

Nos. A04-886 and A04-890

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STATE OF MINNESOTA  
IN SUPREME COURT

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Citizens Advocating Responsible Development, et al.,

Appellants,

vs.

Kandiyohi County Board of Commissioners and the County  
of Kandiyohi, Minnesota and Duininck Bros., Inc.,

Respondents.

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MINNESOTA ATTORNEY GENERAL AND MINNESOTA  
ENVIRONMENTAL QUALITY BOARD'S AMICUS BRIEF AND APPENDIX

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## STATEMENT OF AMICUS CURIAE

The State of Minnesota, through its Attorney General and Environmental Quality Board (“EQB”) (jointly, “State”), respectfully submit this Amicus Brief to discuss an essential element of Minnesota’s environmental review program, cumulative impacts, and how it was addressed by the Minnesota Court of Appeals and Kandiyohi County (“County”) in this case.<sup>1</sup> This Amicus Brief will address the County and Court of Appeals’ interpretations of cumulative impacts analysis and the County’s argument that EQB rules do not require a consideration of cumulative impacts in an Environmental Assessment Worksheet (“EAW”).

Specifically, the County and the Court of Appeals misconstrued cumulative impacts analysis by concluding that a Responsible Governmental Unit (“RGU”) must first determine that at least a single project will have actual *significant* impacts before any cumulative impacts analysis is required in an EAW. See *Citizens Advocating Responsible Development v. Kandiyohi County Board of Commissioners*, 2005 WL 44823, at \*3 (Minn. Ct. App. Jan. 11, 2005). Appendix, App-3. The County also misconstrues EQB’s environmental review rules in arguing that, by using the term “effects” in Minn. R. 4410.1700, subp. 7.B. – “the cumulative potential *effects* of related or anticipated future projects” – the EQB intended that the subpart be interpreted as *not* requiring that potential cumulative *impacts* be considered. That is, the County is in error by arguing

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<sup>1</sup> This brief was not authored in whole or in part by counsel for any party to this appeal. No other person or entity made a monetary contribution to the preparation or submission of this brief. Minn. R. Civ. App. P. 129.03.

that “cumulative impacts” and “cumulative effects” are not synonymous.<sup>2</sup> The Minnesota Environmental Policy Act (“MEPA”), Minn. Stat. ch. 116D, uses the terms “effects” and “impacts” interchangeably. The EQB has also historically interpreted and applied the terms as synonymous and used them interchangeably. The EQB’s approach is consistent with MEPA, EQB’s definition of cumulative impacts, and similar terms used in the federal environmental review program on which the EQB’s environmental review program was patterned.

The U.S. President’s Council on Environmental Quality (“CEQ”) has found there is increasing evidence that the most devastating environmental impacts “may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time.”<sup>3</sup> If the County and Court of Appeals’ application of cumulative impacts is allowed to stand or if the County’s construction of EQB’s rules is adopted, inappropriate barriers will be imposed on the proper application of cumulative impact analyses. Without incorporating cumulative impact analyses into RGU environmental review and planning, it will be impossible for the State to move

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<sup>2</sup> In prior judicial proceedings, the County argued that Minn. R. 4410.1700, subp. 7.B. did not require a cumulative impacts analysis and that the phrases “cumulative impacts” and “cumulative effects” are not synonymous. The State assumes the County and *amici* Association of Minnesota Counties will make those same arguments in this proceeding.

<sup>3</sup> Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act 1* (Jan. 1997). This document can be found at <http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm> (last viewed April 30, 2005).

towards sustainable development, i.e., development that meets the needs of the present without compromising future generations' abilities to meet their needs.<sup>4</sup>

### STATEMENT OF THE CASE AND FACTS

The State takes no position with respect to the Statement of the Case and Facts set forth in the Appellants' Brief. The State's Brief will address legal issues that are not fact dependent, i.e., whether the Court of Appeals and the County misconstrued language in Minn. R. ch. 4410 addressing cumulative impacts.

### SCOPE OF REVIEW

This Brief concerns the construction of two rules used in the EQB's environmental review program, specifically Minn. R. 4410.0200, subp. 11 and 4410.1700, subp. 7.B. Rules for construction of administrative rules are the same as the rules for statutory construction. *See* Minn. Stat. § 645.001 (2004). Statutory construction is a question of law, which this Court reviews de novo. *See Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998).

### ARGUMENT

**I. THE EQB'S EAW RULES REQUIRE AN RGU TO CONSIDER POTENTIAL CUMULATIVE IMPACTS IN AN EAW AND THE EQB RULES DO NOT REQUIRE A DETERMINATION THAT A SINGLE PROJECT MUST FIRST BE FOUND TO HAVE ACTUAL SIGNIFICANT ENVIRONMENTAL EFFECTS BEFORE A CUMULATIVE IMPACTS ANALYSIS IS REQUIRED.**

An RGU reviewing a project in an EAW must assess and consider cumulative impacts, i.e., the incremental effects of the project itself in addition to other past, present

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<sup>4</sup> *See, id.* at 3.

and reasonably foreseeable future projects. EQB's EAW rules do not contain a pre-condition to the RGU's obligation to conduct a cumulative impacts analysis; that is, there is no requirement that an RGU first find that any single project creates actual *significant* environmental effects as a pre-condition to conducting the required cumulative impacts analysis. These positions are clearly demonstrated in the history of the creation and application of the EQB rules. The State will address that rule history first and then address the application of the rules in this case.

**A. History Of The EQB Rules.**

The Minnesota legislature enacted MEPA in 1973, patterning it after the National Environmental Policy Act ("NEPA"), enacted in 1969. *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 323, n.28 (Minn. 1977). Minnesota courts have used federal law (i.e., NEPA), CEQ regulations adopted under NEPA, and cases from other jurisdictions to interpret MEPA. *See, e.g., Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457, 468 (Minn. 2002); *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 323, 325-27 (Minn. 1977); *Minnesota Public Research Interest Group v. Minnesota Environmental Quality Council*, 237 N.W.2d 375, 380-83 (Minn. 1975). This approach is consistent with longstanding Minnesota practice of looking to decisions made under federal and state statutes of a similar character or general purpose for the principle by which to construe Minnesota statutes. *Christgau v. Woodlawn Cemetery Ass'n, Winona*, 208 Minn. 263, 293 N.W. 619, 625 (1940); *Campbell v. Motion Picture Mach.*

*Operators' Union of Minneapolis*, 151 Minn. 220, 186 N.W. 781, 783 (1922); *State v. Duluth Board of Trade*, 107 Minn. 506, 121 N.W. 395, 399 (1909).

Under MEPA, “where there is a *potential* for significant environmental *effects*” resulting from an action, the action must be preceded by an environmental *impact* statement. See Minn. Stat. § 116D.04, subd. 2a (2004) (emphasis added); Minn. R. 4410.1700, subp. 1.

“In deciding whether a project has the *potential* for significant environmental *effects* the RGU shall compare the *impacts* that may be reasonably expected to occur from the project with the criteria [Minn. R. 4410.1700, subp. 7.A.-7.D.] in this part.” Minn. R. 4410.1700, subp. 6 (emphasis added). The four factors the RGU must consider in applying the standard are set out in Minn. R. 4410.1700, subp. 7. The second listed factor is “*cumulative potential effects* of related or anticipated future projects.” Minn. R. 4410.1700, subp. 7.B. (emphasis added). The EQB’s rules do not define the terms “effects” or “cumulative effects.” However, the rules do define the term “cumulative impact:”

“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.*

Minn. R. 4410.0200, subp. 11 (emphasis added).

The EQB’s rules and the CEQ environmental review regulations have many similarities. For example, the CEQ regulations require a finding of no significant impact

to avoid ordering an EIS. See 40 C.F.R. §§ 1501.4, 1508.13. The CEQ regulations also require consideration of *cumulative impacts* in making that decision. See 40 C.F.R. § 1508.27(b)(7); see also *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (discussing importance of cumulative impact analysis in NEPA-required environmental assessments). In determining whether a project will have a significant impact, the federal agency must consider the action in relation to other actions “[w]ith individually insignificant but cumulatively significant impacts.” *Id.*<sup>5</sup> CEQ defines “cumulative impact” in terms practically identical to those in the EQB rule:

"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.*

40 C.F.R. § 1508.7 (emphasis added).

In fact, the EQB made express its reliance on the federal environmental review program when, in its 1981 Statement of Need and Reasonableness (“SONAR”) supporting adoption of the cumulative impacts definition (Minn. R. 4410.0200, subp. 11), the EQB stated:

DISCUSSION: This definition is an adaptation of the Council on Environmental Quality definition found at 40 C.F.R. § 1508.7. The term is used in the current rules but is not defined therein. . . .

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<sup>5</sup> Under the CEQ regulations, the cumulative impacts analysis cannot be avoided by breaking the project down into small component parts. See 40 C.F.R. § 1508.27(b)(7).

*The term is used with regard to those cases where environmental review is more properly based on the summation of the impacts of individual projects as opposed to the impact of projects each taken individually.*

Appendix, App-9 (emphasis added).

In addition, the CEQ regulations use the terms “impacts” and “effects” interchangeably and to avoid any possible confusion of using both terms, the CEQ regulations expressly define them as synonymous: “*Effects and impacts as used in these regulations are synonymous. . . .*” See 40 C.F.R. 1508.8 (emphasis added).

Like the CEQ regulations, MEPA and the EQB rules use the terms “effects” and “impacts” synonymously and interchangeably. For example, the MEPA standard for assessing the need for an EIS uses both terms interchangeably and the statute uses the phrases “significant environmental effects” and “significant environmental impacts” synonymously in referring to the required analyses. See Minn. Stat. § 116D.04, subd. 2a (2004) and Minn. R. 4410.1700, subp. 6; see also, Minn. Stat. § 116D.04, subd. 2a(f) (2004) (referring to *impacts* in context of potential significant *effects*). The EQB’s EAW content rule dictates that the EAW must contain a quantification of a project’s physical *impacts* and contain major issue sections “identifying potential environmental *impacts*.” See Minn. R. 4410.1200, items C. and E. (emphasis added). In addition, the EIS decision rule addresses situations where information “about the potential for, or significance of, one or more possible environmental *impacts* is lacking.” See Minn. R. 4410.1700, subp. 2a. (emphasis added). Other rule provisions demonstrate EQB’s interchangeable

use of these terms. *See, e.g.*, Minn. R. 4410.0300, subp. 3 (purpose); 4410.0500, subp. 6 (potential impacts).

The EQB rules, like the CEQ regulations, also recognize that a cumulative impacts analysis is focused on the significance of the collective impacts of individual actions, even individually minor actions. A fundamental principle of cumulative impacts analysis is that the analysis is of the total environmental impact, that is, the individual effects of disparate past, present and foreseeable future projects may add up or interact to cause additional effects not apparent when evaluating only the effects of an individual project at one time.<sup>6</sup>

The EQB has historically interpreted Minn. R. 4410.1700, subp. 7.B. to require an RGU to conduct a cumulative impacts analysis in an EAW. For example, in its 1981 SONAR discussing the factor “cumulative potential effects of related or anticipated future actions,” the EQB stated:

In addition to the environmental *impacts* expected to result directly from a proposed activity in [this criterion], the RGU is required to make an assessment of how it relates to other activities. Certain types of environmental *impacts* may be properly assessed only when viewed in conjunction with *impacts* of other proximate or related activities. For a more complete understanding of the intent of this criterion, definitions of cumulative *effects* [sic], phased actions, and related action should be considered.

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<sup>6</sup> CEQ, *Considering Cumulative Effects* at 8-9. Cumulative effects may result from additive effects, or interactive effects where the net adverse environmental cumulative effect is greater than the sum of the individual effects. *Id.* at 9.

Appendix, App-11 (emphasis added).<sup>7</sup>

EQB's rule guides -- manuals that set forth EQB rule interpretations -- have also consistently interpreted subpart 7.B. to require a cumulative impacts analysis. In its 1989 EQB rule guide, EQB stated "[t]hat an RGU *always has an obligation to consider cumulative impacts* from other projects in determining the need for an EIS on any given project (*see part 4410.1700, subpart 7, item B*)."<sup>8</sup> In EQB's current 1998 rule guide, the EQB reiterates that long-standing interpretation in discussing the rules' cumulative impact considerations:

The rules contain the following provisions involving *cumulative impacts*:

EIS need decision criteria at part 4410.1700, subpart 7, item B. The second of four criteria is "*cumulative potential effects* of related or anticipated future projects." This criterion means that *cumulative impacts* must be weighed along with the project's direct *impacts* when deciding if an EIS is needed. It also implies that the RGU must take into account *cumulative impacts* when preparing the EAW so that sufficient information about *cumulative impacts* is recorded and available for determining the need for an EIS.

EQB, *Guide to Minnesota Environmental Review Rules* 5 (April 1998) (emphasis added).

Appendix, App-23. EQB's 2000 *EAW Guidelines* contain similar "cumulative impact" guidance to RGUs for filling out EQB's EAW form, item 29. *See* EQB, *EAW Guidelines*

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<sup>7</sup> The SONAR excerpt clearly shows EQB's interchangeable use of "effects" and "impacts." EQB's rules did not, in fact, have a definition of cumulative *effects* so that reference was likely directed at the cumulative *impact* definition.

<sup>8</sup> EQB, *Guide to the Rules of the Minnesota Environmental Review Program* 9 (June 1989) (emphasis added). Appendix, App-9. A similar declaration is found in the 1998 *Guide. Id.*, App-22.

- *Preparing Environmental Assessment Worksheets* 14 (February 2000). Appendix, App-31.

In addition, the 1998 *Guide's* glossary and the 2000 *EAW Guidelines* glossary define the phrase "cumulative effects" to mean "effects resulting from a project and other past, present and reasonably foreseeable future projects." Appendix, App-18 and 28. These EQB glossary definitions of "cumulative effects" track the EQB rule definition of cumulative impact. Compare Minn. R. 4410.0200, subp. 11.

Finally, the EQB's 1998 *Guide*, in the Cumulative Impacts section, again shows the federal-state program connection and interchangeable use of phrases "cumulative impacts" and "cumulative effects" as follows:

[T]he best source of guidance on cumulative impacts is the federal Council on Environmental Quality's *Considering Cumulative Effects under the National Environmental Policy Act*, available at <http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm>.

Appendix, App-23.

In accordance with MEPA and the EQB rules, the EQB has developed an EAW form to be used by RGUs. Minn. Stat. § 116D.04, subd. 5a(2) (2004); Minn. R. 4410.1300. The current EQB EAW form requires the RGU to conduct a cumulative impacts analysis at item 29 and uses the phrases "cumulative impacts" and "cumulative effects" interchangeably to address the analysis required in subpart 7.B:

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* . . . .

Appendix, App-37 (emphasis added).<sup>9</sup>

The EQB designed the environmental review rules and EAW form to ensure that RGUs assess not only the environmental impacts/effects directly attributable to the proposed project, but also the cumulative impacts/effects of other past, present and reasonably foreseeable future projects. Indeed, both the Minnesota Pollution Control Agency (“MPCA”) and the Minnesota Department of Natural Resources (“MDNR”) submitted comments stating that the County’s EAWs did not adequately address cumulative impacts, in light of the high density of existing gravel mining operations near the proposed gravel mines. *See* Appellants’ Appendix (“App. App.”) A-65 and A-70. These MPCA and MDNR positions strongly demonstrate a multi-agency interpretation of the EQB’s rules and the EAW form consistent with the EQB’s longstanding interpretations.

Minnesota courts have also interpreted EQB’s subpart 7.B. requirements consistent with the EQB’s longstanding interpretations. In *Pope County Mothers v. Minnesota Pollution Control Agency*, 594 N.W.2d 233 (Minn. App. Ct. 1999), the court applied EQB’s “cumulative impact” definition in finding that MPCA had failed to consider the

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<sup>9</sup> The EAW form uses the term “impact” in numerous items where the RGU is assessing the project’s environmental effects. *See* Appendix, App-34-37 (items 11.a.-b., 12, 21-26, 28, and 30-31).

“cumulative environmental effects” of existing feedlot sites. *See id.* at 237. In *White v. Minnesota Department of Natural Resources*, 567 N.W.2d 724 (Minn. Ct. App. 1997), the court used the phrases “cumulative effects” and “cumulative impacts” synonymously in analyzing MDNR’s EAW regarding a trail system. *See id.* at 731. In *Berne Area Alliance for Quality Living v. Dodge County*, 694 N.W.2d 577, (Minn. Ct. App. 2005), the subpart 7.B. provisions were equated to the EQB “cumulative impact” definition. *See id.*, at 583 (Minge, J. concurring). In the immediate case, the court implicitly found that the County had done a cumulative impacts analysis that “consider[ed] the cumulative effects of past, present and anticipated future projects.” *See Citizens Advocating*, 2005 WL 44823, at \*3 (emphasis added). Appendix, App-3.

In summary, cumulative impacts analysis in environmental review and planning is important for determining all of the environmental consequences of a proposed action (and its alternatives in EISs), determining the scope of environmental documents, and designing mitigation of identified environmental consequences. Environmental degradation from cumulative impacts has been succinctly described as “the tyranny of small decisions.”<sup>10</sup> Minor projects in areas like urban sprawl, timber harvesting or wetland draining and filling, while individually insignificant, may have significant cumulative impacts for present and future generations. MEPA’s ability to protect Minnesota’s natural environment would be substantially hindered if EQB’s rules were

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<sup>10</sup> CEQ, *Considering Cumulative Effects* at 1 (citing W.E. Odum, *Environmental degradation and the tyranny of small decisions*, *Bioscience* 33:728-729 (1982)).

interpreted to limit or exclude an RGU's comprehensive consideration of cumulative impacts.

**B. The County And The Court Of Appeals Erred By Construing EQB Rules To Require An Initial Determination That Any Project Must Have Actual Significant Environmental Effects Before A Cumulative Impacts Analysis Is Required.**

Nothing in EQB's EAW rules, Minn. R. 4410.1700, subps. 6-7, or in EQB's cumulative impact definition requires an initial determination that any project must have actual significant environmental effects before the RGU is required to conduct the cumulative impact analysis under subpart 7.B. To the contrary, EQB's rules, like the CEQ regulations, expressly recognize that cumulative impacts can result from "individually minor but collectively significant projects" taking place over time. *See* Minn. R. 4410.0200, subp. 11. Despite these provisions, both the County and the Court of Appeals concluded that actual significant impacts must exist from at least one project before the RGU is required to do a cumulative impacts analysis.

The County prepared responses to public comments, including comments from MPCA and MDNR, about the inadequate cumulative impacts analysis in each EAW. Administrative Record ("AR") 128-35 and 140-47.<sup>11</sup> In its responses, the County determined that no cumulative impacts existed applying the following interpretation of EQB's cumulative impacts criteria:

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<sup>11</sup> The County's resolution for a negative declaration (i.e., no EIS) expressly stated that the responses to public comments constituted, in part, the factual bases for its findings and conclusions. *See, e.g.* App. App. A-25A.

“ . . . 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. . .”

AR 135 and 147; *see also* App. App. A-63.

The district court rejected the County’s interpretation and found that the County “mischaracterized the standard by which cumulative impacts as possibly being substantial are to be measured, *see* Minn. R. 4410.0200, subp. 11, . . .” App. App. A-19. However, the Court of Appeals concluded:

. . . It [the County] 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.

*See Citizens Advocating*, 2005 WL 44823, at \*3 (emphasis added). Appendix, App-3.

Both the County and the Court of Appeals misapplied EQB’s rules because those rules do not require any such determination or pre-condition before an RGU is required to conduct a cumulative impacts analysis under subpart 7.B. The district court correctly rejected the County’s interpretation but the County’s mischaracterization is perpetuated by the Court of Appeals’ conclusion that the County did not misapply the law.

This Court should reject these determinations as both an erroneous interpretation of EQB rules and an erroneous construction and application of cumulative impact principles. These determinations, if upheld, would eviscerate cumulative impact considerations in the EQB’s environmental review program because no cumulative impacts analysis would be done unless some actual significant effects from at least one

project existed. There is absolutely no evidence that EQB's rules intended such absurd and unreasonable results.<sup>12</sup>

The County and the Court of Appeals also misapplied the MEPA standard for determining the need for an EIS, that is, whether there is the *potential for* significant environmental effects. See Minn. Stat. § 116D.04, subd. 2a (2004) and Minn. R. 4410.1700, subps. 1 and 6; see also Minn. R. 4410.1700, subp. 7.B. (cumulative *potential* effects). Here, the County read out of existence the lower MEPA "potential for" threshold by determining that *actual* significant effects must exist before any cumulative impacts analysis is required. The County's erroneous interpretation is perpetuated by the Court of Appeals' conclusion that the County did not misapply the law. This Court should also reject these erroneous interpretations of MEPA's lower "potential for" threshold for requiring an EIS.

**II. THE COUNTY MISCONSTRUES EQB RULES BY ARGUING THAT CUMULATIVE IMPACTS AND CUMULATIVE EFFECTS ARE NOT SYNONYMOUS AND THAT MINN. R. 4410.1700, SUBPART 7.B. DOES NOT REQUIRE A CUMULATIVE IMPACTS ANALYSIS.**

In this case, the Appellants have argued that the EQB's EAW/EIS decisional criteria in Minn. R. 4410.1700, subp. 7.B., require a cumulative impacts analysis. In the appellate proceeding, the EQB submitted an amicus brief supporting that argument based on EQB's longstanding interpretations of subpart 7.B. The County argued, in response, that subpart 7.B. does not require a cumulative impacts analysis because cumulative

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<sup>12</sup> In ascertaining EQB's intentions, the Court must presume EQB did not intend a result that is absurd or unreasonable. See Minn. Stat. § 645.17(1) (2004).

impacts and the cumulative effects provisions of subpart 7.B. are not synonymous.<sup>13</sup> In the appellate proceeding, the County also argued that any analysis under subpart 7.B. should not address effects from past or present (e.g. pre-existing) projects.<sup>14</sup> Under its narrow interpretation, the County would apparently not evaluate any cumulative effects from existing gravel mines (e.g., both abandoned and currently operating sites).

The County's arguments are directly contrary to EQB's cumulative impact rules, the EQB's 1989 and 1998 guides reflecting the EQB's longstanding interpretation of subpart 7.B., EQB's 2000 *EAW Guidelines*, and EQB's EAW form. *See infra*, pp. 5-11. As demonstrated previously, the EQB has consistently and historically interpreted subpart 7.B. to require a comprehensive cumulative impacts analysis that considers the incremental effects of the proposed project in addition to other past, present and reasonably foreseeable future projects. *See infra*, pp. 8-11. In addition, MEPA, the EQB's rules, the past and current EQB guides and guidelines, and the EAW form use the terms "effect" and "impact" interchangeably and synonymously. *See infra*, pp. 5-11. In fact, the *EAW Guidelines* for sand and gravel mining projects suggest that the cumulative impacts analysis in the EAW form, item 29, discuss future mine expansions as well as

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<sup>13</sup> The district court, without the benefit of any EQB amicus participation, assumed that EQB made a conscious decision to interpret and apply the terms "effect" and "impact" differently. App. App. A-16. However, the district court did find that a cumulative impacts analysis was required under subpart 7.A. (type, extent and reversibility of environmental effects) and determined that the County's EAWs did *not* cover the issue of cumulative impacts in any meaningful manner. *Id.*, at 16 and 19-20.

<sup>14</sup> *See* Appellant Kandiyohi County's Reply Brief (June 28, 2004), pp. 2-4.

“how the mine relates to past mining in the vicinity with respect to cumulative environmental impacts.” See *EAW Guidelines* 15. Appendix, App-32. This Court should accord substantial deference to these longstanding EQB interpretations, interpretations that are integral parts of MEPA’s environmental review and planning program.<sup>15</sup>

Subpart 7.B. is consistent with the provisions of the cumulative impact definition. In preparing an EAW, the RGU is required to factor in the impacts of connected and phased actions as part of the “single project” to be evaluated in the EAW. See Minn. R. 4410.1700, subp. 9. Under the related provisions of subpart 7.B., the RGU would assess independent projects (i.e., projects that are not connected or phased actions) with potential cumulative impacts on the same geographic area during similar times. Compare Minn. R. 4410.2000, subp. 5.<sup>16</sup> Anticipated future projects are also covered by subpart 7.B. and the cumulative impact definition. In this manner, the criteria in

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<sup>15</sup> Minnesota courts give deference to an agency’s longstanding interpretation of its own statutes and rules. *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 660 N.W.2d 427, 433 (Minn. Ct. App. 2003); see also *Goodman v. State, Department of Public Safety*, 289 N.W.2d 559 (Minn. 1979) (courts accord substantial consideration to the interpretation of administrators working with the problem sought to be remedied).

<sup>16</sup> In its 1988 SONAR discussing this subpart, the EQB noted that this related action provision addressed independent projects, that is, neither connected actions or phased actions. See EQB SONAR 15 (August 3, 1988). Appendix, App-41. Prior to the 1988 rule amendment deleting the definition, the EQB rules had a definition of “related action” that meant, in relevant part, two or more projects affecting the same geographic area that were planned to occur or would occur at the same time. See Minn. R. 4410.0200, subp. 72 (1983). Related actions did not necessarily have to be proposed by the same person and related actions did not necessarily have to be the same type of action. See EQB 1981 SONAR at 25. Appendix, App-10.

subpart 7 comprehensively address the project's incremental impacts in addition to the other past, present and reasonably foreseeable future projects regardless of what person undertakes the other projects. *See* Minn. R. 4410.0200, subp. 11 (cumulative impact).<sup>17</sup>

The County's narrow interpretation of subpart 7.B. would lead to absurd and unreasonable results. Under that interpretation, the EAW would apparently not evaluate the potential for significant impacts from at least past or present (pre-existing) projects in the area. This would eliminate the "impact" considerations of an entire subset of projects, like the abandoned and existing gravel mine operations in this case, that under the principles of cumulative impacts analysis would potentially create effects in proximity (e.g. location and timing) to the proposed project. This interpretation, if upheld, would eviscerate cumulative impact considerations in EAWs because entire potential impacts would forego an RGU's consideration and evaluation. There is absolutely no evidence that EQB's rules or EQB intended such an absurd and unreasonable result.

The County, on appeal, argued that the district court's holding regarding "cumulative impacts" of other past and existing gravel operations was directly contrary to the court's determination regarding the application of subpart 7.B. The County's only support for its argument was to an unpublished decision, *EIO, Inc. v. Minnesota Pollution Control Agency*, 1998 WL 389079 (Minn. Ct. App. July 14, 1998), where the court

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<sup>17</sup> The scoping decision for an EIS must identify "potential impact areas resulting from the project itself and from related actions." *See* Minn. R. 4410.2100, subp. 6, item F. The 1998 *Guide* specifically cites this provision in discussion about preparing cumulative impact analyses. Appendix, App-44.

limited its review of subpart 7.B. to the consideration of effects from future operations only. *See id.*, at \*3. Appendix, App-44. The court found that MPCA had “properly considered the cumulative effect of this project [Scherping feedlot]” because MPCA considered both phases of Scherping’s project and there was no evidence of future operations. *Id.* The court did not address the cumulative impact definition in Minn. R. 4410.0200, subp. 11. As a result, the *EIO* decision has no persuasive effect.

The State urges this Court to reject the County’s argument as directly contrary to the EQB’s longstanding rule interpretation.

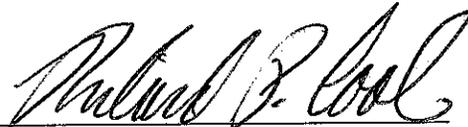
### CONCLUSION

For the foregoing reasons, the State respectfully urges this Court to reject the County and the Court of Appeals’ misapplication of EQB’s cumulative impact rules and to reject the County’s argument that there is a distinction with a difference between the construction and application of cumulative impacts and cumulative effects.

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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).