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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A18-1503**

Protect Our Minnetonka Parks, Inc.,  
Relator,

vs.

City of Minnetonka,  
Respondent.

**Filed June 17, 2019  
Affirmed  
Schellhas, Judge**

City of Minnetonka  
Resolution No. 2018-094

Marshall H. Tanick, David Robbins, Meyer Njus Tanick, P.A., Minneapolis, Minnesota  
(for relator)

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respondent)

Considered and decided by Schellhas, Presiding Judge; Jesson, Judge; and Smith,  
Tracy M., Judge.

**UNPUBLISHED OPINION**

**SCHELLHAS**, Judge

Relator challenges respondent's denial of its petition for an environmental-  
assessment worksheet in connection with a proposed mountain-bike trail system on the

basis that respondent's denial is not supported by substantial evidence, is arbitrary and capricious, and is based on an error of law. We affirm.

## **FACTS**

In the summer and fall of 2016, staff of the City of Minnetonka and the Minnetonka Park & Recreation Board worked together to prepare a proposal for more trails, including mountain-bike trails, in the city. After a city resident requested that the park board add mountain-bike trails to the city's park system (the project), the city staff created a feasibility study and concept plans for the project for consideration by the park board. In February 2018, the park board directed city staff to further study and develop a concept plan for the project. City staff then prepared the Minnetonka Mountain Bike Study for development of the project at Lone Lake Park (the park). The park is a 146-acre community park and preserve, with 14 acres of developed land for public use. The study included an independent biological assessment of natural resources at the park. In June 2018, the park board voted unanimously to recommend approval of the project to the city council. The project includes construction of 4.7 miles of 18-24 inch-wide mountain-bike trails. After the park board recommended the project, the city reviewed the park and identified more than three miles of informal trails that had developed over the years within the wooded slope of the park.

In July 2018, appellant Protect Our Minnetonka Parks, Inc. (POMP), petitioned the Minnesota Environmental Quality Board (EQB), requesting that the city be required to prepare an environmental-assessment worksheet (EAW) before approving the project.

POMP alleged in the petition that the project may have the potential for significant environmental effects at the park and cited a number of concerns.

The city council addressed POMP's petition at its August 6, 2018 meeting. The city heard testimony from the city's recreation-services director, the city attorney, the city's natural-resources manager, an environmental consultant, and multiple citizens; reviewed the independent biological assessment, the Mountain Bike Study, numerous articles, and a technical memorandum conducted by an independent environmental-consulting firm on behalf of POMP; and reviewed correspondence from various state and federal agencies. On a four-to-two vote, the city council resolved that none of the criteria in POMP's petition required the preparation of an EAW and denied the petition.

This certiorari appeal follows.

## **D E C I S I O N**

“The Minnesota Environmental Policy Act (MEPA) requires that government agencies contemplating taking action . . . on a proposed project must first consider the project's environmental consequences.” *Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs*, 713 N.W.2d 817, 823 (Minn. 2006) (footnote omitted) (*CARD*). MEPA establishes a “project-specific review, where a proposed project is reviewed to determine whether it has the potential to cause significant environmental effects.” *Id.* This process may involve preparation by a responsible government unit (RGU) of an EAW, which 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.”<sup>1</sup> *Id.* at 824 (citing Minn. Stat. § 116D.04, subd. 1a(c)).

Rules adopted by the EQB under MEPA govern the necessity of conducting an EAW. Minn. Stat. § 116D.04, subd. 2a(b) (2018) (directing EQB to establish categories of projects requiring EAW); Minn. R. 4410.4300 (2018) (establishing categories of projects requiring EAW). An RGU must conduct an EAW when material evidence accompanying a petition signed by more than 100 citizens “demonstrates that, because of the nature or location of a proposed action, there may be the potential for significant environmental effects.” Minn. Stat. § 116D.04, subd. 2a(e) (2018). “Material evidence” means “evidence that is both admissible” and “relevant and consequential to whether the project may have the potential for significant environmental effects.” *Watab*, 728 N.W.2d at 90.

An RGU “shall deny” an EAW petition “if the evidence presented fails to demonstrate the project may have the potential for significant environmental effects.” Minn. R. 4410.1100, subp. 6 (2017). In considering the need for an EAW, an RGU considers:

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

B. cumulative potential effects. The RGU shall consider the following factors: whether the cumulative potential effect is significant; whether the contribution from the project is significant when viewed in connection with other contributions to the cumulative potential effect; the degree to which the project complies with approved mitigation measures specifically designed to address the cumulative potential

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<sup>1</sup> A “government unit” includes “any general or special purpose unit of government in the state including” towns and cities. Minn. Stat. § 116D.04, subd. 1a(e) (2018).

effect; and the efforts of the proposer to minimize the contributions from the project;

C. the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority. The RGU may rely only on mitigation measures that are specific and that can be reasonably expected to effectively mitigate the identified environmental impacts of the project; 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.

Minn. R. 4410.1700, subp. 7 (2017) (incorporated by Minn. R. 4410.1100, subp. 6)).

We review an RGU's denial of a petition for an EAW to determine whether it is unreasonable, arbitrary or capricious, or unsupported by substantial evidence. *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). This standard is "generally deferential." *In re Env'tl. Assessment Worksheet for the 33rd Sale of State Metallic Leases*, 838 N.W.2d 212, 216 (Minn. App. 2013) (quotation omitted), *review denied* (Minn. Nov. 26, 2013); *see also CARD*, 713 N.W.2d at 832 (stating that appellate court's "role when reviewing [RGU] action is to determine whether the [RGU] has taken a hard look at the problems involved, and whether it has genuinely engaged in reasoned decision making" (quotation omitted)).

## I.

Raising a number of concerns, POMP argues that the city's denial of its EAW petition was not based on substantial evidence. We disagree. "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.” *CARD*, 713 N.W.2d at 832 (quotation omitted). On appeal, POMP bears the burden of proving that the city’s decision was not supported by substantial evidence. *See Friends of Twin Lakes v. City of Roseville*, 764 N.W.2d 378, 381–82 (Minn. App. 2009) (stating that appellant had “not met its burden of proving that respondent’s decision was unsupported by substantial evidence” where it failed to point out “evidence to the contrary”). We address each of POMP’s environmental concerns in turn.

*Detrimental effect on the park’s water resources*

POMP argues that it presented evidence at the city-council hearing that the project would have a detrimental effect on the park’s water resources. A park-board employee explained that the project trails will not cross any wetlands or waterways. The city found that “[n]o wetland impacts are proposed” because the project would not cross any waters and the “trails will be located far enough away from surface waters that sedimentation is unlikely to occur.” We conclude that substantial evidence supports the city’s findings. *See CARD*, 713 N.W.2d at 833 (concluding material evidence existed based on testimony from RGU’s staff).

*Soil erosion*

POMP alleged in its petition that the project would cause soil erosion and claimed that the project would involve “extremely steep slopes (25-35% grades),” which will “diminish the capacity of the soil to retain rainfall.” Referencing various articles and manuals about how to properly construct and maintain mountain-bike trails, the park board advised the city council that the project will follow the National Park Service’s best

practices for mountain-bike-trail construction and management, and that the project, in fact, will contain only 10% grade slopes. POMP presented no evidence that these techniques or plans will be insufficient to prevent a significant environmental impact. *See Watab*, 728 N.W.2d at 90 (stating that “[a]llegations of vague or generalized fears and concerns are . . . not sufficient” to defeat RGU’s conclusion of no potential for significant environmental impact). The city found that as “a result of the use of field location of the trail, use of appropriate design and construction methods, and imposition of seasonal use restrictions, soil erosion and compaction will not be significant.” We conclude that substantial evidence supports the city’s finding.

*Disturbance to wildlife and tree populations*

POMP alleged at the city-council hearing that a number of wildlife species and their habitats will be disturbed, displaced, and fragmented, and that the tree population could decline. The city’s natural-resources manager stated that, while individual animals could be displaced, the project will not significantly impact the “overall population.” The park-board’s staff advised that potential “habitat loss is minimal” based on the fact that the park contains 132 acres and construction of the project would only take up 1.7 acres. The city found that the potential “habitat loss due to the [p]roject is minimal,” and while it could have an impact on “individual animals,” it “will not have significant adverse effects on the overall population of any animal class.” Additionally, the natural-resources manager stated that “some small trees will be removed,” but the project will “avoid” areas of larger trees and their root zones. The city found that the project “will result in minimal tree removal,” that “only smaller trees will be removed” while trees “of significant size will not be

removed,” and that the “overall tree removal will not alter the existing closed canopy of trees in the park.” We conclude that substantial evidence supported the city’s findings. *See Iron Rangers for Responsible Ridge Action v. Iron Range Res.*, 531 N.W.2d 874, 881 (Minn. App. 1995) (deferring to “discretion of the county” when proposed project would leave “over 100 acres of forest cover” in a 250-acre woodland, and stating that when “there are technical disputes and uncertainties, the court must assume that the agency or RGU has exercised its discretion appropriately”), *review denied* (Minn. July 28, 1995).

*Ecological degradation of the long-eared bat and rusty-patched bumble bee*

POMP alleged in its petition that the project could adversely affect and encroach upon the “critical habitats” of “sensitive species,” specifically the long-eared bat and the rusty-patched bumble bee. On these issues, the park board provided information, including the biological assessment, along with testimony at the city council hearing. The city found that the project will not affect the long-eared bat because the closest known habitat of the long-eared bat is 16 miles away from the park. The city also found that any potential impacts concerning the rusty-patched bee will “be fully and adequately addressed” by the project’s coordination with the U.S. Fish & Wildlife Services (USFWS), which will work onsite to identify nesting areas of the bee and assist with relocation of trails, as well as advise on the “optimal season of the year, to avoid disturbance of the queen coming out of hibernation” and the “foraging habitat while it is blooming.” The city found that city staff will obtain “all permits as recommended or required by the USFWS.” The park-board’s testimony and presentation identified and explained the intended mitigation efforts. The city found that while the threat of invasive species, such as buckthorn and garlic mustard,



existed, a number of mitigation efforts will prevent further spread of these species. We conclude that the city’s findings are supported by substantial evidence in the record. *See id.* (deferring to RGU when project would potentially harm plant species “listed as ‘of special concern’” but the effects of the project on the species were unknown); *cf. Twin Lakes*, 764 N.W.2d at 383 (holding that RGU “permissibly relied on existing regulatory oversight to prevent significant environmental impact before it would occur,” and discussed “mitigation measures to be put into place”).

*Public-health concerns from drop in predatory-mammal populations*

POMP alleged in its petition that disrupting the “biodiverse” habitat of the park, could cause the population of predatory mammals to drop, causing a rise in Lyme-Disease-carrying mice, which could adversely affect public health in the area. The city found that no evidence showed that populations of predatory mammals would drop and POMP points to no evidence in the record to support a contrary finding. We conclude that the city’s finding is supported by substantial evidence. *See Iron Rangers*, 531 N.W.2d at 881 (stating that RGU “cannot be compelled to prepare an E[AW] on the basis of speculative factors”).

*Possible damage to archaeological sites*

POMP argues that it also presented information at the city-council meeting that the project posed a threat to any yet-to-be discovered archaeological sites in the area. The record includes correspondence with the Minnesota State Historic Preservation Office, and a state archaeologist, and the park board explained at the hearing that, because the park previously existed as “disturbed” ground, caused by agricultural and recreational-ski use, the “potential for locating intact archaeological resources” was low. The city found that no

archaeological sites have been identified in the area and rejected POMP's argument. We conclude that substantial evidence supports the city's finding.

*Disturbance to quiet environment*

POMP alleged in its petition that the project could disturb the "solitude for other park users." The city found that substantial evidence does not support POMP's claim that the project will cause a significant environmental impact. On appeal, POMP cites to no material record evidence that supports its claim that a disruption of "park users' experience of serenity" will cause a significant environmental impact. And POMP cites no authority to support its argument that the failure of an RGU to consider the solitude of other users of a project area results in reversible error. *See* Minn. R. 4410.1700, subp. 7 (listing criteria for determining the potential for significant environmental effects). We conclude that the city's finding is supported by substantial evidence.

The city's findings and its conclusion that the project has no potential for significant environmental impact are supported by substantial record evidence as a whole. We therefore conclude that the city did not err by denying POMP's petition for an EAW. *See Twin Lakes*, 764 N.W.2d at 384 ("While appellant may disagree with this judgment, it has failed to prove that [the RGU]'s findings are unsupported by the evidence as a whole. From the record before us, it is clear that respondent took a hard look at the salient issues presented by the proposed amendment. As a result, we defer to [the RGU]'s decision.").

**II.**

POMP argues that the city's denial of its petition for an EAW was arbitrary or capricious. A decision is arbitrary or capricious if it "(a) relied on factors not intended by

the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise." *CARD*, 713 N.W.2d at 832.

POMP first argues that the city's decision was improper based on a councilmember's statement at the city-council hearing about the cost of an EAW. And POMP argues that some councilmembers based their decision on "anti-environmental" motives. These arguments lack merit. The city's resolution does not reference cost or "anti-environmental" motives; it identifies POMP's concerns, reviews the evidence, and concludes that the project will cause no significant environmental impact. *See Reserve Mining Co. v. Minn. Pollution Control Agency*, 364 N.W.2d 411, 415 (Minn. App. 1985) ("The court is interested in determining the collective reasons of an agency's action as enunciated by the agency. Reading a transcript might give the court ideas of individual member's view, but one member's views may not reflect the basis for the action of other members."), *review dismissed* (Minn. June 10, 1985).

POMP also argues that the city "blithely disregarded" evidence of the potential for significant environmental impacts resulting from erosion, invasive species, and the threat to the bee. In *Twin Lakes*, an organization challenged a city's decision not to conduct an environmental-impact statement, arguing in part that the city improperly examined pre-existing regulatory oversight and other mitigation strategies. 764 N.W.2d at 382. This court recognized that the Minnesota Rules specifically require an RGU to consider "the extent to which the environmental effects are subject to mitigation by ongoing public regulatory

authority, *id.* (citing Minn. R. 4410.1700, subp. 7), and concluded that the city did not err because it “studied the situation and determined that the project does not have a potential for significant environmental effects because pre-existing regulatory oversight requires mitigation measures,” *id.* at 383.

Similarly here, city staff explained how the project was subject to USFWS regulation regarding the bee’s habitat, and that the city would receive all permits necessary prior to commencing the project. Regarding soil erosion and potential for hydrological damage, city staff stated that they would apply for and follow any permits by “all required watershed districts.” Finally, while the city acknowledged that some impact on wildlife in the area would occur, based on information in the biological assessment, it concluded that the project would not have the potential to cause a significant impact on those populations. We conclude that the city did not disregard POMP’s concerns and properly based its decision on mitigation strategies under pre-existing regulatory oversight. *See id.* (“This court has repeatedly recognized that such regulatory oversight weighs heavily in favor of a finding of no significant impact.” (quotation omitted)); *Watab*, 728 N.W.2d at 92 (holding that RGU’s determination of no significant environmental impact was supported by substantial evidence when project that involved permitting and potential for hydrological damage was subject to “ongoing regulatory review”).

POMP argues that the city failed to consider the cumulative effects of the previously constructed pickleball courts in the park. In *CARD*, the supreme court concluded that when considering the “cumulative potential effects of related or anticipated future actions” an “RGU must take into account outside projects that have the potential to cause significant

environmental effects when considered in conjunction with the proposed project,” limited to “specific projects actually planned or for which a basis of expectation has been laid,” and “geographically to projects in the surrounding area that might reasonably be expected to affect the same natural resources.” 713 N.W.2d at 830–32. Here, the city considered the potential cumulative effects stemming from the pickleball courts and found that “no significant cumulative potential effects” existed because the pickleball courts had been constructed with USFWS oversight to mitigate water runoff, and that the city’s natural-resources manager stated that during construction of the pickleball courts, staff “consulted with the [USFWS], who determined that the pickleball courts would have no impact on the [ ] bee.” And the USFWS verified that the pickleball project, in its entirety, would have no effect on the bee, which was the only species that had been identified as potentially affected. The city’s natural-resources manager also stated that, because the “land use in the park will not change and this project will not cause changes in any adjacent property,” no potential cumulative significant environmental effects existed. We conclude that the city did not disregard this factor, and that finding is supported by substantial evidence.

POMP also argues that the city failed to consider that its regular maintenance of trails “over time” expands the width of the trails. But POMP cites to no material evidence that shows that such widening was already occurring or how it would relate to the project, especially in light of the fact that the project involves shutting down portions of trails that are in disrepair to reclaim them. *See id.* at 835 (stating that RGU may “reasonably” consider mitigation measures that “are specific, targeted, and are certain to be able to mitigate the environmental effects”).

We conclude that the city considered the requisite factors in determining whether to conduct an EAW, and supported its decision with substantial record evidence. The city's decision therefore was not arbitrary or capricious.

### III.

POMP argues that the city made multiple errors of law, resulting in a reversible decision. We review questions of law that arise from a denial of a petition for an EAW de novo. *Metallic Leases*, 838 N.W.2d at 216. In determining the need for an EAW, an RGU must review all material evidence to determine whether a proposed project may have the potential for significant environmental effects. *Watab*, 728 N.W.2d at 91; Minn. Stat. § 116D.04, subd. 2a(e). POMP claims that the city erroneously relied on the biological assessment submitted by the park board. But the city's resolution states that it considered all information presented by POMP at the meeting, and that it incorporated the information in its resolution. And POMP's petition explicitly cites to the report of the city's "own consultant" and to the park-board's Mountain Bike Study. We therefore conclude that the city did not err in citing to this evidence in its resolution.

POMP also claims that the park-board's evidence, relied on by the city, concludes that the project may have the potential for significant environmental effects, citing findings that: (1) the secondary impacts of tree removal "are difficult to quantify until the trail is sited," (2) several woodland bird species "may" experience displacement, and (3) the impact on the bee "is harder to quantify" based on a lack of knowledge about the extent of its population. But, as noted above, the city's natural-resources manager testified that staff would engage in appropriate mediation through active management, construction best

practices adopted by the U.S. National Park Service, and cooperation with the USFWS to arrange for an expert from that federal agency to assist in protecting the bee's habitat and pollinating area.

POMP claims that the city's resolution reflects that the city used an incorrect standard when it concluded that the project will "not likely [] have significant environmental impacts." In referencing the type, extent, and reversibility of environmental effects, the city concluded that the project will "have *some* environmental impacts," but that the "evidence demonstrates that the [p]roject is not likely to have *significant* environmental impacts." While the city's resolution acknowledges the potential for *some* environmental impact, substantial evidence supports the city's conclusion that the project will not have the potential for *significant* environmental impact. *See Watab*, 728 N.W.2d at 91 ("Absent the presentation of [] material evidence, no basis exists to conclude that the [proposed project] may have the potential to *significantly* affect the environment."). We conclude that the city used the proper standard in denying POMP's EAW petition and did not commit reversible error.

**Affirmed.**