

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 11, 2012

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2010AP2623

Cir. Ct. No. 2009CV4828

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

NORTH LAKE MANAGEMENT DISTRICT,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
DONALD J. HASSIN, JR., Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. North Lake Management District (NLMD) has appealed from a circuit court order denying its amended petition for review, which challenged a decision by the Wisconsin Department of Natural Resources (DNR) determining that the DNR was not required to prepare an environmental impact

statement (EIS) for the development of a public access and boat launch site (the Kraus site) on North Lake in Waukesha County. We affirm the circuit court's order.

¶2 On appeal, NLMD contends that the DNR violated Wisconsin's Environmental Policy Act (WEPA), as codified in WIS. STAT. § 1.11 (2009-10),¹ and due process requirements by failing to provide a meaningful opportunity for public input and participation in the decision-making process that led to the DNR's November 5, 2009 "Environmental Analysis and Decision on the Need for an Environmental Impact Statement" (the final EA). In the final EA, the DNR concluded that the development of the Kraus site was not a major action that would significantly affect the quality of the human environment and that an EIS therefore was not required prior to final action by the DNR to develop the public access and boat launch at the Kraus site.

¶3 In support of its argument that it was denied a meaningful opportunity for input and participation, NLMD contends that the DNR refused to allow it timely access to the Kraus site so that it could conduct scientific field studies during the growing season. It also objects that the final EA included a discussion of a two-site approach and studies that were not subject to the public comment process because they were not in the draft EA released by the DNR on November 10, 2008. In addition, it objects that the DNR relied on a November 12, 2009 resource managers' summary that it did not release until after it released the final EA on November 5, 2009. NLMD contends that the DNR's

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

failure to provide it with a meaningful opportunity for input resulted in a final EA decision that was unreasonable and unfair.

¶4 When a party appeals a circuit court order reviewing an administrative agency's decision, this court reviews the decision of the agency, not the circuit court, and applies the same scope of review as the circuit court. *Sierra Club v. DNR*, 2010 WI App 89, ¶20, 327 Wis. 2d 706, 787 N.W.2d 855. However, because the circuit court's decision was thorough and well-reasoned, we follow its analysis in affirming its order.

¶5 WEPA's purpose is to ensure that agencies consider environmental impacts during decision making. *State ex rel. Boehm v. DNR*, 174 Wis. 2d 657, 665, 497 N.W.2d 445 (1993). "WEPA is procedural in nature and does not control agency decision making. Rather, it requires that agencies consider and evaluate the environmental consequences of alternatives available to them and undertake that consideration in the framework provided by [WIS. STAT. § 1.11]." *Boehm*, 174 Wis. 2d at 665.

¶6 WEPA requires state agencies to prepare an EIS for every recommendation or report on a proposal for a major action significantly affecting the quality of the human environment. *Id.*; WIS. STAT. § 1.11(2)(c). A major action is an action of such magnitude and complexity that it will have significant effects upon the quality of the human environment. WIS. ADMIN. CODE § NR 150.02(16). It does not include actions whose significance is based only on social or economic effects. *Id.*

¶7 The test on review of a negative EIS determination is one of reasonableness and good faith. *Boehm*, 174 Wis. 2d at 665-66. The two-part test under the reasonableness and good faith standard inquires: (1) whether the agency

has 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 and (2) giving due regard to the agency's expertise where it appears 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 results 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. *Id.* at 666. The record produced by the agency need not follow any particular form. *Id.* at 667. All it has to do is reveal in a form susceptible of meaningful evaluation by a court the nature and results of the agency's investigation and the reasoning and basis for its conclusion. *Id.* In determining the reasonableness of the DNR's decision that an EIS is not required, courts defer to the technical expertise of the department. *Id.* at 677.

¶8 In its decision and order denying NLMD's petition, the circuit court addressed the two-part test of reasonableness and good faith. It concluded that the DNR developed a reviewable record of sufficient depth to permit a reasonably informed preliminary judgment of the environmental consequences of developing the Kraus site. It also concluded that the DNR's decision that the development of the Kraus site was not a major action significantly affecting the human environment followed from the DNR's investigation and was consistent with the exercise of reasonable judgment by the DNR as an agency committed to compliance with WEPA.

¶9 NLMD's arguments on appeal primarily implicate the first part of the *Boehm* test. We agree with the circuit court that 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 its proposal for the Kraus site.

¶10 In the circuit court's decision, it described the actions taken by the DNR to solicit public input in regard to the Kraus site. This included holding a public meeting on January 11, 2005, prior to the DNR's purchase of the Kraus site, which generated 180 written comments, including comments asking the DNR to purchase and develop the Kuchler site on Highway 83 instead of the Kraus site. After reviewing the matter, the DNR determined that the Kuchler site did not meet standards for public boat access because the road to the launch was too narrow, the launch site was too small, the parking area set aside for disabled anglers and boaters was too far from the launch site, the property was prone to flooding, and it would require more extensive dredging and maintenance than the Kraus site. The DNR then purchased the Kraus site and, on October 23, 2008, held a public meeting to accept comments on its plans for the development of the site, which included a boat ramp, an accessible boarding dock, a parking lot with spaces for vehicles and trailers, improvements to the access road, portable restrooms, lighting, landscaping, and storm water controls.

¶11 During the comment period, NLMD advocated for a two-site approach, with boat and trailer access at the Kuchler site and a low impact pedestrian and canoe access at the Kraus site. During this comment period, a letter dated October 31, 2008, was also submitted to the DNR by Attorney Donald Gallo. Although the letter did not clearly identify Gallo's client, it advocated for the two-site approach, attached construction plans for the Kuchler site, and referred to a visit to the Kraus site by Gallo and at least one other person on June 2, 2008, at which they pointed out to the DNR what they believed to be an

ephemeral wetland area. The October 31, 2008 letter also commented on wetland delineations and on the DNR's wetland analysis and storm water management plans, and attached reports discussing potential wetland areas, vegetation, and turtle habitat.

¶12 On November 10, 2008, the DNR made its draft EA available to the public, with a comment period open until December 10, 2008. The draft EA concluded that the plan for the Kraus site would not have a significant adverse effect on the environment and that no EIS was needed. The draft EA listed the Kuchler site as an alternative that was considered and rejected by the DNR, which concluded that development and maintenance of the Kuchler site would result in greater environmental impacts than the development of the Kraus site.

¶13 On December 10, 2008, Gallo submitted a twenty-one page letter with over 100 pages of exhibits on behalf of NLMD and approximately 400 North Lake riparian owners, advocating for the two-site alternative and alleging that the DNR had not adequately considered that alternative. This letter acknowledged that the DNR had provided "the NLMD/Riparian Owners" with access to the Kraus site to conduct wetland delineation and habitat assessment work in November 2008, and included a consultant's December 5, 2008 wetland and habitat evaluation report. The letter requested an additional hearing to discuss the consultant's data. In addition, it presented data and argument concerning potential wetland, storm water, habitat and lake bed impacts allegedly not adequately addressed in the draft EA.

¶14 After release of the draft EA and prior to release of the final EA, the DNR conducted an evaluation of the two-site alternative proposed by NLMD. Between August and October 2009, it also received a report addressing the

wetland delineation of the Kraus site from the Southeastern Wisconsin Regional Planning Commission (SEWRPC); a storm water evaluation from a private engineering firm retained by the DNR; a permit application and construction drawings prepared for NLMD for the Kuchler site; a wildlife and habitat analysis of both sites by Tom Lizotte of the DNR's Wildlife Management Program; an analysis of the impact of grading and filling at each site by Water Regulation and Zoning Specialist Andrew Hudak; and comments by DNR Water Resources Biologist Craig Helker, addressing dredging and comparing the impacts on the public interest and wetland functions at each site and under the two-site approach. DNR staff also surveyed the Oconomowoc River to evaluate the impact of dredging, evaluated flora and fishery resources, and partially evaluated NLMD's incomplete dredging application. In addition, on October 26, 2009, seven DNR resource managers visited the Kraus and Kuchler sites, evaluating and comparing the wetland functional values, public navigable water interests, and the overall environmental impact of developing each site, including effects on fisheries, wildlife, water quality and the lake. The resource managers' conclusions were summarized in a memo to the file dated November 12, 2009, one week after release of the final EA.

¶15 On November 5, 2009, the DNR certified the final EA, which revised and expanded the draft EA to include information and analyses obtained and developed since the release of the draft EA, to address the comments received during the post-draft EA comment period, and to address the two-site alternative proposed by NLMD. The final EA addressed the two-site alternative in both narrative form and a matrix. The final EA included nineteen attachments, eight of which had not been included in the draft EA because they post-dated it.

¶16 On appeal, NLMD contends that the circuit court did not address its arguments that the public participation permitted by the DNR was inadequate because NLMD was not granted timely access to the Kraus site; the final EA included a discussion of a two-site approach and studies that were not subject to the public comment process because they were not in the draft EA; and the DNR relied on the November 12, 2009 resource managers' summary, but did not release it until after it released the final EA. We reject NLMD's argument that the circuit court's decision was somehow inadequate for failing to specifically address these matters. In its decision, the circuit court acknowledged that NLMD had taken issue with the DNR's "note and comment procedures." It then rejected NLMD's argument that the DNR record was inadequate, concluding that the DNR had considered all relevant areas of concern in sufficient depth and that the EA "adequately ventilates the comments received from the NLMD." In any event, as already noted, this court reviews the agency decision, not the circuit court's decision. Based upon the record compiled by the DNR, we conclude that NLMD's arguments provide no basis for relief on appeal.

¶17 To inform its decision making on whether an EIS is required, an agency must provide the opportunity for public participation and assemble a reviewable record. *North Lake Mgmt. Dist. v. DNR*, 182 Wis. 2d 500, 505-06, 513 N.W.2d 703 (Ct. App. 1994). The DNR may provide the opportunity for public participation by conducting an informational meeting. *See id.* at 506. An informational meeting is defined as "an optional, informal proceeding conducted by the department to receive public comments on an EA, EIS or an EIR [Environmental Impact Report.]" WIS. ADMIN. CODE § NR 150.02(14).

¶18 Informational meetings are also discussed in WIS. ADMIN. CODE § NR 150.21(2), which provides that after giving the public notice of a proposed

action, the DNR is required to “consider all public comments and may revise the EA if one was prepared. An informational meeting may be held to receive further public input and aid in the review of and decision on the need for the full EIS process.”

¶19 NLMD is correct that an agency must give reasonable consideration to information presented and issues raised by interested parties concerning possible environmental effects. *Wisconsin’s Env’tl. Decade, Inc. v. PSC*, 79 Wis. 2d 409, 424 n.14, 256 N.W.2d 149 (1977). It must also explore and evaluate the environmental impacts of all reasonable alternatives. WIS. ADMIN. CODE § NR 150.22(2)(e).

¶20 As the facts set forth above make clear, the DNR satisfied all of these requirements here. As summarized in the DNR’s brief and the circuit court’s decision, the DNR satisfied its duties by soliciting public comments and holding informational meetings on its proposal to develop the boat launch at the Kraus site before it purchased the property, and again after it gave notice of its proposed development plan and before issuing its draft EA. The DNR solicited and accepted comments and information at and after both of these meetings, and again after issuing the draft EA. NLMD offered comments and analysis addressing the DNR’s analyses, and addressing the alternatives of the Kuchler site and the two-site approach. Those alternatives were addressed by the DNR in the final EA as required by WIS. STAT. § 1.11(2)(e) and WIS. ADMIN. CODE § NR 150.22(2)(e). As noted by the circuit court, the fact that the DNR rejected these alternatives does not indicate that it did not fully evaluate the facts and consider them.

¶21 The record developed by the DNR was not only adequate, it was extensive. It addressed all relevant areas of concern in sufficient depth to evaluate the project's environmental consequences. It responded to comments from NLMD and thoroughly addressed the alternatives, including the Kuchler site and the two-site approach. The first prong of the *Boehm* test therefore clearly was satisfied.

¶22 In concluding that no basis exists to disturb the DNR's decision, we also reject NLMD's contention that the decision must be reversed or vacated because the DNR did not allow NLMD access to the Kraus site at the proper time of the year to conduct scientific field studies. NLMD cites no authority for the proposition that its right to publicly comment on the DNR proposal compelled the DNR to grant it access to conduct scientific studies on the site, including digging test pits and wells. In any event, it is undisputed that the DNR provided access to the Kraus site on June 2, 2008 and in November 2008, and that NLMD incorporated its analysis in comments provided to the DNR during the comment periods. While NLMD contends that the access provided was inadequate because it did not occur during the growing season, and alleges that its requests for access during the growing season were denied by the DNR, it supports this argument by citing to letters that reference the DNR's denial of requests made by the Reddelien Road Neighborhood Association, not by NLMD. Based on this record, NLMD's arguments concerning access to the Kraus site provide no basis for relief on appeal.

¶23 NLMD also contends that it was unfairly denied the opportunity to comment on the two-site approach because the DNR discussed this alternative in its final EA, but not in the draft EA. This argument ignores the fact that each of the sites that make up the two-site option was analyzed as alternatives in the draft

EA. Most importantly, the record establishes that NLMD advocated repeatedly and extensively on behalf of the two-site approach, and the issues and arguments raised by it were evaluated and addressed by the DNR. Its contention that it was not allowed to adequately comment on the two-site approach is therefore without merit.

¶24 NLMD also contends that the inclusion of EA Attachment 12 (the August 2009 SEWRPC report), Attachment 14 (final project development plans), Attachment 15 (the storm water analysis from the private engineering firm retained by the DNR), Attachment 16 (plans for the Kuchler site submitted by NLMD), and Attachment 17 (Kraus site floodplain map) in the final EA but not in the draft EA denied it an opportunity to comment on those studies. Initially, we note that the DNR was entitled to revise its draft EA based on comments and information received after release of the draft EA. However, this did not mean that it had to reopen its public comment period or hold another public informational meeting each time it received and considered new material. In any event, NLMD's argument that it was denied the opportunity to comment on Attachment 16 is without merit because it was NLMD that provided this document to the DNR. Its arguments concerning the remaining attachments are also without merit because, regardless of whether these particular attachments were provided to NLMD prior to release of the final EA, NLMD commented extensively on the subjects addressed in those attachments, including storm water management, flood potential, and wetland delineation. Moreover, NLMD obtained the 2003 and 2008 wetland delineation reports on which Attachment 12 was based. NLMD therefore had an adequate opportunity to comment, and the DNR considered its comments. Nothing more was required.

¶25 Similarly, no relief is warranted based on NLMD's objection that the memo summarizing the resource managers' evaluation of the Kraus and Kuchler sites was not released by the DNR until after the release of the final EA. NLMD's argument ignores that it was NLMD's provision of information about the Kuchler site and its advocacy for the two-site approach that precipitated the resource managers' additional evaluation of the Kuchler and Kraus sites, separately and as a part of the two-site alternative. While the DNR was entitled to consider the resource managers' analyses when evaluating and responding to the alternatives proposed by NLMD, nothing in the law compelled the DNR to provide the summary of their analyses to NLMD to allow it to respond prior to issuing the final EA.

¶26 NLMD's final argument is that the DNR's decision that its proposed development of the Kraus site will not significantly affect the quality of the human environment is unreasonable, and will not protect the water quality of North Lake. This argument implicates the second part of the *Boehm* test, which inquires whether the DNR's decision that the development of the Kraus site is not a major action significantly affecting the quality of the human environment follows from the results of its investigation in a manner consistent with the exercise of reasonable judgment by an agency committed to compliance with WEPA's obligations, and giving due regard to the agency's expertise. *See Boehm*, 174 Wis. 2d at 666, 677.

¶27 In this argument, NLMD takes issue with the amount of wetlands impacted by the project and the cutting of mature trees. It asserts that storm water from the site will impact neighbors' septic systems, and that the development will cause significant area lake bed filling and destroy threatened or endangered species habitat.

¶28 In reviewing the DNR’s decision, this court defers to the technical expertise of the department, relying on “its expertise in making such technical scientific determinations as long as it acts reasonably based on an adequately developed record.” *Id.* (citation omitted). As already discussed, the record developed by the DNR was more than adequate. The DNR identified the environmental issues related to the proposed development of the Kraus site, thoroughly considered and addressed all pertinent environmental factors and effects, and considered the alternatives to the Kraus site, applying its expertise to determine that an EIS was unnecessary. Nothing more was required. *See id.* at 677-78. Because the DNR’s decision that the development of the Kraus site was not a major action significantly affecting the human environment was reasonable based upon the record, no basis exists to disturb its decision not to prepare an EIS.

By the Court.—Order affirmed.

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

