of land would be taken at a later date in the form of 50–foot buffer strips along the waterway, as a consequence of the PWI list. Relator argues that the DNR's failure to provide notice of the consequences of the Watercourse being designated as a public water amounts to a due-process violation. "[T]he notice required by due process will vary with the circumstances and conditions of each case, making it impossible to draw a standard set of specifications as to what is constitutionally adequate notice, to be mechanically applied in every situation." *Application of Christenson*, 417 N.W.2d 607, 611–12 (Minn. 1987) (quotation omitted). And Minnesota courts recognize that it is "both unrealistic and unnecessary under the law" to require the DNR to provide notice of "every possible outcome" of an agency decision. *Comm'r of Nat. Res. v. Nicollet Cty. Pub. Water/Wetlands Hearings Unit*, 633 N.W.2d 25, 31 (Minn. App. 2001). Here, the

DNR did not violate relator's due-process rights by failing to alert landowners in 1980 that, 35 years in the future, the PWI could inform the DNR's designation of certain lands as buffer areas.

Next, we reject relator's argument that Big Stone County's buffer law amounts to an unconstitutional taking under the United States and Minnesota Constitutions. The DNR lacks authority to enforce the buffer law because Minnesota law grants the Board of Water and Soil Resources (BWSR)—rather than the DNR—the authority to "coordinate the water and soil resources planning and implementation activities of counties, soil and water conservation districts, watershed districts, [and] watershed management organizations...." Minn. Stat. § 103B.101, subd. 9(1) (2016); *see also* Minn. Stat. § 103F.48, subd. 1(a), (b) (2016) (defining "Board" as "the Board of Water and Soil Resources"). Minnesota law grants BWSR and local soil and water conservation districts the authority to enforce compliance with riparian buffer zones. *See* Minn. Stat. § 103F.48, subd. 7; *see also* Minn. Stat. § 103B.101, subd. 12a (authorizing BWSR or local county or watershed district to issue penalty orders for "violations of the water resources riparian protection requirements under section[ ] ... 103F.48"). Thus, relator is not entitled to relief against the DNR on these grounds.

***6** Lastly, to the extent relator's appeal attacks the excavation permit, the proper course of action was for relator to seek a contested-case hearing on the issuance of the permit under Minnesota Statutes section 103G.311. An applicant challenging a permit may file a demand for hearing. Minn. Stat. § 103G.311, subd. 5(a). The demand for hearing must be filed within 30 days of receipt of the permit, and an order respecting a permit becomes final after 30 days. *Id.* Because relator failed to file a demand for hearing within 30 days of receipt of the permit, or challenge the permit itself, he is precluded from attacking the permit's provisions for the first time on appeal now.

Affirmed.

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