

Nos. A04-886 and A04-890

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State of Minnesota  
**In Supreme Court**

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

*Respondents.*

vs.

Citizens Advocating Responsible Development, David Carlson,  
Anna Becker, James Becker, Barbara Bengston, Roger Bengston,  
David Dunn, Judy Dunn, Robert Foiley, J. Arthur Haug, Mary Haug,  
Beth Johnston, Anthony Ogdahl, Bonnie Ogdahl, Marie Ostby,  
Kimberly M. Becker Stenglein, Ray G. Stenglein, Mary Lou Werner,  
Chris Woltjer, Mark Woltjer, Connie Zabel, Mark Zabel, David R. Zane,

*Appellants.*

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**BRIEF OF AMICUS CURIAE  
ASSOCIATION OF MINNESOTA COUNTIES**

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**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF AMICUS CURIAE.....	1
STATEMENT OF LEGAL ISSUE.....	2
SUMMARY OF THE CASE AND FACTS.....	3
STANDARD OF REVIEW.....	3
ARGUMENT.....	3
I.    THE PHRASE “CUMULATIVE POTENTIAL EFFECTS OF RELATED OR ANTICIPATED FUTURE PROJECTS” SHOULD NOT BE CONSIDERED THE SAME AS THE DEFINITION OF “CUMULATIVE IMPACTS” .....	3
CONCLUSION.....	9

## TABLE OF AUTHORITIES

	<u>Page</u>
Civil Appellate Procedure Rule 129.03 .....	1
Minn. Stat. § 116D.04 (2004).....	3, 4, 7
Minn. Stat. § 116D.045 (2004) .....	5, 7
Minn. Stat. § 375.163 .....	1
Minn. Stat. § 645.001 (2004) .....	2, 3
Minn. Stat. § 645.16 (2004) .....	6
Minn. Stat. § 645.17(2) (2004) .....	6
Minn. R. 4410.0200, subp. 11 (2003) .....	1, 2, 3, 6
Minn. R. 4410.110, subps. 5 & 6 (2003) .....	4
Minn. R. 4410.1400 .....	4
Minn. R. 4410.1700, subp. 1.....	1
Minn. R. 4410.1700, subp. 7 (2003) .....	1, 2, 3, 5, 6
Minn. R. 4410.1700, subp. 11 (2003) .....	2
<i>Harris v. County of Hennepin</i> , 679 N.W.2d 728 (Minn. 2004) .....	2, 3
<i>State v. Loge</i> , 608 N.W.2d 152 (Minn. 2000) .....	6
<i>Trout Unlimited, Inc. v. Minnesota Dep't of Agriculture</i> , 528 N.W.2d 903 (Minn. App. 1995) .....	5
<i>U.S. Specialty Ins. Co. v. James Courtney Law Office</i> , 662 N.W.2d 907 (Minn. 2003) .....	6

*Vlahos v. R&I Construction of Bloomington, Inc.*,  
676 N.W.2d 672 (2004) ..... 6

## STATEMENT OF AMICUS CURIAE

The Association of Minnesota Counties (“AMC”) submits this amicus brief to discuss whether the phrase “cumulative potential effects of related or anticipated future projects” under Minnesota Rule 4410.1700, subpart 7 (2003) should be considered synonymous with the definition of “cumulative impacts” under Minnesota Rule 4410.0200, subpart 11 (2003). AMC has a public interest in this appeal because its outcome will directly impact the policies and practices of every county with respect to the processing of zoning applications and the management of development.<sup>1</sup>

AMC is a voluntary association of all 87 counties in the State of Minnesota organized pursuant to Minnesota Statute § 375.163. AMC represents the position of Minnesota counties before the State and Federal Government agencies and the public. Minnesota counties are routinely appointed as the responsible government unit (“RGU”) vested with the responsibility under the Minnesota Environmental Protection Act (“MEPA”) to determine whether a project “has the potential for significant environmental effects.” Minn. R. 4410.1700, subp. 1.

Kandiyohi County has properly explained that the decisional criteria of “cumulative potential effects of related or anticipated future projects” is different

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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 contribution to the preparation or submission of this brief. Minn. R. Civ. App. P. 129.03.

from “cumulative impacts,” which encompasses “other past, present, and reasonably foreseeable future projects regardless of what person undertakes the other projects.” Minn. R. 4410.1700, subp. 11. If the position of the Appellants is adopted, the scope of environmental review will be greatly expanded without proper rulemaking. Minnesota counties, and all RGUs for that matter, will be faced with the potentially monumental task, and associated cost, of collecting the data required for this type of review. Such a broad review will have a substantial impact on Minnesota counties’ resources. Moreover, the analysis required in any given case may well be beyond the in-house expertise of county departments.

#### **STATEMENT OF LEGAL ISSUE**

This amicus brief addresses a single issue: whether the phrase “cumulative potential effects of related or anticipated future projects” under Minnesota Rule 4410.1700, subpart 7 (2003) should be considered synonymous with the definition of “cumulative impacts” under Minnesota Rule 4410.0200, subpart 11 (2003).

Most apposite cases, statutes or rules:

Minn. R. 4410.1700, subp. 7 (2003);  
Minn. R. 4410.0200, subp. 11 (2003);  
Minn. Stat. § 645.001 (2004); and,  
*Harris v. County of Hennepin*, 679 N.W.2d 728 (Minn. 2004).

## **STATEMENT OF THE CASE AND FACTS**

AMC adopts the Statement of the Case and Statement of Facts in Respondent Kandiyohi County's Brief. The factual and procedural aspects of this case, however, do not impact the legal issue involving AMC's amicus position.

## **STANDARD OF REVIEW**

AMC's brief focuses on the interplay between Minnesota Rules 4410.0200, subp. 11 and 4410.1700, subp. 7(B), as well as the effect it will have on counties' ability to financially and administratively handle requests for environmental review. The rules of construction and interpretation 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 and is reviewed de novo. *Harris v. County of Hennepin*, 679 N.W.2d 728, 731 (Minn. 2004).

## **ARGUMENT**

### **I. THE PHRASE "CUMULATIVE POTENTIAL EFFECTS OF RELATED OR ANTICIPATED FUTURE PROJECTS" SHOULD NOT BE CONSIDERED THE SAME AS THE DEFINITION OF "CUMULATIVE IMPACTS."**

#### **A. MEPA statutory and regulatory background.**

Pursuant to MEPA, the Environmental Quality Board (EQB) has promulgated rules concerning the environmental review of development projects. *See* Minn. Stat. § 116D.04; Minn. R. 4410.1000-4410.3000 (2003) (setting out general process from citizens' petition through EIS preparation). There are various

means to initiate an environmental review: 1) mandatory review; 2) discretionary review; and 3) a petition signed by at least 25 individuals. *See* Minn. R.

4410.1000-4410.1100. Upon receipt of the petition, the EQB designates a responsible governmental unit (“RGU”) to determine whether or not an environmental assessment worksheet (“EAW”) is required. Minn. R. 4410.110, subps. 5 & 6 (2003). An EAW is a “**brief document which is designed to set out the basic facts** necessary to determine whether an environmental impact statement is required for the proposed action.” Minn. Stat. § 116D.04, subd. 1a(c) (2004) (emphasis added).

Once it is determined an EAW is necessary, the RGU then has the project proposer submit data regarding the project. *See* Minn. R. 4410.1400. When the RGU deems the submittal for the EAW complete, specific steps with time periods are provided to complete the EAW process. From the date the submittal is deemed complete, the RGU has up to 75 days, not including adequate time to publish notice and to hold public meetings, to complete the EAW process. *See* Minn. R. 4410.1400-4410.1600.

Upon completion of the EAW process, the RGU must consider four criteria in determining whether a project has the potential for significant environmental effects and warrants an environmental impact statement (“EIS”):

1. Type, extent, and reversibility of environmental effects;

2. **Cumulative potential effects of related or anticipated future projects;**
3. The extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority; and
4. The extent to which environmental effects can be anticipated and controlled as a result of other environmental studies undertaken by public agencies or the project proposed, or of EIS's previously prepared on similar projects.

See Minnesota Rules 4410.1700, subp. 7 (emphasis added.)

The EIS is the primary document by which agencies use to meet MEPA's statutory goals of careful and informed environmental decision making. An EAW cannot substitute for "the more extensive analysis contemplated by an EIS." *Trout Unlimited, Inc. v. Minnesota Dep't of Agriculture*, 528 N.W.2d 903, 909 (Minn. App. 1995).

The financial resources for the preparation of the EAW and EIS are significantly different. Minnesota Statute § 116D.045 (2004), indicates the project proposer is responsible for all reasonable costs associated with the preparation and distribution of the EIS. There is, however, no similar cost shifting mechanism for the EAW process. Therefore, Minnesota counties and their taxpayers must pay for all administrative costs associated with the preparation of the EAW.

**B. “Cumulative impact of related or anticipated future projects” is not synonymous with “cumulative potential effect.”**

Appellants contend these phrases should be considered synonymous. This position, however, violates the statutory presumption the legislature and state agencies intend an entire statute or rule to be effective and certain. *See* Minn. Stat. § 645.17(2) (2004); *State v. Loge*, 608 N.W.2d 152, 158 (Minn. 2000). The legislature and state agencies would not have employed different terms in different subdivisions of the statute or in different subparts of a rule if it had intended those provisions to have the same effect. *See Vlahos v. R&I Construction of Bloomington, Inc.*, 676 N.W.2d 672, 677 n. 4 (2004).

Furthermore, when interpreting a statute, a court must first look to the language of the statute to determine its meaning and “ascertain and effectuate the intent of the legislature.” Minn. Stat. § 645.16 (2004). A court “must give a plain reading to any statute it construes, and when the language of the statute is clear, the court must not engage in any further construction.” *U.S. Specialty Ins. Co. v. James Courtney Law Office*, 662 N.W.2d 907, 910 (Minn. 2003) (citations omitted).

Here, the plain language of Minnesota Rule 4410.0200, subpart 11 and Minnesota Rule 4410.1700, subpart 7 indicate the two phrases in question are distinctly different. They are different because they serve two very different purposes. “Cumulative potential effect” comes into play during the EAW process

when a “brief document” containing only “basic facts” is required. *See* Minn. Stat. § 116D.04, subd. 1a(c) (2004). Therefore, it is appropriate for the RGU to only consider “related or anticipated future projects.” To require a more in-depth review would transform an EAW into a more complex environmental review document which would overly burden county financial and administrative resources. Conversely, the definition of “cumulative impacts” appropriately applies to the EIS stage because it involves a “more extensive analysis” and because it allows counties to recoup the large financial and administrative costs associated with it. *See* Minn. Stat. § 116D.045 (2004). If the phrases are found to be synonymous and are both applied to the EAW process, counties, with their limited financial and administrative resources, will be ill-equipped to properly process the expansive environmental review required to comply with such an interpretation of the rules.<sup>2</sup>

Recently, environmental review has become a hot bed of litigation as counties, and other municipalities, have struggled to comply with the nuances and complexities of the law. While counties have worked hard to comply with the rules, the interpretation suggested by Appellants would simply prove unmanageable for most counties with their limited resources. AMC requests the

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<sup>2</sup> Some rural Minnesota counties only have two people, the zoning administrator and an assistant, to process all zoning and environmental issues.

Court to carefully consider the ramifications to public entities if such an interpretation is adopted.

Conceivably, even the smallest project may trigger a broad review for projects which are not even contemplated. For instance, one farmer's decision to build a small feedlot in an agricultural district could trigger a broad review of all past or future potential agricultural activities related to feedlots. The pitfalls of an expansive interpretation are significant for the unwary. In the present case, the Court of Appeals utilized the appropriate standard of review by evaluating the existence of related or anticipated future projects and determined none existed. If this analysis is rejected, the necessary environmental review could be endless and result in even more litigation, further draining the resources of Minnesota counties.

The opening of a single gravel pit in an appropriately zoned area could also raise significant issues. Since counties have maps showing likely areas of the county where gravel deposits may exist, it could be argued the opening of one gravel mine could spur others to open up. Without further applications or at least some evidence of future action, how could counties determine the scope of the review for this single gravel mine when no others are contemplated or planned?

Shoreland is also an area of significant litigation. What if a developer wants to build on a shallow prairie pothole lake which is subject to degradation from development. How would a county study the effects on the lake, since there is no

good information available at this time, nor in the foreseeable future, advising counties of how much development and of what type can occur before a negative impact is experienced on shallow lakes?

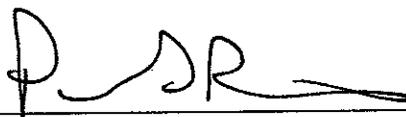
A broad interpretation of the rules would overly complicate the environmental review process and result in even more litigation. The Court should adopt an approach to environmental review which does not create an unworkable situation for counties with limited financial and administrative resources.

### CONCLUSION

AMC requests the Court to affirm the Court of Appeals' decision and reject the expansive interpretation suggested by Appellants. To hold otherwise would make an EAW more than a brief document with basic facts and would unduly burden counties' financial and administrative resources.

Respectfully submitted,

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