COURT OF APPEALS
DECISION
DATED AND RELEASED

July 16, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2118

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

GEORGE M. REYNOLDS and
DOOR COUNTY ENVIRONMENTAL COUNCIL, INC.,

Petitioners-Appellants,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent-Respondent,

GOING GARBAGE, INC.,

Intervenor-Respondent.

APPEAL from an order of the circuit court for Milwaukee County: FRANK T. CRIVELLO, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. George M. Reynolds and Door County Environmental Council, Inc. ("Reynolds") appeal from an order of the trial

court affirming the Wisconsin Department of Natural Resources's decision that an Environmental Impact Statement ("EIS") was not required in evaluating the application of Going Garbage, Inc. for operation of a solid waste transfer and storage facility, and the DNR's decision conditionally approving the application. Reynolds claims an EIS was required and that the DNR's conditional approval of Going Garbage's application violated WIS. ADM. CODE § NR 502. Because the DNR's negative EIS decision was reasonable and because the DNR complied with the law, we affirm.

I. BACKGROUND

In December 1992, Going Garbage submitted an application for an operating license for a solid waste transfer and storage facility to the DNR. The plans were for construction of a 70' x 70' metal sided building on a twenty-acre parcel of land in the Town of Liberty Grove, in Door County. All dumping, storing, and transferring would be confined to the building, and no hazardous waste would be accepted. The facility would handle an average of twenty-two tons of garbage per day, and the building was specifically designed to be leakproof, with a six-inch concrete floor sloped towards a catch basin. The facility would also include a storage area for recyclable materials which would exist on a concrete slab with retaining walls, covered by a roof.

The DNR issued conditional approval in March 1993. Opponents of the project commenced a lawsuit challenging the conditional approval on the grounds that the DNR did not comply with the Wisconsin Environmental Protection Act ("WEPA"). In December 1993, the Honorable Michael P. Sullivan issued a decision which concluded that the DNR had not complied with WEPA and ordered the DNR to prepare an environmental assessment ("EA"). Accordingly, the DNR withdrew its conditional approval and commenced preparation of the EA. The EA was issued in draft form in July 1994. An informational public hearing regarding the EA was held in August 1994, and many written comments were received by the DNR. The final EA was issued in October 1994, and concluded that an EIS did not need to be prepared. The DNR issued a revised conditional approval.

Reynolds commenced two lawsuits: one challenging the DNR's preliminary decision to not prepare an EIS, and another challenging the final

conditional approval of the project. Going Garbage intervened as a respondent in both matters and the cases were consolidated. The trial court issued a decision in May 1995, affirming the DNR's decisions in their entirety. The trial court issued an order affirming the DNR's decision in June 1995. Reynolds appeals from this order.

II. DISCUSSION

The general principles of reviewing a Chapter 227 appeal are as follows. Our review is of the decision of the administrative agency, not that of the circuit court. ***Wisconsin Pub. Serv. Corp. v. Public Serv. Comm'n***, 156 Wis.2d 611, 616, 457 N.W.2d 502, 504 (Ct. App. 1990), and is governed by § 227.57(6), STATS. Review of an agency's findings of fact is governed by § 227.57(6):

> If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action ... if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

"Substantial evidence," as used in § 227.57(6), is that degree of evidence which would allow a reasonable mind to reach the same conclusion as the agency. ***Madison Gas & Elec. Co. v. Public Serv. Comm'n***, 150 Wis.2d 186, 191, 441 N.W.2d 311, 314 (Ct. App. 1989). "Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion. Facts of mere conjecture or a mere scintilla of evidence are not enough to support [an agency's] findings." ***Cornwell Personnel Assocs. v. LIRC***, 175 Wis.2d 537, 544, 499 N.W.2d 705, 707 (Ct. App. 1993).

> Legal conclusions drawn by the [agency] are subject to judicial review. The [agency's] construction of a statute and

> its application to a particular set of facts is a question of law. Although [an agency's] resolution of questions of law does not bind a reviewing court, some deference is appropriate due to the [agency's] expertise. If the [agency's] interpretation "reflects a practice or position long continued, substantially uniform and without challenge by governmental authorities and courts," great weight will be accorded the [agency's] decision. This deference will also be extended to [an agency's] application of a particular statute to a particular set of facts.

Id. at 544-45, 499 N.W.2d at 708 (citations omitted).

A. Negative EIS Decision.

With respect to an agency decision to not prepare an EIS, our standard of review is even more specifically defined:

> Whenever an agency determines that an EIS is unnecessary, the reviewing court must inquire whether this determination "was reasonable under the circumstances." The reasonableness standard has been expressed as a two-part test:
>
> > First, has the agency developed a reviewable record reflecting a preliminary factual investigation covering the relevant areas of environmental concern in sufficient depth to permit a reasonably informed preliminary judgment of the environmental consequences of the action proposed;
> >
> > [s]econd, giving due regard to the agency's expertise where it appears actually to have been applied, does the agency's determination that the action is not a major action significantly affecting the

> quality of the human environment follow from the result of the agency's investigation in a manner consistent with the exercise of reasonable judgment by an agency committed to compliance with WEPA's obligations?

City of New Richmond v. DNR, 145 Wis.2d 535, 542-43, 428 N.W.2d 279, 282 (Ct. App. 1988) (citations omitted).

WEPA requires that all state agencies prepare an EIS for "every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the human environment." Section 1.11(2), STATS. The DNR, after conducting an EA, concluded that Going Garbage's project did not require an EIS to be prepared because it was not a major action which would significantly affect the quality of the human environment. Based on the foregoing standard, we review the DNR's decision to determine whether it was reasonable under the circumstances.

First, we address whether the DNR "developed a reviewable record reflecting a preliminary factual investigation covering the relevant areas of environmental concern in sufficient depth to permit a reasonably informed preliminary judgment of the environmental consequences of the action proposed." "The test for this is whether the DNR has identified the environmental issues and the expected impact of the proposed action and considered available alternatives in a manner that provides a basis upon which a reasonable determination can be made as to whether an EIS is required." ***New Richmond***, 145 Wis.2d at 543-44, 428 N.W.2d at 282.

Based on the record before us, we conclude that the DNR complied with this requirement. The DNR compiled 452 pages of documentation, including an extensive EA analysis, maps, field investigations, comments and responses to comments, and correspondence between the DNR and interested or concerned parties.

Further, the DNR's factual investigation did address Reynolds's primary concerns: the Hine's emerald dragonfly and potential contamination of

surface and groundwater. The record demonstrates that the DNR consulted experts in the field of endangered species to determine any adverse impact upon the dragonfly. The DNR also conducted numerous on-site investigations to address the dragonfly issue. In determining that the facility would not adversely impact the dragonfly population, the DNR utilized a conservative approach by assuming that the dragonfly was located at a point closest to the facility; that the dragonfly was actually an endangered species; and by imposing conditions upon Going Garbage to protect the dragonfly.

In addition, the DNR addressed concerns about groundwater contamination. A DNR hydrogeologist inspected the site on two occasions and researched the hydrogeology in Door County. Moreover, the facility is designed to be leakproof and the DNR has imposed conditions upon Going Garbage to ensure that leaks do not occur. The DNR also investigated and addressed potential problems from storm water runoff. Based on data from solid waste management files, and tests that monitored storm water driveway and parking lot runoff, the DNR determined that contamination would not occur to the groundwater. In addition, the DNR imposed conditions which would require Going Garbage to monitor the groundwater to ensure that leakage had not occurred.

Based on the foregoing, we deem the administrative record that was compiled in this case to be more than adequate because it contains an in-depth analysis of both the environmental issues and the effects associated with Going Garbage's proposed action.

We turn now to the second part of the test: whether the DNR's determination that the action is not a major action significantly affecting the quality of the human environment reasonably follows from its investigation. "In determining the reasonableness of the DNR's decision that an EIS is not required, we defer to the technical expertise of the department." ***New Richmond***, 145 Wis.2d at 548, 428 N.W.2d at 284. We do so here because the "DNR is the state agency possessing staff, resources, and expertise in environmental matters." ***Id.*** Accordingly, we will uphold the DNR's determination that an action is not a major action as "long as it acts reasonably based on an adequately developed record." ***Id.*** Again, based on our review of the record, we conclude that the DNR acted reasonably in making this determination.

In conducting the assessment, the DNR considered the adverse environmental effects. Its investigation documented that Going Garbage's facility would not have any significant impact on the environment. The investigation was comprehensive and included public hearings, public comments, and resulted in *conditional* approval. The conditions were imposed in order to prevent any significant environmental impact. Accordingly, we conclude that the record in this case does provide a reasonable basis for the DNR's decision that no EIS was required.[1]

B. Conditional Approval.

Reynolds also challenges the DNR's conditional approval of the project, alleging both that the DNR erred as a matter of law in granting conditional approval and that it erroneously exercised its discretion in granting conditional approval. Reynolds claims that: (1) the DNR erred in granting an exemption from WIS. ADM. CODE § NR 502.04(2)(f), which prohibits facilities from being located within 1,200 feet of a water supply; and (2) the DNR erred in finding that the project was in compliance with WIS. ADM. CODE § NR 502.04(3). We reject both arguments.

1. Exemption from § NR 502.04(2)(f).

[1] Reynolds raises two peripheral concerns with respect to the negative EIS determination: (1) that the DNR segmented the project in order to grant approval; and (2) that the DNR failed to consider alternatives as required by § 1.11(2)(e), STATS. We reject both contentions as meritless. There is nothing in the record to convince us that the DNR segmented this project in order to grant approval. The entire project consisted of construction of the transfer and storage facility. The DNR investigated the facility's potential environmental impact and granted conditional approval. The project was not broken into segments, but submitted as a single unit.

Similarly, the record documents that the DNR did consider alternatives. As amply noted by the trial court: "The DNR adequately considered alternatives in the EA, including consideration of no action, reducing the size, modifying the facility and alternative locations." Accordingly, we reject Reynolds's contention on this issue.

Section NR 502.04(2)(f) provides: "LOCATION STANDARDS. No person may establish, construct, operate, maintain or permit the use of property for any facility regulated under this chapter within the following areas: ... (f) Within 1,200 feet of any public or private water supply well." An applicant can request an exemption from this requirement. *See* § NR 500.08. It is undisputed in this case that there are wells within the 1,200 foot parameter.[2] As a result, Going Garbage did request an exemption, which the DNR granted for the following reasons:

> [(1)] All transfer operations occur inside of a small enclosed building where all potential contaminants resulting from the waste and routine cleaning will be collected and treated at a nearby wastewater treatment facility.
>
> [(2)] All public and private water supply wells located within 1 mile of the site are up-gradient to the ground water flow direction. Therefore, even if some unanticipated event were to occur at the site, no public or private water supply wells would be impacted.
>
> [(3)] Ground water monitoring wells will monitor for changes in ground water quality on the property. In the unlikely event that a problem is discovered, remedial action may be taken before contaminants migrate off-site.

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[2] The parties dispute *the number* of wells within the 1,200 foot parameter. The DNR noted only three and argues that this is based upon the 1,200 feet being measured from the facility itself rather than from the property boundary. Reynolds argues that there are more than three wells if you measure from the property boundary, rather than the facility building.

Based on statutory construction rules that we must reject any unreasonable or absurd interpretation of a statute, we conclude that the DNR's interpretation of NR 502.04(2)(f) is correct. ***In re Paternity of Ashleigh N.H.***, 178 Wis.2d 466, 472, 504 N.W.2d 422, 424 (Ct. App. 1993) (administrative rules are subject to same principles governing statutory construction); ***State v. West***, 181 Wis.2d 792, 796, 512 N.W.2d 207, 209 (Ct. App. 1993) (appellate court must reject unreasonable or absurd interpretation of a statute). Accordingly, we conclude that the 1,200 foot distance should be measured from the facility building rather than the property boundary because the activity at issue will be occurring within the facility, not at the property boundary.

In reviewing this issue, we defer to the DNR's technical expertise in analyzing the justifications for exemption. *See* ***City of La Crosse v. DNR***, 120 Wis.2d 168, 179, 353 N.W.2d 68, 73 (Ct. App. 1984). In granting the exemption, the DNR gathered relevant information and conducted site inspections. The DNR concluded that the wells within the 1,200 foot parameter would not be affected because the facility was leakproof, the depth of the well casing would protect the well water from any infiltration, and the up-gradient/side-gradient groundwater flow would prevent the wells from becoming contaminated.[3] Further, the DNR imposed the monitoring conditions to ensure that any contamination could be contained and corrected. We conclude, therefore, that the DNR's grant of exemption was reasonable and that there is adequate support in the record to sustain its findings.

2. Compliance with § 502.04(3).

Section NR 502.04(3) provides:

> PERFORMANCE STANDARDS. No person may establish, construct, operate, maintain or permit the use of property for any facility regulated under this chapter within an area where there is a reasonable probability that the facility will cause:
>
> (a) A significant adverse impact on wetlands.
> (b) A significant adverse impact on critical habitat areas.
> (c) A detrimental effect on any surface water.
> (d) A detrimental effect on groundwater quality.

Reynolds contends the DNR erred in determining that Going Garbage's project would satisfy these performance standards and challenges the DNR's finding that: "If the conditions of approval set forth below are properly complied with,

[3] We are not persuaded by Reynolds's argument that the DNR's decision should be reversed because the exemption stated that all of the wells are up-gradient, when in fact one of the wells involves side-gradient flow. The DNR clearly recognized that one of the wells was side-gradient in the EA, concluding that even the side-gradient flow would not impact the well.

the facility will not have an impact on any wetland, or a significant adverse impact on any critical habitat area or a detrimental effect on any surface water or ground water quality."

The record demonstrates that the DNR reached this finding on the following bases: a comprehensive EA, repeated site inspections and field study, consultation with DNR experts as well as outside experts, public comments and concerns, and an in-depth analysis of environmental implications. In addition, based on Going Garbage's proposal, the facility would be leakproof, its design would prevent any pollution from escaping from the building, and the facility would not handle hazardous wastes. Moreover, the DNR imposed numerous conditions on Going Garbage to ensure continuing compliance with the performance standards.

Accordingly, we are convinced that the DNR's finding was based on substantial evidence contained in the record and, therefore, reject Reynolds's claim that the DNR erred in determining that Going Garbage's facility would comply with the performance standards. Based on our review of the administrative record, we are convinced that the DNR exercised its expertise in granting conditional approval, that there is substantial evidence in the record to support its findings, and that there was compliance with the law.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.