

STATE OF MINNESOTA  
IN SUPREME COURT  
A04-886 and A04-890

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Citizens Advocating Responsible Development, et al,  
Appellants,  
vs.  
Kandiyohi County Board of Commissioners,  
Respondent,  
County of Kandiyohi, Minnesota,  
Respondent,  
Duininck Brothers, Inc.,  
Respondent.

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APPELLANT CARD'S BRIEF AND APPENDIX

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MACK & DABY P.A.  
John E. Mack, #65973  
P.O. Box 302  
26 Main Street  
New London MN 56273  
(320) 354-2045  
ATTORNEYS FOR APPELLANT CARD

RATWIK, ROSZAK & MALONEY  
Jay T. Squires, #214699  
300 U.S. Trust Building  
730 Second Avenue South  
Minneapolis MN 55402  
(612) 339-0600  
ATTORNEYS FOR KANDIYOHI COUNTY

PETERS & PETERS PLC  
James P. Peters #177623  
507 N. Nokomis St., #100  
Alexandria MN 56308  
(320) 763-8458  
ATTORNEYS FOR RESPONDENTS

KRAFT, WALSER, HETTIG & HONSEY  
Donald H. Walser #114091  
131 South Main Street  
Hutchinson MN 55350  
(320) 587-8150  
ATTORNEYS FOR RESPONDENT DUININCK

MINNESOTA ATTORNEY GENERAL  
Dwight S Wagenius, #113505  
445 Minnesota St., Suite 900  
St. Paul MN 55101  
(651) 296-7345  
ATTORNEYS FOR EQB

TABLE OF CONTENTS

Table of Contents . . . . . i

Index to Appendix . . . . . ii

Table of Authorities . . . . . iii

Legal Issues . . . . . vi

INTRODUCTION . . . . . 1

STATEMENT OF THE CASE AND FACTS . . . . . 8

ARGUMENT:

I. THE COURT OF APPEALS ERRED WHEN IT HELD THAT A CUMULATIVE SIGNIFICANT ENVIRONMENTAL EFFECT COULD OCCUR UNLESS AT LEAST ONE GRAVEL PIT COULD POSE A SIGNIFICANT ENVIRONMENTAL EFFECT. . . . . 10

II. THE COURT OF APPEALS ERRED IN HOLDING THAT A MERE RECOMMENDATION BY THE COUNTY THAT ANY FUTURE CUPS IN THE WATERSHED SHOULD INCLUDE PROGRESSIVE RECLAMATION AND WATER MONITORING WAS SUFFICIENT TO OBTAIN THE NEED FOR AN ENVIRONMENTAL IMPACT STATEMENT. . . . . 24

III. EVEN UNDER A STRICT STANDARD OF REVIEW, THE INFORMATION PRESENTED BY CITIZENS AND OTHERS PLACED A BURDEN ON THE KANDIYOHI COUNTY BOARD TO PRODUCE EVIDENCE REFUTING THE INFORMATION IF IT WAS AVOID THE REQUIREMENT OF AN EIS. . . . . 30

CONCLUSION . . . . . 38

INDEX TO APPENDIX

Court of Appeals Decision . . . . . A-1

District Court Decision . . . . . A-9

Resolution to Approve EAW . . . . . A-25a

EAW, Duininck CA Pit . . . . . A-26

DNR Letter re Duininck, 1/9/03 . . . . . A-37

EAW, Eagle Lake West Pit . . . . .	A-39
Duininck Reply to EAW Responses . . . . .	A-50
MPCA Letter re Duininck EAW's . . . . .	A-64
Duininck Response to MPCA Concerns . . . . .	A-66
DNR Letter to Duininck, 5/28/03 . . . . .	A-69
EQB Guidelines . . . . .	A-71
Minn. R. 4400.0200 (In relevant Part) . . . . .	A-72
Minn. R. 4400.1700 (In relevant Part) . . . . .	A-73
<i>Dead Lake Association, Inc. v. Otter Tail County</i> . . . . .	A-74
Grant of Petition for Further Review . . . . .	A-85

TABLE OF AUTHORITIES

<u>MINNESOTA STATUTES:</u>	<u>PAGE #</u>
Minn. Stat. § 86B.201 . . . . .	21
Minn. Stat. § 116D.01 et seq. . . . .	Passim
Minn. Stat. § 606.01 . . . . .	1
Minn. Stat. § 645.16 . . . . .	20, 21
 <u>MINNESOTA RULES:</u>	
Minn. R. 4410.0200 . . . . .	Passim
Minn. R. 4410.1700 . . . . .	Passim
Minn. R. 6110.3400 . . . . .	27
 <u>MINNESOTA CASES:</u>	
<i>Amoco Pipeline Co. v. Minnesota Valley Landscaping, Inc., 467 N.W.2d 351 (Minn. App. 1991)</i> . . . . .	20
<i>Berne Area Alliance v. Dodge County Board of Commissioners, 694 N.W.2d 577 (Minn. App. 2005)</i> . . . . .	28, 29
<i>Chapman v. Davis, 45 N.W.2d 822 (Minn. 1951)</i> . . . . .	15
<i>Cummings v. Koehnen, 568 N.W.2d 418 (Minn. 1996)</i> . . . . .	21
<i>Dead Lake Association, Inc. v. Otter Tail County, No. A04-717 (Minn. App. 2 February, 2005)</i> . . . . .	Passim
<i>Goodman v. State Department of Public Safety, 282 N.W.2d 559</i> . . . . .	21
<i>In re Peterson's Estate, 1950 42 N.W.2d 59 (Minn. 1950)</i> . . . . .	15

<i>Iron Rangers for Responsible Ridge Action v. Iron Range Resources, 532 N.W.2d 874 (Minn. App. 1995) . . . . .</i>	Passim
<i>Mankato Citizens Telephone Co. v. Commissioner of Taxation, 245 N.W.2d 313 (Minn. 1966) . . . . .</i>	21
<i>Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency, 644 N.W.2d 457 (Minn. 2002) . . . . .</i>	2
<i>No Power Line, Inc. v. Minnesota Environmental Quality Council, 262 N.W.2d 312 (Minn. 1977) . . . . .</i>	18
<i>People for Environmental Enlightenment &amp; Responsibility, Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858 (Minn. 1958) . . . . .</i>	2
<i>Pope County Mothers v. Minnesota Pollution Control Agency, 594 N.W.2d 233 (Minn. App. 1999) . . . . .</i>	Passim
<i>Radke v. St. Louis County Board, 558 N.W.2d 282 (Minn. App. 1997) . . . . .</i>	1
<i>Reserve Mining Co. v. Herbst, 256 N.W.2d 808 (Minn. App. 1977) . . . . .</i>	2
<i>Sellin v. City of Duluth, 80 N.W.2d 67 (Minn. 1956) . . . . .</i>	1
<i>Trout Unlimited, Inc. v. Minnesota Department of Agriculture, 528 N.W.2d 903 (Minn. App. 1995) . . . . .</i>	Passim
<i>White v. Minnesota Department of Natural Resources, 567 N.W.2d 724 . . . . .</i>	26

CASES FROM OTHER JURISDICTIONS:

*American Motorists Insurance Co. v.  
R & S Meats, Inc.,*

526 N.W.2d 791 (Wis. App. 1994) . . . . .	14
<i>Gittel v. Abram,</i> 649 N.W.2d 661 (Wis. App 2002) . . . . .	14, 15
<i>Greater Boston Television Corp. v. F.C.C.,</i> 444 F.2d 841 (D.C. Cir. 1970) . . . . .	2
<i>Tandy Corporation v. Sharp,</i> 872 S.W.2d 814 (Tex. App. 1994) . . . . .	14

STATEMENT OF THE LEGAL ISSUE INVOLVED

I.

DID THE COURT OF APPEALS ERR WHEN IT HELD THAT A CUMULATIVE SIGNIFICANT ENVIRONMENTAL EFFECT COULD OCCUR UNLESS AT LEAST ONE GRAVEL PIT COULD POSE A SIGNIFICANT ENVIRONMENTAL EFFECT.

The Court of Appeals Held: In the Negative

Most Apposite Statutes:

Minn. Stat. § 116D.04

Minn. Stat. § 645.15

Most Apposite Cases:

*Pope County Mothers v. Minnesota Pollution Control Agency*,  
594 N.W.2d 233 (Minn. App. 1999)

*Mankato Citizens Telephone Co. v. Commissioner of Taxation*,  
245 N.W.2d 313 (Minn. 1966)

*Trout Unlimited, Inc. v. Minnesota Department of  
Agriculture*, 528 N.W.2d 903 (Minn. App. 1995)

II.

DID THE COURT OF APPEALS ERR IN HOLDING THAT A MERE RECOMMENDATION BY THE COUNTY THAT ANY FUTURE CUPS IN THE WATERSHED SHOULD INCLUDE PROGRESSIVE RECLAMATION AND WATER MONITORING WAS SUFFICIENT TO OBVIATE THE NEED FOR AN ENVIRONMENTAL IMPACT STATEMENT?

The Court of Appeals Answered: In the Negative.

Most Apposite Statutes:

Minn. Stat. § 116D.04

Most Apposite Cases:

*Pope County Mothers v. Minnesota Pollution Control Agency*,  
594 N.W.2d 233 (Minn. App. 1999)

*Dead Lake Association, Inc. v. Otter Tail County,*  
No. A04-717 (Minn. App. 2 February, 2005)

*Berne Area Alliance v. Dodge County Board of Commissioners,*  
694 N.W.2d 577 (Minn. App. 2005)

III.

EVEN UNDER A STRICT STANDARD OF REVIEW, DID THE  
INFORMATION PRESENTED BY CITIZENS AND OTHERS  
PLACE A BURDEN ON THE KANDIYOHI COUNTY BOARD TO  
PRODUCE EVIDENCE REFUTING THE INFORMATION IF IT  
WISHED TO AVOID THE REQUIREMENT OF AN EIS?

The Court of Appeals: In the Negative.

Most Apposite Statutes:

Minn. Stat. § 116D.04

Most Apposite Cases:

*Pope County Mothers v. Minnesota Pollution Control Agency,*  
594 N.W.2d 233 (Minn. App. 1999)

## INTRODUCTION

The standard of review in cases involving local government action under Minn. Stat. § 116D.04 subd. 10 is subtly different from the standard which applies to the review of local government and agency decisions on writ of certiorari pursuant to Minn. Stat. § 606.01. On the one hand, it is well settled that review of the acts of a governmental body upon a writ of certiorari is limited to questions of whether the governmental body had jurisdiction, whether its decisions were regular, and whether the determination it made was arbitrary, oppressive, unreasonable, fraudulent, without evidence to support it, or was made under an erroneous theory of law (see, e.g., *Sellin v. City of Duluth*, 248 Minn. 333, 80 N.W.2d 67 (Minn. 1956); *Radke v. St. Louis County Board*, 558 N.W.2d 282 (Minn. App. 1997)). On the other hand, Minn. Stat. § 116D.04, which provides for review in a declaratory judgment action, has been interpreted to require a broader inquiry by the Appellate Courts.

In *Pope County Mothers v. Minnesota Pollution Control Agency*, 594 N.W.2d 233 (Minn. App. 1999), the Court of Appeals discussed one of the standards for review which applies to § 116C cases in some detail:

On appeal from a summary judgment reversing an agency decision, we review the agency decision de novo to determine if it is unreasonable, arbitrary or capricious. See *Iron Rangers for Responsible Ridge Action v. Iron Range Resources*, 532 N.W.2d 874, 879 (Minn.App. 1995) (reviewing the administrative record for substantial evidence supporting the agency determination), review denied (Minn. Jul. 28, 1995).

An agency's decision is arbitrary or capricious if the agency relied on factors the legislature never intended it to consider, if it entirely failed to consider an important aspect of the problem, if it offered an explanation for the decision that runs counter to the evidence, or if the decision is so implausible that it could not be ascribed to a difference in view or the result of agency expertise. *Trout Unlimited, Inc. v. Minnesota Dep't of Agric.*, 528 N.W.2d 903, 907 (Minn.App. 1995), review denied (Minn. Apr. 27, 1995). If the agency's decision represents its will, rather than its judgment, the decision is arbitrary and capricious. *Id.* A reviewing court will intervene only where there is a "combination of danger signals [that] suggest the agency has not taken a 'hard look' at the salient problems and 'has not genuinely engaged in reasoned decision-making.'" *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977) (quoting *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 851 (D.C. Cir. 1970)).

(*Id.* at 236)

Our courts have gone a step farther and have held that a county's decision also requires substantial evidence in the record to support its findings. *Iron Rangers, supra*. See also, *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457 (Minn. 2002). And, as always, a board decision is subject to reversal if it was based upon an erroneous theory of law. See, e.g., *People for Environmental Enlightenment & Responsibility, Inc. v. Minnesota Environmental Quality Council*, 266 N.W.2d 858 (Minn. 1958).

This expanded scope of review has particular application in the case of actions taken by local governmental agencies which have statewide impact. Most local units of government apply

local ordinances or rules to local issues or projects. Units of State government, including administrative agencies, apply state statutes or regulations to issues having statewide impact. But cases such as this which arise under Minn. Stat. § 116D.04 involve the application by local units of government of state statutes and regulation and have a statewide impact. Waters which become polluted in Kandiyohi County flow into Renville County and all other points down the watershed. Air which becomes polluted in Kandiyohi County drifts into Meeker County, Stearns County, and all points beyond.

At the same time, local units of government are particularly attuned to purely local concerns, especially when they involve businesses which have a significant economic impact within their jurisdiction. A local government body which fails to take into account a large employer's significant contribution to the prosperity of the area is likely to have a different makeup after the next election. Such an employer contributes significantly to the local economy through jobs and taxes; it often contributes significant amounts to local charitable and social causes, provides substantial assistance to religious and cultural organizations, and often participates directly and indirectly in local politics. Its owners or managers are often leading citizens in the community.

Because of this, the words "[I]f the agency's decision

represents its will, rather than its judgment, the decision is arbitrary and capricious" assume special importance. The Kandiyohi County Board not only ruled against an Environmental Impact Statement, but that it **wanted** to rule against the need for an Environmental Impact Statement. As the District Court stated:

This gives at least some indication that the EAWs may not have been compiled with the greatest attention to detail and accuracy. When viewed in the light most favorable to Defendants, the court must find that the steep slopes are the Glacial Ridge bluff exclusively. However, this finding assumes less effect when weighed against the clear deficits in evidence supporting other assumptions in the EAWs and the lack of any response to many reservations expressed by the DNR, the MPCA, and the various citizens.

(A-13)

There are several other indications of this bias. Although the Court of Appeals held that there must be at least one significant adverse impact with respect to one gravel pit to trigger the cumulative impact analysis, the Kandiyohi County Board's claim was that each and every gravel pit had to have an adverse impact to trigger that analysis (A-63) - a position that is so absurd<sup>1</sup> that is difficult to imagine that it could be maintained by an objective body. Again, although the DNR and the MPCA submitted detailed questions and objections with respect to the content of the EAW (A-69; A-64), the County did not even respond to these concerns. On the dates where the County Board

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<sup>1</sup>A developer with 9 polluted pits could avoid the cumulative impact test by purchasing an unpolluted pit if this were correct.

made its essential decisions to approve the EAW and to proceed without the need for an EIS, it held a vote without prior discussions and without permitting public input.

In entrusting the authority to make determinations concerning the need for Environmental Impact Statements to elected units of local government, the legislature was taking a calculated risk. It could not be unaware of the inherent bias city or county officials could be expected to have favoring local development and business interests. So it wrote the key environmental laws in ways which might be expected to correct for this natural bias. It required strict compliance by those elected RGU's ("Responsible Governmental Units") with not only the State's statutes, but all applicable regulations promulgated by the Department of Natural Resources ("DNR"), the Minnesota Pollution Control Agency ("MPCA"), the Environmental Quality Board ("EQB"), the Minnesota Department of Transportation ("MnDOT") and the Federal Environmental Protection Agency ("EPA").

It encouraged extensive input by all State agencies with an interest in a project, and provided for public input at every stage of the process. It also provided for judicial review by way of declaratory judgment action rather than the narrower review through a writ of certiorari. By such means, the legislature intended to insure that the natural inclination of

local elected officials toward the interests of local developers be checked and balanced.

The legislature could have mandated that appropriate statewide agencies, such as the MPCA, the DNR and MnDOT have the authority to mandate an EIS, taking all final authority from a local elected officials. It declined to do so, perhaps hoping that the extensive statutory provisions for overseeing the actions of these local officials would be sufficient to insure proper compliance with statutes and regulations. If, however, these provisions prove insufficient to do so, the legislature may have to revisit the statutes which give local elected units of government final authority with respect to issues having statewide environmental impacts. It is to be hoped that careful judicial review in light of the relevant legislative policies will make such action unnecessary.

In view of these considerations, certain statements of the Court of Appeals need to be viewed with a gimlet eye. The following passage is particularly troubling:

Third, Citizens also argues that the county failed to consider the cumulative effects of past, present, and anticipated future projects. We disagree. The minutes of board meetings and the county's decision to order an EAW reflect that the board knew about and considered past and present gravel mining in the area. The board grappled with the best method to remedy past failures to require and enforce reclamation of pits. It also was reminded by a citizen's letter that, in 2002, it had issued this same developer three permits covering a

total of 53.5 acres. As for "anticipated future projects," the county did not find that such projects were planned or likely. Cf. *Trout Unlimited*, 528 N.W.2d at 908 (determining it was arbitrary for commissioner to conclude individual projects were unlikely to stimulate additional irrigation projects where EAW stated that future stages were "planned or likely" and agency letter indicated nearby parcels would likely be irrigated pending outcome of this project).

(A-4)

The Court of Appeals was indulging in the sort of analysis that both the legislative and the regulatory scheme made it clear it was not supposed to apply. The Court of Appeals' language implies that merely because the Kandiyohi County Board's minutes reflected that it was aware of an issue, that it had considered the issue adequately. The law is not so narrow. The holdings in *Pope County Mothers*, *supra* and *Trout*, *supra* to the effect that a board decision is subject to reversal "[i]f it offered an explanation for the decision that runs counter to the evidence, or if the decision is so implausible that it could not be ascribed to a difference in view or the result of agency expertise" mandates a review not only to determine if the RGU considered the relevant factors, but the quality of that consideration.

The District Court's memorandum lays out in considerable detail the reasons why the quality of the Board's consideration failed to meet the standards set forth in *Pope County Mothers*,

*Trout*, and the statutes and regulations of the State of Minnesota. These reasons are sound and cogent. The Supreme Court should adopt them.

#### STATEMENT OF THE CASE AND FACTS

Duininck Brothers, Inc., ("Duininck") applied for two Conditional Use Permits ("CUP") from the Kandiyohi County Board to permit the company to develop gravel pits at two sites in the county. The Board granted the permits and determined that an Environmental Impact Statement ("EIS") would not be required. Citizens Advocating Responsible Development ("CARD") brought an action to require the County to have an EIS prepared before a CUP could be granted. CARD brought a motion for summary judgment before the District Court, which was heard on January 21, 2004 (A-9).

On February 19<sup>th</sup>, 2004, the District Court granted CARD's motion for summary judgment, and judgment was entered on March 26<sup>th</sup>, 2004 (A-9). The Kandiyohi County Board and Duininck appealed on May 7<sup>th</sup>, 2004. On January 11<sup>th</sup>, 2005, the Court of Appeals reversed the order of the District Court (A-1), and on February 8<sup>th</sup>, 2005, CARD sought further review in the Supreme Court (A-87). On March 29<sup>th</sup>, 2005, the Supreme Court granted further review (A-85).

In the early years of this decade, the Minnesota Department of Transportation decided to widen Minnesota Highway 23 from

Willmar to New London, creating four lanes of travel. Duininck Brothers, which would bid on parts of the project, decided that it needed more gravel in order to perform more efficiently. MnDot prepared an environmental assessment. The EA spotlighted possible problems with noise and groundwater in the area.

Duininck applied for a CUP to expand gravel mining at its Eagle Lake pit, and on August 30<sup>th</sup>, 2002, its application was placed on the agenda of the Kandiyohi County Planning Commission. On October 7<sup>th</sup>, 2002, the Planning Commission held a public Hearing on the application. The minutes reflected that various citizens participating in the hearing had safety concerns about truck traffic, concerns about whether gravel mining was the highest and best use of the land, concerns about highway access, concerns about the depth to groundwater and the depth of mining activity and the concomitant threat to groundwater quality from mining, as well as the proximity of the operation to existing residential homes and similar concerns.

In October, 2002, various citizens petitioned the Minnesota Environmental Quality Board ("EQB") to require an Environmental Assessment Worksheet on this pit.

In November, 2002, Duininck submitted another Conditional Use Permit Application for the Duininck CA Pit, requesting permission to mine about 17 acres from that pit in advance of the probable taking along Highway 23 by MnDot. The Planning

Commission held a public hearing on December 9<sup>th</sup>, 2002, with respect to that application. There was considerable opposition to the application by the public.

On December 17<sup>th</sup>, 2002, the County Board voted to require an EAW on the CUP application for the Duininck CA Pit. By April 14, 2003, Duininck had submitted a draft EAW regarding that CA pit to the County (A-26), and submitted a similar draft EAW with respect to the Eagle Lake West pit (A-39). Public comment was received on the draft EAW's. Numerous individuals and agencies, including the MPCA and the DNR, commented negatively on the EAW's. On June 23<sup>rd</sup>, 2003, Duininck submitted a response to the comments of the MPCA (A-66).

On July 28<sup>th</sup>, the County Board met and determined not to require an EIS based on the EAW's, and the comments and responses to them. There are no minutes nor any transcript of this hearing. From this determination, CARD appeals.

I.

THE COURT OF APPEALS ERRED WHEN IT HELD THAT A CUMULATIVE SIGNIFICANT ENVIRONMENTAL EFFECT COULD NOT OCCUR UNLESS AT LEAST ONE GRAVEL PIT COULD HAVE A SIGNIFICANT ENVIRONMENTAL EFFECT.

In reversing the District Court, the Court of Appeals stated:

In this case, however, we need not determine whether these various statements of the criterion are substantively distinguishable because the county considered other gravel mining in the area and the environmental effects of gravel mining generally. **It**

*then determined that because no significant environmental effect had been identified for any single gravel pit, there was no basis to conclude there existed a cumulative significant environmental effect based on other gravel pits.* Therefore, we cannot conclude that the county failed to consider an important aspect of the problem or misapplied the law.

(A-6; Emphasis added)

On the face of it, this is implausible. The argument just cited is eerily reminiscent of the sorites fallacy first identified by the Greek Philosopher Eubulides:

One grain does not make a heap; Adding one more grain does not make a heap. Therefore, no number of grains can make a heap.

Or, to use a less sophisticated analogy, it is like arguing that because one marble in a bag is not heavy, a thousand marbles in a bag cannot be heavy.

The language italicized above is an uncommonly clear example of this sort of fallacy. It does not follow that because no single instance of the thing under consideration (here, gravel pits) has a property (here, the property of having a significant environmental impact), then no number of gravel pits could have a significant environmental impact. On this logic, the entire county could be dug into gravel pits, and there could still be no significant environmental impact. The County Board could keep approving gravel pits, one after the other, each without a significant environmental in itself, and eventually the whole county could look like the far side of the moon. No sane

legislature or agency could countenance this result. Common sense indicates that the Court of Appeals' analysis has to be flawed.

Even more important than common sense, the Court of Appeals' analysis is contrary to statutes and regulations which bear directly on this issue. Minn. R. 4410.1700 subp. 7 mandates:

In deciding whether a project has the potential for significant environmental effects, the following factors shall be considered: A. type, extent, and reversibility of environmental effects; B. cumulative potential effects of related or anticipated future projects; C. the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority; 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, including other EIS's.

This regulation relies upon the definition of "cumulative impact" set forth in Minn.R. 4410.0200 subp. 11:

"Cumulative impact" means the impact on the environment that results from incremental effects of the project in addition to other past, present, and reasonably foreseeable future projects regardless of what person undertakes the other projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.

Although the District Court's order was generally favorable to Citizens' concerns, it did rule against them with respect to the interpretation of subp. 7B, stating:

Defendants argue that the text of Minn. R. 4410.1700

subp. 7(b) shows the intent of the rulemakers that any burdens on the environment that may have been occasioned by projects having begun prior to related or anticipated future projects must be left out of consideration. This rationale is more accurate. The court must assume that the choice of terms the rulemakers used in Minn. R. 4410.1700 subp. 7(b) was a conscious intent not to have the subpart be interpreted as requiring that the cumulative potential impact of a project be considered.

(A-24)

Although the District Court did not explicitly say so, it appears to mean that because the phrase "cumulative **impact**" is different from the phrase "cumulative potential **effect**" the rulemakers meant the two terms to be interpreted differently. While it is wise for lawmakers and rulemakers to use the same term consistently throughout the text of a statute or rule, the use of synonymous rather than identical terms is not always indicative of an intent to reach a different result, and "impact" and "effect" are functionally synonymous here. Minnesota has not adopted a "different term - different meaning" rule. Moreover, even the states that have adopted that rule have employed it only as an aid to statutory construction, a rebuttable presumption which can be overborn by other evidence of legislative intent. For instance, the Texas Court of Appeals said in *Tandy Corporation v. Sharp*, 872 S.W.2d 814 (Tex. App. 1994):

We disagree that the use of the term "financial condition" in the amendment prescribes an entirely different computational scheme. This Court has held

that the mere use of a different term in a situation in which the previous term could have been repeated does not necessarily establish a different legislative intent.

(*Id.* at 817)

Similarly, the Wisconsin Court of Appeals, in *Gittel v. Abram*, 255 Wis. 2d 767, 649 N.W.2d 661 (Wis. App 2002), provided a useful analysis of when the use of different words and terms in a statute indicates a different legislative intent:

There is a rule of statutory construction that different word choices in different parts of the same statute, particularly within the same section, may create an inference that the enacting body intended different, distinct meanings. *American Motorists Ins. Co. v. R & S Meats, Inc.*, 190 Wis.2d 196, 214, 526 N.W.2d 791 (Ct.App. 1994). This rule rests on the premise that it is logical to assume the enacting body had the entire statute or section in mind when it chose the different words. *Gittel*, however, provides us with no basis for assuming that the wording of Wis. Stat. § 806.07 was chosen with the different wording of Wis. Stat. § 805.17(3) in mind. Indeed, the history shows that when first enacted, § 805.17(2), now § 805.17(3), provided: "Upon motion of a party . . .," S.Ct. Order, 67 Wis.2d 585, 712 (eff. Jan. 1, 1976); § 806.07, in contrast, provided "On motion . . .," as it currently does, S.Ct. Order, 67 Wis.2d 585, 726. The words "its own motion or the" were added to § 805.17(3) in 1991. S.Ct. Order, 160 Wis.2d xiii, xiv (eff. July 1, 1991). This history supports our reading of § 806.07 because the language of § 806.07 never qualified the phrase "[o]n motion" with "of a party," as Page 785 did § 805.17(3) (originally enacted as § 805.17(2), see S.Ct. Order, 73 Wis.2d xxxi, xxxvi (eff. Jan. 1, 1977)), it was not necessary to add language to § 806.07 to include the court.

(*Id.* at 784)

In other words, while the use of different words or terms is

one of the factors a court may use to determine legislative or regulative intent, other factors that go into this determination. This is especially true when the use of the two terms which are in proximity have been defined in terms of each other.

The broader rule is that where the words of a law or regulation are not ambiguous or unclear, legislative intent must be ascertained by considering all relevant factors, including, e.g., the mischief to be remedied, the object to be attained, and the consequences of the particular interpretation. *Chapman v. Davis*, 45 N.W.2d 822 (Minn. 1951); *In re Peterson's Estate*, 1950 42 N.W.2d 59 (Minn. 1950).

Even if the "different term - different meaning" rule had any bearing on this case, the fact that there **may** be instances where the meaning of the two words diverge is the beginning of the inquiry, not the end of it. For the two different words may have the same meaning as applied. Here, if the terms "impact" and "effect" differ at all, it is only because the term "effect" can be broader and "impact" is a species of "effect." By a familiar rule of logic, at least some effects are necessarily impacts.<sup>1</sup> Hence, rather than indicating an intent to use different words to mean different things, the rulemakers used different words to indicate that the first word, "impact," was

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<sup>1</sup>If some A is B, then some B is A.

one member of the set of things represented by the second word, "effects." If one were to define the term "impact" by genus and species, it would be correct to say that an "impact" is an "effect" which is "significant" or "substantial." Then, if we substitute a phrase like "**significant** effect" for "impact," in Rule 4410.1700 we get obtain this result:

In deciding whether a project has the potential for **significant** environmental **effects**, the following factors shall be considered: A. type, extent, and reversibility of **significant** environmental **effects**; B. cumulative potential **significant effects** of related or anticipated future projects;

The substituted phrase has exactly the same meaning as "impact." If there is a real difference in this context, respondents have yet to suggest one. Surely the rulemakers were not referring to **insignificant** effects.

The use of the different words "impact" and "effect" in 4410.0200 and 4410.1700 is not even sloppy regulatory draftsmanship. Rather, it mandated by a sound grammatical principle, familiar from English 101. One does not define words by using the same term; one wishes to avoid "circular definitions."<sup>2</sup> If the rulemakers had said, "Cumulative impact" means the impact on the environment that results from incremental

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<sup>2</sup>For example, if one were to define "naked mole rat" as "a mole rat that has no hair," this definition would be useless unless one already knew what a mole rat was. If one already knew what a mole rat was, one probably would not be looking the term up in the first place.

impacts of the project...,“ they would have been guilty of making such a “circular definition.”<sup>3</sup> So, given the definition used in the regulation, a cumulative impact *is* an incremental effect. The only remaining question is whether it is the sort of “cumulative potential effects” indicated in Minn. R. 4410.1700, subp. 7B are the same as “impacts” within the meaning of Minn. R. 4410.0200 subp. 11.

The language of 4410.0200 allows that they may be,<sup>4</sup> and careful analysis indicates that they are. Let us begin with a common-sense question: If impacts are not effects in this case, then what does “effects” mean in the 4410.1700 context: Literary effects? Special effects? Insignificant effects? The terms “effect” and “effects” are never defined in Minn. Stat. § 116D.04 or 4410.0200, and there is no plausible reading of “effects” in 4410.1700 that (a) has a meaning different from “impact” and (b)

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<sup>3</sup>This is precisely the sort of thing which commentators have criticized with respect to NEPA and 40 C.F.R. § 1508.27(b)(7), which states: “‘Cumulative impact’ is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” This definition has been criticized as faulty for defining an “impact” as an “impact.” Minnesota’s rulemakers justifiably wanted to avoid such criticism.

<sup>4</sup>Naturally, there might be other sorts of “effects” which are not “impacts.” But if the rulemakers had meant to refer to effects which are not impacts, one could have expected them to define “effects,” and they did not.

permits Rule 4410.1700 subp. 7B to make sense.

Let us also consider statutory and regulative history. Minn. Stat. § 116D.01 et seq., sometimes referred to as the Minnesota Environmental Protection Act, or "MEPA," was patterned after the National Environmental Protection Act, 42 U.S.C. § 4321 et seq. ("NEPA"). Minnesota Courts have looked to federal interpretations of NEPA, both by Federal Courts and Federal Agencies, as a guide to the interpretation of MEPA. See, *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 323 (Minn. 1977).

More importantly, the Federal Council on Environmental Quality ("CEQ") has used the terms "impact" and "effect" interchangeably when referring to cumulative harm to the environment over time. 40 C.F.R. § 1508.7 states:

"Effects" include:

- (a) Direct effect, which are caused by the action and occur at the same time and place.
- (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonable foreseeable....

40 C.F.R. 1508.8 makes it clear that for the purpose of these environmental regulations at least,

Effects and impacts as used in these regulations are synonymous....

The Environmental Quality Board has adopted this principle and applied it consistently. For example, the Environmental Assessment Worksheet which the Board has developed contains language that indicates that an effect is precisely the sort of thing that an impact is in this context:

29. *Cumulative impacts.* Minnesota Rule part 4410.1700, subpart 7, item B requires that the RGU consider the "Cumulative potential effects of related or anticipated future projects" when determining the need for an environmental *impact* statement. Identify any past, present, or reasonably foreseeable future projects that may interact with the project described in this EAW in such a way as to cause cumulative *impacts*. Describe the nature of the cumulative *impacts* and summarize any other available information relevant to determining whether there is potential for significant environmental *effects* due to cumulative *impacts*....<sup>5</sup>

To be sure, the use of language in a form does not define the language of a regulation, much less the language of a statute. But frequent or common usage can be utilized in statutory interpretation when the words of the law are not explicit, through examination of the language used and the history of the use of that language, in light of the subject matter, the purpose of the statute, the occasion and necessity for

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<sup>5</sup>One of the reasons for the interchangeable usage of "impact" and "effect" in the various regulations is the lack of an English word of which "impact" and "effect" are subspecies and in relation to which they have different properties (unlike the case of "red" and "green," which are subspecies of "color" with different properties). It is a useful exercise to imagine what word or phrase would collate the common properties of "impact" and "effect" while differentiating them.

the law, and the consequences of a particular interpretation.

*Amoco Pipeline Co. v. Minnesota Valley Landscaping, Inc.*, 467

N.W.2d 351 (Minn. App. 1991). As Minn. Stat. § 645.16 indicates:

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

- (1) The occasion and necessity for the law;
- (2) The circumstances under which it was enacted;
- (3) The mischief to be remedied;
- (4) The object to be attained;
- (5) The former law, if any, including other laws upon the same or similar subjects;
- (6) The consequences of a particular interpretation;
- (7) The contemporaneous legislative history; and
- (8) Legislative and ***administrative interpretations*** of the statute.

(Italics supplied)

Following this principle, this Court held, in *Goodman v. State Department of Public Safety*, 282 N.W.2d 559, that administrative interpretations of statutes, although not binding on the courts, should receive consideration unless found to be erroneous and in conflict with the express purpose of the act and

intention of the legislature. See also, *Mankato Citizens Telephone Co. v. Commissioner of Taxation*, 245 N.W.2d 313 (Minn. 1966); *Cummings v. Koehnen*, 568 N.W.2d 418 (Minn. 1996).

Clearly, the MPCA and the EQB have interpreted "cumulative impact" to mean the same thing as "cumulative effects," and because this is a plausible reading of the regulation and advances the purposes of the statute, it should be given effect.

This principle is especially applicable where, as here, the agencies have been using the interchangeable definitions of "effects" and "impacts" for many years and both the County and the developer not only knew that they used them, but had dealt with these agencies and tailored their conduct to the agencies' interpretation of these terms. It is not as if these rules were criminal statutes whose interpretation needs to be made with respect to a criminal defendant's right to have absolute clarity about his possible liability under the statute.

Moreover, the legislature itself has utilized very similar language in § 116D.04:

Where there is potential for significant environmental **effects** resulting from any major governmental action, the action shall be preceded by a detailed environmental **impact** statement prepared by the responsible governmental unit. The environmental **impact** statement shall be an analytical rather than an encyclopedic document which describes the proposed action in detail, analyzes its significant environmental **impacts**, discusses appropriate alternatives to the proposed action and their **impacts**, and explores methods by which adverse environmental

**impacts** of an action could be mitigated. The environmental impact statement shall also analyze those economic, employment and sociological **effects** that cannot be avoided should the action be implemented.

Clearly the legislature itself used the two terms, "impact" and "effect," interchangeably in the enabling statute; it is hard to see how a Court could interpret a statute so as to find the two words synonymous and interpret a regulation implementing that statute so as to find the two words to have a different meaning. The cumulative impact rule applies to both "impacts" and "effects" interchangeably, and thus applies in this case.

Since the cumulative impact test does apply to the County Board's required analysis in this case, the decision of the Court of Appeals must be reversed. The Court of Appeals, having decided that Minn. R. 4410.0200 does not apply to this project, upheld the Kandiyohi County Board's determination that "[b]ecause no significant environmental effect had been identified for any single gravel pit, there was no basis to conclude that there existed a cumulatively significant environmental effect based on other gravel pits." But since § 4410.0200 does apply to this case, that Court's "no single problematical gravel pit" interpretation of rule cannot pass muster either.

Rule 4410.0200 explicitly states: "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." The rule was

designed to encompass the case where the effect of any single gravel pit was unproblematical but taken together, their impact or effect was problematical. It is axiomatic that at some point a difference in quantity can become a difference in kind; what better phrase could be used to describe this phenomenon in the environmental context than "Cumulative impact"? This interpretation - that no problem need to be shown with respect to any single project where there are a goodly number of such projects and where the sheer number of them might effect the environment collectively - had to be what the agency had in mind when it wrote 4410.0200 on 4410.1700.

## II.

THE COURT OF APPEALS ERRED IN HOLDING THAT A MERE RECOMMENDATION BY THE COUNTY THAT ANY FUTURE CONDITIONAL USE PERMIT ("CUP") IN THE WATERSHED SHOULD INCLUDE PROGRESSIVE RECLAMATION AND WATER MONITORING WAS SUFFICIENT TO OBLIATE THE NEED FOR AN ENVIRONMENTAL IMPACT STATEMENT.

In this case, the Court of Appeals held that a mere recommendation by the County at any future CUPs in the watershed should include progressive reclamation and water monitoring. The Court said:

Here, the county stated for both pits "there were no environmental effects identified which cannot be adequately addressed by the developer or resolved through ongoing enforcement of existing regulations and permits." The county is in the unique position of being responsible for the CUP process, for implementation and enforcement of its mining

ordinances, and for environmental review of these proposed gravel pits. ... With regard to these proposals, the county expressly recommended that any future CUPs in this watershed should include progressive reclamation and water monitoring. The MPCA will also require a pollution prevention plan. Accordingly, there is substantial evidence of ongoing monitoring and enforcement at the county, as well as other governmental levels, which was properly considered in the count's negative EIS declaration.

(*Id.* at p. 11)

This is precisely the sort of "vague statement of good intentions" that the Court of Appeals, in *Iron Rangers, supra*, said was inadequate. With respect to this "vague statement" proffered by intervener, the Court of Appeals, in *Dead Lake Association, Inc. v. Otter Tail County*, No. A04-717 (Minn. App. 2 February, 2005), an unpublished case, the Court of appeals said:

The record before us suggests that the county similarly erred when it concluded that "[t]here are adequate and appropriate state and local regulations governing the activities of this project that will limit and control the environmental effects." Appellant attacks the board's findings on a number of grounds, including: (1) the project description and magnitude, (2) the reduction in the number of units and boat slips, (3) the cluster-development design of the project, (4) future commercial uses, (5) boating impacts, and (6) docking facilities. We need not address each of appellant's concerns here and instead focus only on the county's determination regarding the environmental effects of increased boating activities.

While not determinative of the need for an EIS, the expert recommendations of specialized governmental agencies can be helpful in highlighting the deficiencies in an EAW. In a letter to the county, the DNR highlighted that "[b]oat traffic in shallow lakes

or in shallow portions of lakes has been conclusively established by numerous well-done studies to cause a number of potentially serious impacts. *The EAW did not contain an evaluation of the likelihood of occurrence of [boat traffic] impacts, or a description of them.*" (Emphasis added.) The DNR then listed a number of impacts that can occur from increased boat traffic, including: (1) disruption of bottom sediments from propeller and other turbulence, (2) an increase in phosphorous concentrations, (3) damage to emergent and submergent aquatic vegetation in shallow areas, (4) wake-caused disturbances of over-water bird nesting and shorelines, and (5) disturbance of water-bird and waterfowl species. The USFWS also expressed its concerns, "[g]iven the potential for adverse environmental impacts related to the project." Specifically, it explained that "the sensitivity of shallow water bodies to relatively small amounts of pollutants combined with the scope of the project may have significant detrimental effects on water quality in Dead Lake." The county, however, concluded that it could mitigate any significant adverse effects by implementing certain boating recommendations of the DNR and by its concurrent authority with the DNR to "mitigate the environmental effects of boating through their ongoing regulatory authority" to enact boating restrictions on the lake.

(A-80)

Similarly, in the instant case, the County's assurances that the adverse effects of the gravel mining could be mitigated were conclusory and perfunctory. As the District Court here said:

Based on the information contained in the EAW's and in communications by Intervening Defendant, and concerns raised in earlier sections of this legal analysis, it is worth posing further questions regarding the scope of any environmental burdens or benefits to be brought by excavating operations on the two planned pits. A governmental unit must consider not only possible measures to mitigate environmental effects, but first and foremost it is obligated to consider the extent of the potential for environmental effects. *Cf. Pope County Mothers*, 594 N.W.2d at 238 (citing to *White*, 567

N.W.2d at 732, which states that an EAW extensively addressing the extent to which *identified* environmental effects can be mitigated complies with *Trout*.)  
(Emphasis supplied)

The guidance and monitoring that regulatory authorities give after a project has commenced is laudable - but more fully discovering what, if any, cautions may be occasioned by a project before the project commences and has the opportunity to occasion effects may go even further towards helping these regulatory authorities accomplish the goals of safeguarding the public and the environment.

Maintaining meaningful regulatory authority over mining projects is key to this safeguarding function. However, the policy served by ordering an EIS is to obtain the best reasonably possible idea of the total degree of the environmental effects that a project will bring, before the project is started, and thus before any possible irreversible effects occur.

Several concerns were raised; the answers to these concerns, when given, were fleeting. In the EAW, Defendants and Intervening Defendant were specifically asked about any potential for cumulative impacts. (AR pp. 12, 33) Guidelines by the Minnesota Environmental Quality Board specifically state that especially for sand and gravel projects, this was to be adequately addressed. (AR p. 74) It was summarily decided that there was no potential for cumulative impacts; no further explanation or supporting evidence was given in the EAW's (AR pp. 12, 33). The DNR and citizens raised concerns about this. (e.g., AR p. 110) Intervening Defendant's answer to them was a clear misstatement of the law, and Intervening Defendant dismissed these concerns in a perfunctory manner and without any specific evidence. (AR p. 113)

(A-23)

This analysis is similar to that made by the Court in *Dead Lake, supra.*:

It is true that the county and the DNR have statutory authority to regulate boat usage on Minnesota lakes. See Minn. Stat. § 86B.201 (2004) (permitting political

subdivisions to adopt regulations relating to the use of waters of the state); Minn. R. 6110.3400 (2003) (giving the DNR jurisdiction to regulate a body of water when so requested by a political subdivision of the state).

....

But the county failed to explain how it would implement such boating regulations. While the county did not "entirely fail" to consider an important aspect of the problem" in the EAW, it did "Offer an explanation for the decision that [ran] counter to the evidence" in deferring this issue to its own authority to impose boating restrictions on the lake at some point in the future without complete information. *Pope County Mothers*, 594 N.W.2d at 236. Accordingly, it was arbitrary and capricious for the county to rely on some nebulous "ongoing regulatory authority" in the form of its own ability to enact restrictions that did not yet exist at the time of the negative declaration when the effects of the increased boat usage had not yet been adequately addressed. In this respect, the proposed mitigation measure that the county and the DNR "have the ability to mitigate the environmental effects of boating through their ongoing regulatory authority" was inadequate as nothing "more than mere vague statements of good intentions."

(A-80)

The Court of Appeals' decision in the instant case is directly contrary to its decision in *Dead Lake*, and *Dead Lake* represents the better law.<sup>7</sup> If all that were necessary to defeat

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<sup>7</sup>On the day this brief was written, the Supreme Court overruled one of the *Dead Lake* cases, A03-750, noting:

In a separate action, the Association appealed this negative declaration to district court. The County and Developer moved for summary judgment, which the district court granted. However, the court of appeals recently reversed the district court's grant of summary judgment to the County and the Developer and remanded to the County for preparation of an EIS. *Dead Lake Ass'n, Inc. v. Otter Tail County*, No. A04-717, 2005 WL

the requirement for an EIS is to state that adverse effects will be mitigated by what the County will do at some future date, environmental law could be held hostage to a "pig in the poke."

Another panel of the Court of Appeals has recently addressed this very issue. In *Berne Area Alliance v. Dodge County Board of Commissioners*, 694 N.W.2d 577 (Minn. App. 2005). In *Berne*, the Court of Appeals reversed Dodge County's determination that no EIS was required of a feedlot, holding that the Board had misinterpreted the meaning of the word "capacity" as set forth in Minn. Stat § 116D.04 subd. 2a(d)(1)(i). For present purposes, however, the really interesting language occurs in Judge Minge's concurring opinion. Not only does he (like the majority) use the terms "effect" and "impact" interchangeably. He uses the cumulative effect/impact test to criticize the adequacy of the EAW's analysis of impact on groundwater and the inadequacy of mitigational or remedial proposals. He states:

From the record, it appears that if the potential cumulative effect includes the full physical capacity of the proposed buildings, several matters need further

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221773 (Minn. App. Feb. 1, 2005). The court of appeals also reversed the Minnesota Pollution Control Agency's decision to grant a permit for the development of a wastewater treatment system, determining that the grant was premature based on an inadequate environmental review. *Dead Lake Ass'n, Inc. v. Comm'r of Minnesota Pollution Control Agency*, No. A04-483, 2005 WL 287490 (Minn. App. Feb. 8, 2005). The County and Developer have filed petitions for review in both cases.

So this determination does not effect the instant case.

analysis to determine whether the project would have a significant environmental effect and whether an EIS is needed. One is the farmland available for spreading manure from the facility. Dodge County found that 1,200 acres were needed to handle the manure and that that acreage had been identified. At full capacity, 50% more animal units would be in the facility and 1,800 acres of land would apparently be needed. The Pollution Control Agency (PCA) commented some fields have steep slopes and that Finstuen's plan to spread manure after fall harvest delays absorption of nutrients until the next growing season. The significance of these comments on needed or appropriate acreage for manure application is unclear. However, the EAW should analyze the acreage needed to properly handle the potential cumulative effect of these considerations and, given the reported extensive Karst formations in the area, whether suitable acreage is available for manure application without creating a significant environmental effect.

In the instant case, the same sort of analysis applies. The County Board and the developer simply stated that there would be no groundwater problem. The County's ordinance does not even define "water table," yet it relied on Duininck's assurances that its operations would remain 25 feet above the water table and that therefore there would be no water quality issues (AR114). Yet there is no confirmation of the assumed depth in the record. Similarly, the phrase "progressive reclamation" is used by the developer to indicate what it would do to mitigate any potential adverse effects, but not only is the phrase not defined in the County ordinances; it is not defined by the County or the developer anywhere else either (as, say, in the EAW). This is precisely the sort of thing Judge Minge indicated had to be discussed in some detail, both with regard to cumulative impact

issues and mitigation issues. Kandiyohi County's analysis falls short in both respects.

### III.

EVEN UNDER A STRICT STANDARD OF REVIEW, THE INFORMATION PRESENTED BY CITIZENS AND OTHERS PLACED A BURDEN ON THE KANDIYOHI COUNTY BOARD TO PRODUCE EVIDENCE REFUTING THE INFORMATION IF IT WAS AVOID THE REQUIREMENT OF AN EIS.

Minn. Stat. § 116D.04, subd. 2a, has already been set forth above, but it is convenient to do so again for ready reference:

Where there is potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed environmental impact statement prepared by the responsible governmental unit. The environmental impact statement shall be an analytical rather than an encyclopedic document which describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated. The environmental impact statement shall also analyze those economic, employment and sociological effects that cannot be avoided should the action be implemented.

Where an agency makes decisions without considering the required information, the Court must reverse the RGU's determination and order an EIS so that these decision makers have the complete information before them. *Pope County, supra.*

Not only must the required information address the statutory and regulatory criteria in itself: the decision making body must respond to such inputs of the public and government agencies as are presented to it. This is particularly important if the RGU

is in effect ignoring (if not outright overruling) the DNR and the MPCA. As the District Court put it:

The DNR, citizens, and hydrology experts raised concerns about the projects' effect on water quality. (AR pp. 101, 109) In response, Intervening Defendant gave an explanation not logically justified by its very little evidence, and even stated that before it began mining it could not definitely tell what the mining's effects on water quality would be. (AR pp. 114, 126)

Defendants asked a division of the DNR for information on whether the planned mining expansion would negatively affect any rare natural features in the immediate area; the department said that it would not. (AR pp. 17, 38) However, this division expressly stated this was not substitute for the opinion of the DNR as a whole and in consideration of the area as a whole, not simply the rare natural features. (AR pp. 18, 39). Although this statement is clear and unmistakable, Defendants represented in the EAW's as if the entire DNR were standing behind Defendants regarding this issue. (AR pp. 17, 38) Defendants also have no definite plan regarding how the land would be used after the expanded mining (AR pp. 126, 144-45). Many citizens' comments went unanswered, and as the court must find, thus partially or completely unconsidered. (e.g., AR pp. 78, 79, 145)

Clearly, not every project requires an EIS. But in this case, there are many concerns, supported by evidence, that mining in the planned pits may well bring a high degree of environmental effects. In light of this, to simply rely on ongoing regulatory authority to alleviate all potential effects would vitiate the policies behind an EIS.

(A-23)

While reviewing courts are to look to the evidence presented before the relevant agency rather than the arguments presented to the District Court in making their determination of the need for an EIS (see, e.g., *Iron Rangers, supra*), what, precisely, is

incorrect in the above-quoted passage? The defendants suffered from tunnel vision, and simply ignored without comment a significant quantity of evidence submitted by the advocates of an EIS. As the District Court put it:

Two environmental studies of the area undertaken by public agencies exist; these are the MnDOT March 2002 CASH 9.Trunk Highway 23 Interchange Environmental Assessment (SAR pp. 7-65) and the 1980 Hydrologic Budget for Eagle Lake (SAR pp. 110-124). It is unquestioned that these studies were available to defendants; even had research by Defendants not shown them that these studies existed, via the comments of citizens received by Defendants during the comment period at the very least, defendants were on notice that these studies had been done and were readily available to them. (e.g. AR p 100) Defendants were thus obligated to make use of these studies during their considerations, and no evidence shows that this was done.

....

It is clear and beyond contention that the information in these studies would have given defendants a significantly more substantial depth of information, and particularized to the area on which the sites of the planned pits are located. To name only a part of the information these studies contain, these comparatively exhaustive studies would have given extensive scientific data about the qualities of the soils to be found at and around the planned pits, as well as the area's hydrology.

(A-24)

Compared to this detailed analysis, the Court of Appeals' holding in this case that "the county engaged in reasoned decision making and properly resolved technical disputes within its discretion" is conclusory and perfunctory. For the Court of Appeals' conclusion rests almost entirely upon the developer's

responses to the concerns of the MPCA, the DNR, and the laws of the State of Minnesota. Consider some concerns presented and the developer's (and through it, the County's) reaction to them:

Our primary concern is that both of the proposed pits, in addition to the larger mined complex, lie within the important eagle Lake watershed. A report prepared by the USGS (1980), entitled *Hydrologic Budget for Eagle Lake near Willmar, Minnesota*, identifies this area north of Eagle Lake as being the primary source for groundwater recharge to the lake proper. The study noted that groundwater comprised 22% of the net inflow of water from all sources to eagle Lake. The incremental degradation of this recharge area is a concern. This area will be susceptible to groundwater contamination from runoff entering the pit areas and from future land uses that may not be compatible with the high infiltration rates found in the area, especially if the green cap (i.e. top soil and perennial vegetation) is not restored, The buffer described in the EAW's between the bottom of the excavation sites and groundwater reserves may not be sufficient to fully filter contaminants particularly if the soils are coarse. groundwater contamination in this area is also of particular concern due to the close proximity of residential wells.

(AR-107)

There was no direct response to this concern. If the letter from the developer to the MPCA, detailed below, was meant to serve as an answer to the DNR's concerns as well, the intervener's response is not much more adequate. How was the County Board, or the DNR or the MPCA or MnDOT or anyone else suppose to know if the issue had been adequately addressed? What studies addressed the DNR's concerns?

Consider also the MPCA's stated concerns and the inadequacy of the response to them:

Item 9. Item 9 of the EAW requires the preparer of the EAW to discuss compatibility of the project with nearby and adjacent land uses. The EAW identifies nearby and adjacent land uses but does not adequately discuss the compatibility of the project with nearby and adjacent land uses, especially the residential development located south of the site.

Item 10. Item 10 should provide additional clarification that the 32 acres of brush/grassland "after" development would be the result of reclamation after the pit has been mined for its duration.

Item 16. Item 16 requires the preparer of the EAW to describe any erosion and sedimentation control measures to be used during and after the project is completed. The EAW indicates that Best Management Practices will be used but it does not provide an adequate description of these management practices as instructed by Item 16 of the EAW.<sup>6</sup>

Item 17. The discussion in Item 17 concerning surface-water runoff focuses on the site after it has been reclaimed. The EAW ought to discuss the environmental impacts that will occur during the period of time the gravel pit is being actively mined and the measures that would be taken to mitigate these impacts. Also please note that the NPDES General Permit identified in Item 8 of the EAW requires the submittal of a Pollution Prevention Plan (Plan). The NPDES General Permit requires that the plan be implemented at the site prior to coverage under the permit.

Item 20. The statement in item 20.c stating that "there are no plans to store petroleum products or other material in tanks on site" appears to contradict the information provided in item 19 above it indicating that any above-ground storage tanks on the site will most likely contain fuel and have secondary containment.

Item 29. The information regarding cumulative impacts lacks a discussion of those impacts as instructed by Item 29 of the EAW. A discussion of cumulative impacts is particularly important due to the fact that nearby

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<sup>6</sup>A criticism which could be applied to a good deal of the developer's submissions.

areas are being mind as identified in the EAW.

Now note the developer's responses:

[Item 9] As mentioned in previous documents, every conceivable effort will be made to mitigate any impacts to these nearby residents that might be possible due to the mining of gravel had these measures not been implemented. These measures will include, among others, building a berm along the south side of the property, leaving the current vegetative buffer in place, limiting dust and noise, and containing runoff onsite.

Comment: This says almost nothing, although the "nothing" is well-phrased. What will building a berm do, and how will it mitigate impacts on residents? Leaving a vegetative buffer is to leave what was already there. How will dust and noise be limited, and how will runoff be contained onsite? This is not a plan; it is an aspiration.

[Item 10] The reclamation plan states that 4" of topsoil will be applied to all slopes and a suitable natural vegetation will be planted. This will produce a complete site that would be categorized, in terms of the EAW categories noted in this section, as brush and grassland.

Comment: This is a non-answer answer. The question troubling MPCA was not "How will you categorize the complete site?" but "Will the 32 acres be the result of reclamation?" What is a "complete site"? What reason is there to believe that the developers actions will produce one? And the fact that the reclaimed site could be categorized as brush or grassland is far too vague to convey anything to a reviewer.

[Items 16 & 17] These items were covered quite

extensively in previously submitted documentation. Quoting from the letter submitted to Mr. Gary Geer (Zoning Administrator) on June 13, 2003, regarding how the runoff will be managed while the pit is in operation,

*All runoff from the mining area will be directed back into a holding area in the pit, where it will undergo initial purification by sedimentation. It will then slowly seep into the ground or evaporate. As the water flows through the ground, the sand and gravel will act as a natural sand filter, purifying the water by removing any suspended solids such as sand or silt which might be picked up by the runoff. A variation of these procedures is one of the primary methods used in municipal water treatment plants to remove the suspended solids that are present in municipal water sources.*

The site will be reclaimed in such a manner so that when the pit operations have been completed, the site will have been flattened substantially, slowing down runoff, reducing erosion, and allowing more opportunity for the runoff to seep into the ground rather than flow to other properties. In areas that might be of special concern, permanent erosion control measurers such as riprap will be installed as needed.

Comment: This supplies very little real information. The gist of Duininck's answer to the MPCA's concern appears to be "We will channel the runoff in the right direction and nature will do the rest." With respect to the reclamation issue raised by MPCA, Duininck's response is essentially "We will do the right thing, and it will produce good results."

[Item 20] Currently, there are no plans to store petroleum products or any other materials in above ground storage tanks on the site. If there ever was a chance of an above ground storage tank being used on site for refueling of equipment being used on site, all MPCA standards will be strictly adhered to, including

secondary containment, labeling, etc., to completely eliminate the possibility of contaminants coming in contact with ground water.

Comment: In response to the question "How will you insure compliance with the law?" the developer responds "We will obey the law."

[Item 29] A fairly comprehensive discussion of cumulative impacts in relation to requiring a mandatory EIS was included in my previous letter to Mr. Gary Geer, dated June 13, 2002. It is clear from the Minnesota States that the Responsible Government United (RGU) is in no way bound to require a mandatory EIS in this situation. In addition, to show a cumulative negative impact, there must be reason to believe that each project in itself will at least have a significant negative impact to the environment. It has been shown in this EAW and proven time and time again that gravel pits do not have a negative environmental impact, and many times have a quite positive impact, especially given the current reclamation standards.

Comment: The developer is saying, in effect, "We need not address this concern because we disagree with your interpretation of the law." This, the developer has a right to do, but if it turns out that the developer is wrong - and the first part of this brief has discussed at length the reason why it is wrong - one of the crucial issues which needs discussion if an EIS is to be avoided remains unaddressed. The developer's refusal to provide a direct response, even as a "backup" position, is dangerous: if its interpretation of the regulation is incorrect, and the County Board adopts that interpretation, the County Board's determination will be made based upon an erroneous theory of law, and the reviewing court will be forced to reverse that

determination.<sup>9</sup> That is in fact what is happening here.

In short, even on the merits, and even if this Court disagrees with the undersigned's analysis of the cumulative impact test, the responses of the developer and the county to the very real concerns of the state, its agencies, and the public do not survive a "substantial evidence" analysis. It is hard to see where they survive any sort of evidentiary test at all.

#### CONCLUSION

The Kandiyohi County Board's response to the requirements imposed upon it as a decision-maker is grossly inadequate. The Board misinterpreted important aspects of the law, and misapplied others. The information upon which it based its decision, far from being extensive, was precipitous and conclusory. Indeed, the Board has given good reason to believe it will make whatever findings are necessary to avoid an EIS if permitted to do so.

This Court should adopt the position of the Court of Appeals in *Berne* and *Dead Lake*, both of which refused to give deference to a County Board's decision where crucial factors were left out of the analysis, the Board relied on the developer itself to supply such answers to regulatory concerns as were addressed at all, and the Board actions suggest both bias and tunnel vision.

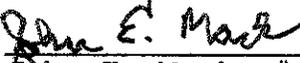
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<sup>9</sup>One wonders why it did not choose to do so. Given the County Board's propensity to rule out an EIS, virtually anything which would have denied the existence of a cumulative impact would probably have proved acceptable.

Not only should this Court reverse the decision of the Court of Appeals. It should, in addition, directly require the preparation of an Environmental Impact Statement.

Dated: April 27<sup>th</sup>, 2005

MACK & DABY P.A.

  
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John E. Mack, #65973  
P.O. Box 302  
New London MN 56273  
(320) 354-2045  
ATTORNEYS FOR CITIZENS



The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).