

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1312, A18-1524, A18-1608**

In re Applications for a Supplemental
Environmental Impact Statement
for the Proposed NorthMet Project.

**Filed May 28, 2019
Affirmed
Worke, Judge**

Minnesota Department of Natural Resources

Paula G. Maccabee, Just Change Law Offices, St. Paul, Minnesota (for relator
WaterLegacy)

Margo S. Brownell, Evan A. Nelson, Maslon LLP, Minneapolis, Minnesota (for relator
Friends of the Boundary Waters Wilderness)

Elise L. Larson, Ann E. Cohen, Minnesota Center for Environmental Advocacy, St. Paul,
Minnesota (for relator Minnesota Center for Environmental Advocacy)

Monte A. Mills, Caitlinrose H. Fisher, Greene Espel PLLP, Minneapolis, Minnesota; and

Jay C. Johnson, Venable LLP, Washington, D.C. (for respondent Poly Met Mining, Inc.)

Sherry A. Enzler, Minnesota Department of Natural Resources, St. Paul, Minnesota; and

John C. Martin, Sarah Koniewicz, Holland & Hart LLP, Jackson, Wyoming (for respondent
Minnesota Department of Natural Resources)

Considered and decided by Slieter, Presiding Judge; Worke, Judge; and Schellhas,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

In these consolidated certiorari appeals, relators Minnesota Center for Environmental Advocacy (MCEA), Friends of the Boundary Waters Wilderness (Friends), and WaterLegacy (WL) challenge decisions by respondent Minnesota Department of Natural Resources (DNR) denying requests for preparation of a supplemental environmental-impact statement (SEIS) in relation to the NorthMet project, a copper-nickel-platinum group elements (PGE) mine proposed by respondent Poly Met Mining Inc. (PolyMet). We affirm.

FACTS

If built, the NorthMet project will be the first copper-nickel-PGE mine in Minnesota. As proposed, the project consists of a mine site six miles south of Babbitt; a plant site six miles north of Hoyt Lakes; and a transportation and utility corridor connecting the mine and plant sites. Surface mining and processing of copper-nickel-PGE ore would take place over an approximately 20-year timeframe (mine life) at a rate of 32,000 tons per day (tpd) of ore processed. Mining would be conducted in three open pits, and ore would be transported to the plant site by rail for processing. Tailings resulting from processing would be stored in an existing but upgraded tailings basin at the plant site.¹ Reclamation

¹ As defined in the final environmental-impact statement (FEIS), tailings are “[w]aste byproducts of mineral beneficiating processes . . . consisting of rock particles, which have usually undergone crushing and grinding, from which the profitable mineralization has been separated.” A tailings basin is “[l]and on which is deposited, by hydraulic or other means, the material that is separated from the mineral product in the beneficiation or

following the 20-year mine life would include monitoring and maintenance of water quality until conditions were deemed environmentally acceptable and in a self-sustaining and stable condition.

Because the project requires federal and state approvals, environmental review was required under both the National Environmental Policy Act (NEPA) and the Minnesota Environmental Policy Act (MEPA). After issuing a draft environmental-impact statement (DEIS) in 2009 and a supplemental draft environmental-impact statement (SDEIS) in 2013, and receiving public comments on both, the DNR, the United States Army Corps of Engineers, and the United States Forest Service released an FEIS on November 6, 2015. The DNR issued a decision determining the FEIS adequate on March 3, 2016; that decision was not appealed.

On June 8, 2018, MCEA and Friends submitted to the DNR a petition for the preparation of an SEIS under Minn. R. 4410.3000 (2017). On July 11, 2018, the DNR issued a decision denying that request. On July 18, 2018, WL submitted an SEIS petition, which the DNR denied on August 20, 2018. The DNR published notice of these denials in the EQB Monitor on September 10, 2018, triggering the period to appeal those decisions. *See* Minn. Stat. § 116D.04, subd. 10 (2018) (providing 30-day period to appeal final decision on need for environmental-impact statement (EIS), period runs from publication

treatment of ferrous minerals including any surrounding dikes constructed to contain the material.”

in the EQB Monitor). MCEA (A18-1312), Friends (A18-1608), and WL (A18-1524) filed separate certiorari appeals, which this court consolidated.²

D E C I S I O N

Under Minnesota law, a permit is required to mine, and no permit may be issued until an EIS has been completed and determined to be adequate. *See* Minn. Stat. §§ 93.481 (2018) (prohibiting mining without permit); 116D.04, subds. 2a-2b (2018) (requiring adoption of rules governing categories of projects for which EIS is required and providing that, when required, EIS must be prepared and determined adequate before permit may be granted); Minn. R. 4410.4400, subps. 1, 8 (2017) (requiring EIS for new mining facility).

Under certain circumstances, preparation of an SEIS is required after an EIS has been prepared and determined adequate. *See* Minn. R. 4410.3000, subp. 3. A project is considered exempt from supplemental EIS requirements after all government decisions have been made, or after a “substantial portion of the project has been completed and an EIS would not influence remaining construction.” Minn. R. 4410.4600, subp. 2(B), (D) (2017). An SEIS is required if, before a project becomes exempt, either

- (1) substantial changes have been made in the proposed project that affect the potential significant adverse environmental effects of the project; or
- (2) there is substantial new information or new circumstances that significantly affect the potential environmental effects from the proposed project that have not been considered in the

² After these appeals were filed, the DNR issued a permit to mine and dam-safety permits and the Minnesota Pollution Control Agency issued National Pollutant Discharge Elimination System/State Disposal System and air-emissions permits for the NorthMet project. Multiple certiorari appeals from these permitting decisions are pending before this court.

[F]EIS or that significantly affect the availability of prudent or feasible alternatives with lesser environmental effects[.]

Minn. R. 4410.3000, subp. 3(A).

The DNR's decision not to require an SEIS is subject to this court's review under the Minnesota Administrative Procedure Act (MAPA) to determine whether the

the substantial rights of the [relators] may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

Minn. Stat. § 14.69 (2018); *see* Minn. Stat. § 116D.04, subd. 10 (2018) (providing for judicial review under MAPA). Appellate courts “accord substantial deference to the agency’s decision.” *Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm’rs*, 713 N.W.2d 817, 832 (Minn. 2006) (CARD). “[This court’s] role when reviewing agency action is to determine whether the agency has taken a ‘hard look’ at the problems involved, and whether it has ‘genuinely engaged in reasoned decision-making.’” *Id.* (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977)). The burden is on relators to show agency error. *See id.* at 832-33.

The DNR’s decision is not based on an error of law

As a threshold matter, relators argue that the DNR erred by interpreting Minn. R. 4410.3000 to provide that an SEIS may be required only based on information provided by

PolyMet. This argument mischaracterizes the DNR's decisions and misstates the relevant law. The DNR considered and issued substantive decisions on relators' petitions for an SEIS. It did not deny those petitions on the basis that the information submitted was not from PolyMet. The DNR *did* reject arguments for an SEIS based on assertions of changes to the project that had not been proposed by PolyMet. But we conclude that this was not error.

“The purpose of an EIS is to provide information for governmental units, the proposer of the project, and other persons to evaluate proposed projects which have the potential for significant environmental effects, to consider alternatives to the proposed projects, and to explore methods for reducing adverse environmental effects.” Minn. R. 4410.2000, subp. 1 (2017). The project “proposer” is “the person or governmental unit that proposes to . . . undertake a project,” here PolyMet. Minn. R. 4410.0200, subp. 68 (2017). As the proposer, PolyMet sets the parameters of the proposed project. *See CARD*, 713 N.W.2d at 835 (summarizing inquiry for determining whether EIS required as “whether the project, *as proposed*, ha[s] the potential for causing significant environmental effects” (emphasis added)); *Iron Rangers for Responsible Ridge Action v. Iron Range Res.*, 531 N.W.2d 874, 881 (Minn. App. 1995) (holding that responsible governmental unit “cannot be compelled to prepare an EIS on the basis of speculative factors”), *review denied* (Minn. July 28, 1995).

As the DNR explains, there are two distinct bases for requiring an SEIS. The first basis, under subpart 3(A)(1), depends on changes to the proposed project significantly affecting environmental effects. Minn. R. 4410.3000, subp. 3(A)(1). This first basis

necessarily depends on the *project proposer* making changes to the *proposed project*. Accordingly, this provision cannot be triggered by third-party assertions that the project has changed, or is expected to change.

MCEA and Friends assert that a change to the project may come about through circumstances other than the project proposer making a change. For instance, they posit that a change in availability of a water source for a project would constitute a change in the project. We disagree. The change in water availability for a project might constitute a new circumstance requiring an SEIS on the second basis, under subpart 3(A)(2). But it would not be a project change. However, if the project proposer later proposed using a different water source as a result of the availability issue, that *would* constitute a project change that might require an SEIS under subpart 3(A)(1).

MCEA and Friends also assert that the DNR's response to their petitions for an SEIS did not distinguish between the first and second bases for requiring an SEIS in the manner that the DNR has done in its brief to this court. Again here, we disagree. In responding to the petitions, the DNR explained that, with respect to the first basis, the DNR had received no formal notification of a project change, and, with respect to the second basis, the new information submitted by MCEA and Friends did not significantly affect the potential for environmental effects because it was too speculative. Thus, the DNR rejected MCEA's and Friends' petitions for two distinct, albeit related, reasons consistent with the distinct purposes of the first and second bases for requiring an SEIS.

The DNR reasonably determined that there is no change to the project requiring an SEIS

The parties agree that PolyMet made a change to the proposed project when it eliminated a wastewater treatment facility (WWTF) that was originally proposed for the mine site and added a mine-to-plant pipeline to transport wastewater to the plant site for treatment (the wastewater treatment system (WWTS)). WL asserts that this change requires preparation of an SEIS. The DNR considered whether the change required an SEIS when PolyMet proposed the change and again in response to WL's petition for an SEIS, concluding both times that it did not.

In initially determining that an SEIS was not required, the DNR identified the minimal nature of the proposed change, noting that “[m]ine water transfers between the Mine and Plant Sites would be accomplished using a three pipeline system instead of one pipe as originally proposed.” The DNR also catalogued the conditions that would not be altered by the proposed change:

No changes are proposed for the actual Mine Site and Plant Site wastewater treatment processes from those evaluated in the [F]EIS. . . . No change is projected in the volume of wastewater that would be treated through the WWTS from the original configuration. No changes in the WWTS discharge quantity and quality are anticipated during operations, reclamation, and closure from that projected under the original two-facility design. . . . Implementing the single facility WWTS will not result in additional mining roads, production rates, plant emission rates, or dewatering rates from those currently proposed and evaluated in the [F]EIS.

In later rejecting WL's petition, the DNR explained:

The elimination of the Mine Site WWTF constitutes a consolidation of two originally separate treatment facilities, one at the Mine Site and one at the Plant Site, into one facility

located at the Plant Site and designated as the [WWTS]. While this is a structural change in project infrastructure, there is no functional difference in the capacity of the WWTS to treat contaminated water from the Mine Site, regardless of source, relative to what was assessed in the [F]EIS for the Mine Site WWTF. Combining the two treatment facilities into a single facility does not change, in any material way, the potential significant adverse environmental effects of the project. . . .

DNR acknowledges the conveyance of untreated water in a new Mine to Plant Pipeline (MPP) along the Transportation Corridor is a new project feature. However, the [F]EIS' overall consideration of pipeline integrity and the potential for spills is still valid for the project and is applicable to understanding the potential for environmental effects associated with the MPP. . . .

Regarding potentially accelerated transition to non-mechanical water treatment methods at the Mine Site due to elimination of the Mine Site WWTF, DNR rejects this suggestion and finds there is no basis for this unfounded conclusion.

On appeal, WL argues that an SEIS is required because of the potential environmental effects of the mine-to-plant untreated water pipeline and the long-term effects of not having mine-site wastewater treatment.³ In deciding whether a project has the potential for significant environmental effects, an agency considers the “type, extent, and reversibility of environmental effects[,]” available mitigation, and “the extent to which environmental effects can be anticipated and controlled as a result of other available

³ WL also asserts on appeal that an SEIS was required because the project change will affect potential effects to air and water quality. But WL forfeited any air-quality arguments by failing to raise them in its petition for an SEIS. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65, 124 S. Ct. 2204, 2214 (2004) (holding that issues not raised to agency in environmental-review proceedings are forfeited); *see also Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that generally an appellate court will not consider matters not argued to or considered by the district court); *Hentges v. Minn. Bd. of Water & Soil Res.*, 638 N.W.2d 441, 448 (Minn. App. 2002) (applying *Thiele* principles to an administrative appeal), *review denied* (Minn. Mar. 27, 2002).

environmental studies undertaken by public agencies or the project proposer, including other EISs.” See Minn. R. 4410.1700, subp. 7 (2017) (governing decision on need for EIS); see also *Sierra Club v. U.S. Army Corps of Eng’rs*, 295 F.3d 1209, 1215-16 (11th Cir. 2002) (explaining that “[t]he standard for determining when an SEIS is required is essentially the same as the standard for determining when an EIS is required” (quotation omitted)). In this case, the DNR applied its expertise to determine that the wastewater-treatment change “does not change, in any material way, the potential significant adverse environmental effects of the project” and that the FEIS’ “overall consideration of pipeline integrity and the potential for spills is still valid for the project and is applicable to understanding the potential for environmental effects associated with the MPP.”

WL argues that the DNR’s reasoning is not supported by the record because the FEIS does not analyze pipeline integrity or spills. Logically, the DNR did not analyze potential effects of a wastewater-pipe spill in the FEIS because such a pipe was not part of the project as originally proposed. But the lack of such analysis alone cannot compel completion of an SEIS, or an SEIS would be required for every change to a project. Most, if not all, project changes will not be discussed in an EIS—precisely because they are *changes*. If the rule intended for *any* change to a project to require an SEIS, it could have so stated. Instead, the rule requires an SEIS only when a change is “substantial” and “affect[s] the potential significant adverse environmental effects of the project.” Minn. R. 4410.3000, subp. 3(A)(1). In this case, the DNR applied its technical expertise to determine that these requisites were not met. According appropriate deference to that expertise, we conclude that the DNR’s determination in this regard is based on a proper

application of the law, supported by substantial evidence, and is not arbitrary and capricious.

The DNR reasonably determined that there is not substantial new information requiring preparation of an SEIS

Relators assert that a technical report filed by PolyMet under Canadian securities laws includes new information that significantly affects potential environmental effects from the proposed project and was not considered by the DNR in the FEIS. More specifically, relators assert that disclosures about the financial viability of the NorthMet project as proposed, and discussion about potential expansions to the project require an SEIS. WL additionally asserts that the technical report includes new information on an alternative for tailings disposal that requires an SEIS.

Financial information

Relators point out that the technical report forecasts a projected internal rate of return (IRR)⁴ for the project that is lower than the IRR stated in the FEIS. But relators do not explain how the revised IRR significantly affects environmental effects or alternatives.

MCEA and Friends suggest that the revised IRR “constitute[s] a significant change in the ‘purpose and need’ for the Project,” and “significantly affect[s] the availability of prudent and feasible alternatives.” Relators note that a responsible governmental unit (RGU) preparing an EIS must consider alternatives to a project and can reject any alternative that does not meet the underlying need for or purpose of the project. While

⁴ An IRR is “a discounted-cashflow method of evaluating a long-term project, used to determine the actual return on an investment.” Bryan A. Garner, ed., *A Handbook of Business Law Terms* 491 (1999).

relators accurately cite the language in Minn. R. 4410.2300(G) (2017) regarding alternatives, none explain how a rule allowing rejection of *alternatives* applies to require additional analysis of the project itself.

MCEA and Friends also cite a recent federal district court decision that they describe as “ordering the preparation of a[n S]EIS based on the impact of low oil prices on the profitability of a pipeline.” See *Indigenous Env'tl. Network v. United States Dep't of State*, 347 F. Supp. 3d 561 (D. Mont. 2018). In *Indigenous Env'tl. Network*, the court did require an SEIS based in part on changes in the market for oil, but not because of the impact on profitability of the pipeline. *Id.* at 576-77. Rather, the court analyzed oil prices in connection with rejecting the federal government’s argument that upstream effects on greenhouse gases need not be analyzed as indirect environmental effects because oil production was expected to remain flat. *Id.* The *Indigenous Env'tl. Network* decision is not helpful here.

WL argues that the revised IRR requires an SEIS because “the Project lacks sufficient income to cover reclamation costs projected by the DNR to prevent and mitigate environmental harm as well as investor returns.” But WL cites no authority requiring the DNR to analyze the financial viability of a project in connection with conducting environmental review.

In rejecting the petitions for an SEIS, the DNR reasoned that (1) the FEIS meets all requirements for *stating* the project’s purpose and no statute or rule required the FEIS to *analyze* the purposes of the project; and (2) the lower IRR in the technical report still supported the existence of a profitable project, and thus there was “no basis to conclude

that the Project will be financially unable to cover the costs of reclamation and closure.” On appeal, the DNR emphasizes that new information requires an SEIS only when it significantly affects the environmental effects of a proposed project and that even the lower IRR in the technical report was calculated after taking into account reclamation and closure costs. The DNR also points out that it is up to the project proposer to determine what financial rate of return it will require in order to pursue a project, and that the DNR’s only responsibility in this regard is to ensure that the financial-assurances requirements of the mining statutes and regulations are met. *See* Minn. Stat. § 93.49 (2018) (requiring operator of mine to provide bond, other security, or financial assurance satisfactory to commissioner); Minn. R. 6132.1200 (2017) (providing that purpose of financial assurance is to ensure source of funds for reclamation and closure, and setting forth financial-assurance requirements).

We conclude that the DNR’s analysis in this regard is based on a proper application of the law, supported by substantial evidence, and is not arbitrary and capricious.

Project expansion

With respect to project expansion, relators point to discussion and financial projections in the technical report regarding two potential mine expansions, one that would process 59,000 tpd over a 14-year mine life, and one that would mine 118,000 tpd over an 18-year mine life (as opposed to the 32,000 tpd and 20-year mine life of the proposed project). The report cautions that “further engineering, environmental studies and permitting would be required to prove the economic viability of these potential scenarios

and to improve the economic uncertainties associated with these estimates” and that the “expansion scenarios would require significant capital investment.”⁵

Because the expansions are not part of the project as currently proposed, they would be analyzed, if at all, as potential cumulative effects of the project. *See* Minn. R. 4410.2300(H) (2017) (requiring analysis of direct, indirect, and cumulative potential environmental effects of a project).

“Cumulative potential effects” means the effect on the environment that results from the incremental effects of a project in addition to other projects in the environmentally relevant area that might reasonably be expected to affect the same environmental resources, including future projects actually planned or for which a basis of expectation has been laid, regardless of what person undertakes the other projects or what jurisdictions have authority over the projects. . . . In determining if a basis of expectation has been laid for a project, an RGU must determine whether a project is reasonably likely to occur and, if so, whether sufficiently detailed information is available about the project to contribute to the understanding of cumulative potential effects. In making these determinations, the RGU must consider: whether any applications for permits have been filed with any units of government; whether detailed plans and specifications have been prepared for the project; whether future development is indicated by adopted comprehensive plans or zoning or other ordinances; whether future development is indicated by

⁵ MCEA and Friends cite a Canadian Securities Administrators Staff Notice providing that a preliminary economic assessment (PEA) is “the first signal to the public that a mineral project has potential viability” and that the “market views PEA results as important information.” That same document emphasizes that the PEA is “a conceptual study of the potential viability of mineral resources” that “requires specific cautionary language” and that pre-feasibility and feasibility studies are more comprehensive studies that actually demonstrate economic viability.

historic or forecasted trends; and any other factors determined to be relevant by the RGU.

Minn. R. 4410.0200, subp. 11a (2017).

The DNR determined that the discussion of mine expansions in the technical report did not require an SEIS, reasoning that “specific information on potential mining scenarios and mineable resources that would be needed for meaningful environmental review is lacking, and an expansion remains speculative.” The DNR properly considered the facts that (1) the technical report itself characterizes the discussion as preliminary; and (2) no permits have been sought for expansion to the project. *See id.*; *White v. Minn. Dep’t of Nat. Res.*, 567 N.W.2d 724, 731-32 (Minn. App. 1997) (holding that DNR did not err by excluding from cumulative-effects analysis future trails when no future projects were anticipated: “Because there were no specific plans . . . any effects they may have . . . are speculative, and any consideration of these effects is equally speculative.”), *review denied* (Minn. Oct. 31, 1997).⁶ Relators challenge the DNR’s judgment that expansions to the NorthMet mine are not sufficiently foreseeable to require an SEIS. But we defer to the DNR’s judgment and conclude that the DNR’s analysis is based on a proper application of the law, supported by substantial evidence, and is not arbitrary and capricious.

⁶ The *White* appeal arose out of a negative declaration on the need for an EIS, which also requires the decision-maker to determine whether there will be cumulative potential effects. *See* Minn. R. 4410.1700, subp. 7 (B).

Tailings-disposal alternative

WL asserts that the technical report includes new information about a tailings-disposal alternative that requires preparation of an SEIS. In support of this argument, WL relies on two sentences in the technical report:

PolyMet has evaluated placing tailings from the 118,000 [standard tons per day] STPD flotation circuit by gravity to two existing taconite mine pits near the Erie plant. This is a less costly alternative than building out the existing [flotation tailings basin] large enough to contain the additional volume anticipated under this scenario.

Based on the two sentences, WL asserts that “PolyMet determined in-pit disposal of NorthMet mine tailings would be feasible, since tailings could be placed ‘by gravity to two existing taconite mine pits’ near the processing circuit.” This vastly overstates the two sentences in the technical report, which state merely that PolyMet has “evaluated” placing tailings in mine pits and do not disclose the results of that evaluation.

In determining the FEIS adequate, the DNR stated:

In-Pit Tailings Disposal. This alternative disposal measure was considered [in the final scoping document]. The only available location for this approach to be pursued was the LTVSMC Area 5 pits. Even if this alternative was used, a tailings basin would still be required because the Area 5 pit would not have enough capacity for all of the tailings produced. Therefore, the action did not provide significant environmental benefit over the proposed action.

Thus, the DNR determined in scoping that the only available location for in-pit disposal could not accommodate the tailings that would be produced by the proposed project. WL did not challenge the DNR’s decision determining the FEIS adequate, and cannot do so now. *See* Minn. Stat. § 116D.04, subd. 10 (providing 30-day appeal period for such

decisions). And we reject WL's argument that the technical report's two-sentence reference to evaluation of in-pit disposal is substantial new information that requires the DNR to re-evaluate the alternative of in-pit tailings disposal in an SEIS. Again here, the DNR's analysis is based on a proper application of the law, supported by substantial evidence, and is not arbitrary and capricious.

Affirmed.