

A05-1029

State of Minnesota
In Court of Appeals

Minnesota Center for Environmental Advocacy,
Appellant,

v.

City of St. Paul Park, R. Gordon Nesvig
and D. R. Horton, Inc.,
Respondents.

**APPELLANT MINNESOTA CENTER FOR
ENVIRONMENTAL ADVOCACY'S BRIEF**

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STATEMENT OF ISSUES

Issue: Whether the City of St. Paul Park's (the "City") decision that the Alternative Urban Areawide Review ("AUAR") for the project that is the subject of this action is adequate was correct under Minnesota law when the AUAR failed to analyze cumulative impacts of the project outside the project boundaries, especially cumulative impacts to the Mississippi River Critical Area?

District Court decision: The Washington County District Court, Hon. J.E. Cass presiding, found that the City's decision on the adequacy of the AUAR was not contrary to the law and facts, including the law regarding examination of cumulative impacts.

Most apposite cases, statutes or rules: Minn. Stat. § 116D. 04, subd. 4a (2004); Minn. R. 4410.3610 (2003); Minn. R. 4410.0200, subp. 11 (2003); Minn. R. 4410.1700, subp. 7.B (2003); *Trout Unlimited v. Minnesota Dept. of Agriculture*, 528 N.W.2d 903 (Minn. Ct. App. 1995).

STATEMENT OF THE CASE

This case involves environmental review of a proposed mixed use development primarily in Grey Cloud Island Township, within the Mississippi River Critical Area. Respondent R. Gordon Nesvig has been and is the owner of the property in question. D.R. Horton, Inc. ("Horton") is an interested party in the development and the environmental review that is the subject of this action. Some of the Project property is located in the City of St. Paul Park (the "City"). The City was the Responsible Governmental Unit ("RGU") for an Alternative Urban

Areawide Review (“AUAR”) of the Project by virtue of the terms of a now-expired Settlement Agreement.¹

By resolution dated March 3, 2003, the City ordered preparation of the AUAR. (R. 5129)². The City published notice of the availability of the draft AUAR for comment in May of 2003. (R. 5000 et seq.) Minnesota Center for Environmental Advocacy (“MCEA”) submitted comments (R. 5997 and Appellant’s Appendix, hereinafter “App.” at 1), as did the Minnesota Department of Natural Resources (“DNR”), the Metropolitan Council, the National Park Service (“NPS”), Friends of the Mississippi River, and a number of additional citizen groups, organizations and government entities. (See R. 5968-6068 and in part, App. 5). The City revised the AUAR and published a proposed final AUAR on November 6, 2003. (R. 5189). Again, DNR objected to the AUAR. (R. 5560; App. 23). After a number of meetings and discussions, DNR withdrew its formal objection, but continued to state its displeasure and discomfort with the AUAR and the manner in which it was used. (R. 5624; App. 27). DNR’s withdrawal

¹ The City was the Responsible Governmental Unit (“RGU”) based on a Settlement Agreement that was allowed to expire. Pursuant to Minnesota Rules, the RGU for this Project, absent the Settlement Agreement and the expected annexations thereunder, would be Grey Cloud Island Township as the governmental entity with the most authority over the whole of the Project area. Minn. R. 4410.0500, subpt. 5 (2003) and 4410.0200, subpt. 75 (2003).

² The Record in this case consists of all pleadings and filings with the district court. No transcript has been ordered as the matter before the district court was a summary judgment review of the record. Because under Rule 111.01, Minn. R. Civ. App., the record is not transmitted until 10 days after this brief is filed, appellant cites to the record using pagination originally provided by the City with the notation “R.”. For items submitted directly to the district court, appellant cites the name of the item.

letter also noted that DNR would require additional environmental review of any proposed “mitigation” that involved changing the rural open space designation for the Mississippi Critical Area. *Id.* Upon withdrawal of DNR’s objection, the City approved the AUAR on May 17, 2004. (R. 5625).

MCEA commenced suit against the City, Nesvig, and Horton, on or about June 11, 2004. (App. 30).³ The parties filed cross motions for summary judgment on the adequacy of the AUAR, commencing in December of 2004. (App. 63). The Washington County District Court, Hon. J.E. Cass presiding, heard the motions on January 21, 2005. The District Court issued its order for judgment on April 21, 2005, denying MCEA’s motions, granting summary judgment in favor of the City, Nesvig, and Horton, and finding that the City’s approval of the AUAR was not incorrect under the law. (App. 117). MCEA filed this appeal on May 20, 2005 and the matter is now pending before this Court. (App. 126).

STATEMENT OF FACTS

The Project Site

This case is about the 667-acre River’s Edge Development Project (the “Project”) located primarily in Grey Cloud Island Township, with a portion located in the City, along the east bank of the Mississippi River in southern Washington County. The area has remained largely rural until this time and, while

³ The complaint included causes of action regarding the legality of the Settlement Agreement for annexation of the Township property, the legality of using an AUAR for the Project, and claims under the Minnesota Environmental Rights Act, Minn. Stat. ch. 116B (2004). Pursuant to agreements between the parties, claims other than those relating to the adequacy of the AUAR were dismissed.

impacted by humans, has also retained in many respects a natural character with a variety of rare or increasingly rare habitats. (R. 5659 et seq., 5797, 5799). These include varieties of prairie and oak savanna habitats as well as bluffs, floodplain forest, and Mississippi River backwaters. (R. 5133, 5659 et seq.). DNR and the National Park Service (“NPS”) identified the bluffs at the Project area as unique in that they are the last place bluffs of that nature to appear on the Mississippi until Iowa. (R. 6059). The area is also within the Mississippi National River and Recreation Area, (“MNRRA”) a unit of the National Park System which is a 72 mile, 54,000 acre corridor from Dayton to Hastings Minnesota. (R. 5722, 6033). The NPS describes the MNRRA as designated in recognition of the unique scenic, recreational, natural, cultural and economic value of the corridor. (R. 6033).

The area is home to nesting bald eagles⁴ and to two endangered and one threatened species of mussels. (R. 5134). The diversity of habitat is important to the support of migrating waterfowl and warblers and many other bird species. (R. 5561, 5619, 5938-39, 6004). The Project is part of the larger Mississippi Flyway corridor for migrating birds of many species. (R. 5671, 5938, 6004).

The Project area is part of the unique geologic features found in southeast Minnesota where seeps, springs and sinkholes form connections between surface and groundwater as demonstrated by seeps and springs from the bluff into the Mississippi River at the Project location. (R. 6005, 6050-51). The Project

⁴ Bald eagles are a species of special concern in Minnesota and are federally listed as threatened. (R. 5133, 5668).

property is listed as an area where the Jordan-Prairie du Chien aquifer is highly sensitive. (R. 5822).

The Mississippi River Critical Area

A large portion of the Project property lies within the designated Mississippi River Critical Area. (“Mississippi Critical Area”). The Mississippi Critical Area consists of the portion of the Mississippi River and its adjacent lands forming a corridor through the larger Twin Cities metropolitan area and beyond. The Mississippi Critical Area was designated under the Critical Areas Act of 1973 and the Mississippi Critical Area continues to be administered by DNR pursuant to the Act, Executive Order, and action by the Metropolitan Council. (R. 5684, 6000; App. 127). The purpose of the critical area designation is to protect and preserve a unique and valuable resource, to prevent and mitigate irreversible damage to the resource, to preserve and enhance its natural, aesthetic, cultural and historical value, and to protect and preserve the biological and ecological functions of the corridor. (*Id.*; App. 140). The purpose and intent of the critical areas designation is echoed in the National Park plans and guidance, recognizing the importance of the designated area to wildlife and recreation. (R. 6033-34, 6036).

The portion of the Project within the Mississippi Critical Area is Rural Open Space District, Executive Order 79-19, representing the highest level of protection within the Mississippi Critical Area. (R. 6000; App. 140). Rural Open Space Districts are intended to be used and developed to preserve their open, scenic, and natural characteristics and ecological and economic functions. *Id.*

In the Metropolitan Council's 2030 Regional Development Framework (the "Framework") the Metropolitan Council also recognizes the statewide and regional importance of the Mississippi River corridor and its designation as a state critical area. (R. Erkel Aff., Exhibit A, pp. 2-4; App. 226). The Framework's goals recognize that preserving vital natural areas, including the river, is essential to the region's quality of life and economic well-being, (R. Framework, p. 5; App. 231), and strongly recommends that the corridor be maintained as a rural open space district receiving the highest protection from urban development and preserving opportunities to restore habitats within the subject area. "It is vital that these cities will make efficient use of infrastructure and develop in a manner that conserves natural features. . . ." (R. Framework, p. 6; App. 232). Policy statement number 4, repeated throughout the document, is to work to conserve, protect *and enhance* the *region's* vital natural resources. (*See e.g.*, R. Framework, p. 23; App. 237) (emphasis added). The Mississippi Critical Area, and portions of this Project, are those regionally significant and vital natural resources.

Almost all the comments submitted on the AUAR raised the fact of the Project being within the Mississippi Critical Area, the importance of the Mississippi Critical Area both locally and regionally, and raised a variety of potential impacts on the Mississippi Critical Area, locally and regionally.

The Project Development and AUAR

Respondents propose a mixed residential and commercial development on the 667 acres. (R. 5631). This will entail converting the area to numerous

buildings, roads, parking areas, stormwater treatment ponds, trails, and lawns. *Id.* While the size of the development dictated a mandatory Environmental Impact Statement (“EIS”) under Minn. R. 4410.4400, subpt. 14 (2003), Horton requested and the City approved preparation of an AUAR as an alternative. (R. 5844). An AUAR is an alternative form of environmental review recognized by Minnesota Rules, and which the Rules require to follow the form of an Environmental Assessment Worksheet (“EAW”) and to provide the “level of information and analysis of an EIS”. Minn. R. 4410.2300 (2003). The AUAR did not examine cumulative impacts of the Project, particularly to the Mississippi Critical Area, outside the Project’s specific boundaries. (R. 5735, 5582). The AUAR did not mention the Mississippi River Critical Area or any connection to it until 47 pages into the document at which point it refers only to the need to “mitigate” for the impacts to the rural open space requirements for the Mississippi Critical Area by changing the designation and to allow for more intensive development. (R. 5583, 5684, 5688).

MCEA and others objected to the failure to conduct cumulative impacts analysis, including failure to analyze the impact of changing the Rural Open Space designation as part of the so-called mitigation plan. (R. 5619, 6061). Horton and the City indicated reliance on EQB Guidance when noting their positions that cumulative impacts analysis was unnecessary in the AUAR. (R. 5735, 5582).

ARGUMENT

I. THE STANDARD OF REVIEW.

A. A Court Will Overturn A Decision That Is Based Upon An Error Of Law Or That Is Arbitrary And Capricious.

Pursuant to Minn. Stat. § 116D.04, subd. 10 (2004), an RGU's decisions regarding the type, scope, or adequacy of environmental review, may be reviewed by declaratory action in the district court. A court will overturn the RGU's decision if that decision is based upon an error of law, is arbitrary or capricious, or is unreasonable. *In the Matter of City of Owatonna's NPDES/SDS Proposed Permit Reissuance for the Discharges of Treated Wastewater*, 672 N.W.2d 921, 926 (Minn. Ct. App. 2004); *Pope County Mothers and Others v. Minnesota Pollution Control Agency*, 594 N.W.2d 233, 239 (Minn. Ct. App. 1999); *Trout Unlimited v. Minnesota Dept. of Agriculture*, 528 N.W.2d 903, 907 (Minn. Ct. App. 1995). A decision is arbitrary and capricious if, among other considerations, the RGU failed to consider an important aspect of the problem. *Trout Unlimited*, 528 N.W.2d at 907; *White v. Minnesota Dept. of Natural Resources*, 567 N.W.2d 724, 730 (Minn. Ct. App. 1997). In the context of environmental review, it is the court's role to ensure that the RGU has taken the requisite "hard look" at environmental consequences of the action, including cumulative impacts of the matter under review. *See e.g., Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 993 (9th Cir. 2004) (*cites omitted*).

B. Questions Of Legal Interpretation Are Reviewed By This Court De Novo With No Deference To The City Required.

Questions of legal interpretation are reviewed by appellate courts de novo, owing no deference to the legal interpretation of either the RGU or the district court. *Modrow v. J.P. Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003); *St. Otto's Home v. Dept. of Human Serv.*, 437 N.W.2d 35, 39-40 (Minn. 1989). Application of the law to undisputed facts, as the case with summary judgment, is a legal conclusion to which this Court need not defer. *Lefto v. Hoggsbreath Eaters, Inc.*, 581 N.W.2d 855, 856 (Minn. 1998); *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989). Furthermore, when, as here, the language of an administrative rules is clear and capable of understanding, the matter presented is a question of law, reviewed de novo. *Jasper v. Commissioner of Public Safety*, 642 N.W.2d 435, 440 (Minn. 2002).

Finally, no deference is due the RGU's interpretation of legal requirements in this case, because the laws and rules in question are ones of general application and not promulgated by the RGU or subject to special expertise of the RGU. While a court may defer to an agency interpretation of its *own* regulation, a court need not defer to an agency's interpretation of a regulation that is not the agency's own regulation, but that of some other authority or a law of general application as in the case of environmental review statutes and regulations. *In re Eller Media Company's Applications for Outdoor Advertising Device Permits*, 642 N.W.2d 492, 501-02 (Minn. Ct. App. 2002) (*reversed in part on other grounds*, 664

N.W.2d 1 (Minn. 2003)). *See also Oregon Natural Desert Assn. v. Thomas*, 940 F.Supp. 1534, 1540 (D.Or. 1996) (*rev'd on other grounds, Oregon Natural Desert Assn. v. Dombek*, 172 F.3d 1092 (9th Cir. 1998) and *Wachtel v. Office of Thrift Supervision*, 982 F.2d 581, 585 (D.C.Cir. 1993).

The City's decision to approve the AUAR as adequate despite a complete lack of analysis of cumulative impacts, is contrary to the legal requirements for an AUAR and it failed to consider important aspects of the problem. Therefore, the City's decision, and the district court's affirmation of the City's decision, should be reversed and remanded for supplemental environmental review considering the cumulative impacts of the AUAR and Mitigation Plan outside the Project boundaries, particularly cumulative impacts to the Mississippi Critical Area.

II. THE PURPOSE AND INTENT OF THE MINNESOTA ENVIRONMENTAL POLICY ACT IS TO PREVENT AND ELIMINATE DAMAGE TO THE ENVIRONMENT, PATTERNED AFTER THE NATIONAL ENVIRONMENTAL POLICY ACT.

In 1973, recognizing the need for careful and thoughtful decision-making on matters that may affect our environment and natural resources, the Minnesota Legislature passed the Minnesota Environmental Policy Act ("MEPA") for the express purposes of a) harmony between humans and their environment; b) to promote efforts that will prevent or eliminate damage to the environment and protect public health; and c) to enrich the understanding of ecological systems and natural resources. Minn. Stat. § 116D.01 (2004). In its thirty-year history, MEPA has fostered review of potential impacts on a wide variety of resources from air

quality, ground and surface water resources, trout streams and lakes, to forests, recreation trails, wildlife habitat, and noise. *See e.g., Pope County Mothers and Others v. Minnesota Pollution Control Agency*, 594 N.W.2d 233 (Minn. Ct. App. 1999), *Berne Area Alliance v. Dodge County*, 694 N.W.2d 577 (Minn. Ct. App. 2005), *Trout Unlimited v. Minnesota Dept. of Agriculture*, 528 N.W.2d 903 (Minn. Ct. App. 1995), *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457 (Minn. 2002), *White v. Dept. of Natural Resources*, 567 N.W.2d 724 (Minn. Ct. App. 1997), *Minnesotans for Responsible Recreation v. Dept. of Natural Resources*, 651 N.W.2d 533 (Minn. Ct. App. 2002), *City of Bloomington v. City of Burnsville*, 666 N.W.2d 414 (Minn. Ct. App. 2003).

MEPA followed closely on a similar national effort, the National Environmental Policy Act (“NEPA”) and was patterned after many of the provisions and requirements in NEPA.⁵ *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 323 (Minn. 1977). This Court

⁵ In addition to Minnesota, fourteen other states (and the District of Columbia) followed the federal government’s lead and adopted state environmental policy acts modeled after NEPA. *See* Daniel R. Mandelker, *NEPA Law and Litigation (2d Ed.)* §§12:1 and 12:2. California, has a “master” environmental review document which is used in a fashion somewhat similar to an AUAR in Minnesota. However, California law makes clear that the master does not relieve project proposers of any environmental review obligation, including cumulative impacts analysis, they may have in the absence of such master environmental review document. *See e.g.,* Cal. Public Resources Code, §§ 21156, 21158; California Code of Reg., Title 14, § 15178(d); *Communities for a Better Environment v. California Resources Agency*, 103 Cal. App. 4th 98, 124 (Ct. App. Cal. 3d 2002).

looks to federal regulations and cases interpreting NEPA for guidance regarding MEPA. *No Power Line, Inc.*, 262 N.W.2d at 323, n. 28 (citing *Minnesota Public Research Interest Group v. Minnesota Environmental Quality Council*, 306 Minn. 370, 237 N.W.2d 375 (1975)); *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457, 468 at n. 10 (Minn. 2002). Like MEPA, NEPA requires an agency to take a “hard look” at environmental impacts of government actions and to do so in an analytical and thorough fashion. “NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that ‘the agency will not act on incomplete information, only to regret its decision after it is too late to correct.’” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998) (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371, 109 S.Ct. 1851, 1858 (1989)).

In order to ensure that government decisions are made with adequate information about the environmental impacts of those decisions, both Acts provide for the preparation of an EIS for any action by a government agency that has the potential for significant environmental effects. See Minn. Stat. § 116D.04, subd. 2a (2004) and 42 U.S.C. § 4332. An EIS is to be an analytical rather than encyclopedic document which analyzes the project’s significant environmental impacts, discusses appropriate alternatives to the proposed action and explores methods by which adverse environmental impacts could be mitigated. *Id.* As the court in *Trout Unlimited* noted, “[t]he very purpose of an EIS. . . is to determine

the potential for significant environmental effects *before* they occur.” *Trout Unlimited*, 528 N.W.2d at 909 (emphasis in original).

If it is unclear whether a project has the potential for significant environmental effects, an Environmental Assessment Worksheet (“EAW”) may be prepared to assess the potential for effects. Minn. Stat. § 116D.04, subd. 2a (2004). As set forth in more detail below, Minnesota has also provided for a third form of environmental review, the AUAR. All three forms require analysis of environmental effects from a project, including cumulative impacts.

Environmental review is all about good government decision-making. Thorough, high-quality, and analytical information supports thorough, high-quality, and analytical decisions about our environment.

III. AN AUAR MUST PROVIDE THE LEVEL OF ANALYSIS COMPARABLE TO THAT OF AN EIS, INCLUDING ANALYSIS OF CUMULATIVE IMPACTS.

A. Alternative Methods Of Environmental Review Must Provide A Level Of Analysis Comparable To An EIS.

MEPA authorizes the Environmental Quality Board (“EQB”) to, by rule, establish alternative methods of environmental review, “which will *address the same issues and utilize similar procedures as an environmental impact statement.*”

Minn. Stat. 116D.04, subd. 4a (2004) (emphasis added). EQB rules provide for alternative review generally in Minn. R. 4410.3600 (2003), and for AUARs specifically in Minn. R. 4410.3610 (2003). Under EQB Rules, an AUAR’s content and format must be similar to that of an EAW, and the AUAR “must

provide for a *level of analysis comparable to that of an EIS*". Minn. R. 4410.3600, subpt. 4 (2003) (emphasis added). There is no provision in statute or rule suggesting an AUAR is not subject to the same cumulative impacts analysis requirements as an EAW or EIS.

B. For An AUAR To Address The Same Issues As An EIS It Must Necessarily Provide A Detailed Cumulative Impacts Analysis.

- 1. Under applicable statutes, rules and guidance, all forms of environmental review require cumulative impacts analysis over the relevant landscape, regardless of project boundaries.**

While the EQB's rules do not define the term "cumulative effects," the rules define the synonymous⁶ 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, subpt. 11 (2003) (emphasis added). (*See also*, R. EQB

Guidance, Brimmer Aff. Ex. A).⁷ *See also* 40 C.F.R. 1508.7. Minnesota's

definition of cumulative impacts that must be examined in the environmental

⁶ The rules promulgated by the federal Council on Environmental Quality pursuant to the National Environmental Policy Act expressly state "[e]ffects and impacts as used in these regulations are synonymous." 40 C.F.R. 1508.8. As discussed in the following section, this Court looks to the federal interpretation of NEPA for guidance in applying MEPA. EQB also references federal rule and interpretation. *See* p. 16, *infra*.

⁷ The "environment" to be examined includes land, air, flora and fauna, but also generally natural features of historic, geologic or aesthetic significance. Minn. R. 4410.0200, subpt. 23 (2003).

review process is the same as that under NEPA. *cf.* Minn. R. 4410.0200 (2003) and 40 C.F.R. 1508.7. Federal regulations provide that an agency must consider as cumulative, actions that “when viewed with other proposed actions, have cumulatively significant impacts and should therefore be discussed within the same impact statement”. 40 C.F.R. § 1508.25(a)(2) and *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 809 (9th Cir. 1999).

In Minnesota, EAWs and EISs, and therefore AUARs, are required to thoroughly examine all potential environmental impacts from a proposal. That thorough review necessarily includes analysis of cumulative impacts from, or related to, the proposal. The environmental review rules adopted by the EQB pursuant to MEPA establish four factors that an RGU must consider when deciding whether a project has the potential for significant environmental effects, necessitating an EIS. *See*, Minn. R. 4410.1700, subps. 6 and 7 (2003). The second factor is “*cumulative potential effects* of related or anticipated future projects.” Minn. R. 4410.1700, subp. 7.B (2003) (emphasis added). The EAW form developed by EQB requires information on cumulative impacts. (R. 5735). EQB’s Guidance document for all forms of environmental review stresses the need for cumulative impacts analysis in both EAWs and EISs and makes clear that cumulative effects or impacts are those that result from incremental projects or decisions that collectively can have a significant impact on the landscape and environment. In fact, the “common example” that EQB uses, is the gradual

urbanization of undeveloped land, ultimately completely changing the nature of the land. (R. EQB Guidance, Brimmer Aff. Ex. A.; App. 166).

EQB Guidance cites with approval and incorporates federal guidance on the issue of cumulative impacts generally: “[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>.” *Id.* The Council on Environmental Quality (“CEQ”) notes that cumulative impacts must be addressed in both Environmental Assessments (EAs) and EISs. (R. Brimmer Aff. Ex. C, p. v; App. 178). Stressing the importance of cumulative effects analysis, the CEQ states that “cumulative effects analysis is *essential* to effectively managing the consequences of human activities in the environment.” (R. Brimmer Aff. Ex. C, p. 3; App. 183). (emphasis added.) Table 1-2 of the CEQ Guidance sets forth principles of cumulative effects analysis including analyzing effects of all actions taken, no matter who takes them, analyzing effects on an ecosystem basis, and that cumulative effects to be analyzed are rarely aligned with political or administrative boundaries. (R. Brimmer Aff. Ex. C, p. 8; App. 188).

Chapter 2 of the CEQ Guidance is especially relevant to this case in that it sets forth parameters for scoping the extent of cumulative effects analysis. It provides that when analyzing the contribution of a specific project to cumulative environmental effects, “the geographic boundaries of the analysis almost always should be expanded.” (R. Brimmer Aff. Ex. C, p. 12; App. 192). Steps for

identifying cumulative effects analysis area include making a list of resources within the project area affected by the project and then determining the geographic areas occupied by those resources (e.g. the Mississippi River corridor) outside the project zone. “In most cases, the largest of these areas will be the appropriate area for the analysis of cumulative effects.” (R. Brimmer Aff. Ex. C, p. 15; App. 195). In Chapter 3, the CEQ Guidance outlines effects to be reviewed and the list includes habitat fragmentation of ecological systems from the cumulative effects of multiple land-clearing activities, including urban development, a significant danger in this case that the City ignored. (R. Brimmer Aff. Ex. C, p. 25; App. 204). EQB’s express reliance on, and citation to, the CEQ Guidance, demonstrates EQB’s intention to cast the cumulative effects analysis net much wider than a project’s specific boundaries.

2. Case law further compels cumulative effects analysis in any type of environmental review, on a relevant landscape or ecosystem scale, not just within project boundaries.

The Minnesota Court of Appeals found in *Trout Unlimited v. Minnesota Dept. of Agriculture*, 528 N.W.2d 903, 908 (Minn. Ct. App. 1995) that one of the factors to be considered in assessing potential for significant environmental effects and determining whether to prepare an EIS is cumulative potential effects of related or anticipated future projects. In that case, the Department of Agriculture must consider the impacts of many different irrigation and chemigation projects on the environment, regardless of their specific relationship to the project under consideration. *Id.* Following *Trout Unlimited*, the Court of Appeals ordered

extensive cumulative effects analysis of cumulative or incremental boating impacts to a sensitive lake resource in Otter Tail county, again extending to past, present and future increases in boating beyond that expected from the specific residential development under consideration. *Dead Lake Association, Inc. v. Otter Tail County*, 2005 WL 221773, at pp. *4-*5 (Minn. Ct. App. 2005) (copy, App. 242).

Federal courts have also interpreted the regulations under NEPA to require detailed analysis of cumulative impacts of past, present and future projects. This analysis is to be detailed enough to be ultimately useful to the decision maker in whether, or how, to alter the program or activity in question to lessen cumulative impacts. *Muckleshoot Indian Tribe*, 177 F.3d at 810.

In *Muckleshoot*, the court called into question the U.S. Forest Service's too-general and one-sided cumulative impacts analysis. The analysis of the proposed logging and land exchange plans did not contain detail adequate to meet the requirements of NEPA, *Muckleshoot Indian Tribe*, 177 F.3d at 811). Particularly relevant to this case (*see Part IV. C. infra*), the court points out that the forest service, to the extent it said anything about cumulative impacts from the project, concentrated on only the cumulative beneficial aspects of the land exchange without any analysis of the potential cumulative negative forest impacts from the logging part of the proposal. *Id.* The court found the analysis to fall far short of useful analysis required by NEPA. *See also Klamath-Siskiyou Wildlands*, 387 F.3d at 993 ("A proper consideration of the cumulative impacts of a project

requires some quantified or detailed information; . . . general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.”)(*cites omitted*).

In *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985),⁸ also a residential development case, the Fifth Circuit made clear the need for cumulative impact assessment of incremental development. The United States Army Corps of Engineers (the “Corps”) approved a permit authorizing a housing developer to construct a canal system for a housing project on an island in Galveston Bay, Texas. *Fritiofson*, 772 F.2d at 1227-28. The Corps decided not to prepare an EIS, failing to assess the housing project in light of cumulative impacts it, together with other past and future developments, would have on the island. *Fritiofson*, 772 F.2d at 1229. The court held that the CEQ’s cumulative impact regulation required consideration of past, present and foreseeable future developments on Galveston Island, even including housing projects that were not yet at the stage of proposals requiring an impact statement. *Fritiofson*, 772 F.2d at 1244-45. The court remanded the case with instructions to the Corps to prepare a cumulative impact analysis of the housing development in light of other developments, past and future. *Fritiofson*, 772 F.2d at 1249.

⁸ In *Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669, 677-78 (5th Cir. 1992), the Fifth Circuit noted that an intervening Supreme Court decision changed the standard of review applied in the *Fritiofson* decision. However, the cumulative impact analysis and ruling still stands.

In *Grand Canyon Trust v. Federal Aviation Admin.*, 290 F.3d 339 (D.C. Cir. 2002), the court rejected the Federal Aviation Administration's ("FAA") environmental assessment and conclusion that an EIS was not required on the planned expansion of an airport. The FAA had considered only the incremental direct impact of additional noise from the expansion on a national park. The court found this an inadequate consideration of cumulative impacts noting that under NEPA, the agency should consider incremental effects alongside of "background" effect from already existing or foreseeable projects or conditions. *Grand Canyon Trust*, 290 F.3d at 342. The court further noted that even a slight increase in adverse conditions may sometimes threaten environmental harm that is significant—harm that might be the "proverbial straw that breaks the back of the environmental camel". *Grand Canyon Trust*, 290 F.3d at 343 (*cites omitted*). The court held that a meaningful cumulative impact analysis must identify,

(1) the area in which the effects or the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions—*past, present, and proposed, and reasonably foreseeable*—that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

Grand Canyon Trust, 290 F.3d at 345, (*cites omitted*) (emphasis added).

Very recently, the Eastern District of Wisconsin held that cumulative impacts analysis in an EIS must be quantitative requiring detailed and the government decision-maker must analyze the cumulative impacts on several forest species of contemporaneous logging or other activities throughout a region, not

just the logging sale in the single national forest at issue. *Habitat Education Center v. Bosworth*, 363 F.Supp.2d 1070, 1077-78 (E.D. Wis. 2005). The court specifically rejected dividing forest projects into multiple individual actions over a wide area, each of which might individually have an insignificant effect, but collectively will have a substantial impact, in order to avoid meaningful cumulative impacts analysis. *Id.*

3. AUAR's do not provide a loophole or excuse from the requirement of cumulative impacts analysis.

EQB requires assessment of cumulative impacts in EAWs, EISs, and, contrary to Horton's representations and the City's approval, in AUARs, especially if those impacts are significant. (R. Brimmer Aff., Ex. A and B. *See also*, App. 166). Horton and the City are incorrect in their assertions that EQB Guidance particular to AUARs does not require cumulative impacts analysis. Rather, the Guidance language clearly anticipates and assumes that cumulative impacts are already necessarily part of the AUAR analysis, because an AUAR is usually used over a large geographic area for more than one action or project by more than one developer or landholder. (R. Brimmer Aff. Ex. B). EQB's general environmental review guidance also notes that large scale, region or community-wide cumulative effects analysis are naturally addressed in an AUAR. (R. Brimmer Aff., Ex. A, p. 5; App. 166). Where, as here, that assumption does not

hold true, detailed cumulative analysis beyond the boundaries of the specific action or project is required under the statute and rules.⁹

Accepting Horton and the City's interpretation of no obligation to review cumulative impacts would mean that very large projects with extensive, significant, community or region-wide environmental impacts that normally would require a full EIS, could escape important EIS analyses like cumulative impacts. That result is clearly contrary to the legislature's stated intent in Minn. Stat. § 116D.04, subd. 4a (2004) that any alternative review must provide the same level of analysis as an EIS. The City and Horton's arguments in this regard and the net result of those arguments are clearly legal error.

Finally if, as Horton and the City urge, the EQB AUAR Guidance can only be read as excusing them from cumulative impacts analysis of the Mississippi Critical Area outside the specific boundaries of the Project, then the EQB Guidance must give way and be disregarded as contrary to the actual language in the statute and rule. EQB rule allowing for the use of AUAR's clearly dictates a level and quality of information akin to that in an EIS. Minn. R. 4410.3600, subpt. 4 (2003). Guidance must be developed, read, and applied within the context and constraints of statute and rule. Guidance sets forth the agency's general thinking

⁹ In fact, new Guidance for AUAR's promulgated by EQB in July of 2004 shortly after completion of this AUAR, makes clear that EQB has always considered cumulative impacts analysis outside the boundaries of the project important in an AUAR when the impacts are significant and where the assumptions about whether the AUAR encompasses a wider range of developments do not hold true. (See R. Revised AUAR Guidance, Brimmer Aff. Ex. B).

on the law and eases its application. However, where an agency's interpretation of a regulation, as set forth in Guidance, is clearly contrary to the plain language of the statute or regulation, or where the interpretation is unreasonable in light of that language, the court is free to disregard the agency legal interpretation. *St. Otto's Home*, 437 N.W.2d at 39-40. Statute and rules control and where they conflict with guidance, guidance must give way. *City of Owatonna*, 672 N.W.2d at 926.

The requirements of federal and state law, and cases interpreting those requirements, demonstrate that cumulative impacts is an integral part of *any* environmental review analysis. There is nothing in EQB's Guidance for AUARs that excuses the City from cumulative impacts analysis in this AUAR. To interpret EQB's AUAR Guidance otherwise, would be to find the EQB's guidance contrary to Minn. Stat. § 116D.04 (2004), rules applying it, and a large body of established case law.

IV. THE RIVER'S EDGE AUAR IS INADEQUATE UNDER THE LAW AS IT FAILS TO CONSIDER CUMULATIVE IMPACTS OF THE PROJECT AND THE "MITIGATION PLAN".

A. The Project Has The Potential For Significant Cumulative Environmental Impacts To The Mississippi Critical Area, A Regional Resource.

As set forth in the Statement of Facts, a large portion of the Project property is within the Mississippi Critical Area and as such is entitled to the highest level of protection. This Project is just one of a number of insults to which the Mississippi River and last remaining areas of rural or natural habitat are subject. (R. 5684, 5722, 5922, 5988, 5992, 6003, 6038, 6045, 6060). Yet, neither

Horton nor the City take responsibility for assessing the cumulative impacts from the Project and past, present and future projects, on the Mississippi Critical Area.

The NPS took issue with the draft AUAR's statement that the Project would provide new recreational opportunities and pointedly noted that rather, the larger effects on the entire MNRRA national resource and the values it sought to preserve must be examined. (R. 6038). DNR and the NPS identified the bluffs at the Project area as unique within the larger region in that they are the last place bluffs of that nature appear on the Mississippi until Iowa. (R. 6059). As recognized in DNR's very first comment letter, the proposed encroachment from the Project:

will negatively affect the ecology of the river corridor by fragmenting habitats into isolated and small patches. There will be a loss of total habitat area and the resulting small patches will be less capable of supporting intact and diverse biotic communities. The corridor functions have been diminished by past activities and the proposed project will contribute further to cumulative impacts.

(R. 6045. *See also* R. 6060). Further, as pointed out by DNR, by the Friends of the Bay, and by Friends of the Mississippi River, only about 4 % of the Metro region's landscape contains species or habitat of significance and therefore, the Project property's large mix of habitats is ecologically important, even when that habitat is in degraded condition. (R. 5992, 6003, 6060). Destruction of even a part diminishes the whole. (R. 6060). Therefore, adequate cumulative impacts analysis under the law must assess cumulative impacts that will surely extend beyond the Project property's boundaries. Like the *Fritiofson* case, Horton and

the City must list and examine all past, present, and future projects that have contributed or will contribute to habitat fragmentation, destruction of rural open space, or the character and aesthetics of the Mississippi River. As stated repeatedly in the CEQ Guidance, federal cases, and state guidance, ecosystems should drive cumulative impacts analysis, not project boundaries.

Likewise, the Metropolitan Council views impacts to natural resources in the developing areas of the metropolitan area as a regional, not local, issue. (R. Framework, p. 7; App. 233). In particular, the Framework states:

Conserving and restoring natural resources of regional or local importance contributes to a healthy natural environment and enhances our quality of life. *Connecting regional and local features by natural resource corridors* helps sustain wildlife and plant habitat. . .

Id. (emphasis added). In the strategies section, the Framework repeatedly instructs cities to stage and plan growth in a comprehensive and connected manner and to incorporate natural resources into local plans, building on the *regional* Natural Resources Inventory and Assessment in a way that conserves natural resources and avoids or protects sensitive areas (referencing the council's and DNR inventory and database.) (R. Framework, pp. 12, 18 and 22; App. 234, 235, 237) Among the community roles identified, is conserving natural resource, particularly water resources, and to protect vital natural areas. (R. Framework, p. 22; App. 236). The Framework specifically points out that rural areas should be supported in efforts to concentrate growth away from existing rural parts of the metro area (such as the Project property). *Id.*

The area is obviously part of the Mississippi flyway migration corridor for birds, the largest migratory corridor outside of U.S. coastal areas. (R. 5671, 5938, 6004). The City's consultants conclude their natural resources inventory with a clear statement that species observed in the area indicate that birds requiring larger territories are currently supported by the area and the vegetation along the river links nearby natural areas, parks, and existing forests and woodlands. (R. 5939).

B. The AUAR Admits That Cumulative Impacts Were Ignored.

On its face, the AUAR fails to abide by the requirements to analyze cumulative impacts from the Project. In section 29, the EAW form asks for the following information:

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 (or discuss each cumulative impact under appropriate item(s) elsewhere on this form.)

(R. 5735) (emphasis added). Horton responded and the City approved the following response:

AUAR Guidelines: This item does not require a response for an AUAR since the entire AUAR process deals with cumulative impacts from related developments within the AUAR area.

(*Id.* and R. 5582). As set forth above, the response is inaccurate because it fails to recognize that EQB's statements regarding an AUAR's need to consider

cumulative impacts clearly assume something about AUAR's that is not true about this one, namely that cumulative effects over a wide geographic area for multiple projects or actions are already part of the AUAR.¹⁰ Also as set forth above, Horton's response and the City's approval of it, is entirely contrary to the clear requirements of the statute and rules that all forms of environmental review must analyze cumulative impacts defined as all past, present and reasonably foreseeable future projects' impact to the environment.

Respondents' argued that the AUAR's selective examination of some cumulative impacts demonstrates the adequacy of the AUAR as to all cumulative impacts. The district court, in an excess of deference, gave Horton and the City a pass on cumulative effects based upon ambiguous guidance from another agency and based upon some minimal discussion of indirect (but not cumulative)¹¹ effects on bird species. The Mississippi Critical Area is about much more than birds. Further, the selective cumulative impacts the AUAR did examine are those least damaging, minimally if at all raised by DNR and other commenters, and that have no bearing on the most critical cumulative impact of all; impacts to the Mississippi Critical Area and the unique mix of important habitats and natural resources it and the site represents. Horton and the City do not get to examine only those impacts

¹⁰ DNR strongly disagreed with the cavalier statements about the need for cumulative impacts analysis outside the Project boundaries. (See R. 5619, 6061).

¹¹ The City and the district court analyses confuse indirect project impacts like taking away bird habitat on site, with cumulative impacts analysis which would require assessment of the large regional impacts of taking away many patches of bird habitat over the course of a number of years.

that make the Project look least damaging to the environment. Again, the City's obligation in environmental review is to all Minnesota's citizens and their interests in the resources in question, not just the economic expectations of the property owner and developers.

The AUAR contains no list, or even mention, of past, present, or reasonably foreseeable future projects in or on the Mississippi Critical Area. *See e.g., City of Carmel-by-the-Sea v. U.S. Dept. of Transportation*, 123 F.3d 1142, 1160 (9th Cir. 1997) (failure to catalogue past projects and failure to provide useful analysis of past, present and future projects prevents thorough assessment of impacts). The AUAR is silent on effects to the Mississippi Critical Area as a whole should the River's Edge development proceed. It is silent on the cumulative effects of increased and continuing habitat fragmentation and edge effects in the river corridor and greater metropolitan area, (R. 5922, 6045-46, 6048-49, 6060-61). The AUAR fails to mention any of the information regarding overall regional significance of the Project property, the Mississippi Critical Area, or impacts to the whole from fragmentation, even when it was brought out by comments. At most, the AUAR claims that none of the two sites of Biological Significance within the Project boundaries are proposed for development. (R. 5673). This is inadequate. There is no discussion of what wider impact further fragmentation and elimination of the Project property's habitats will have on the larger metropolitan region's vanishing natural resources. (R. 5561). The AUAR

contributes to the problem identified by DNR of smaller and smaller quilt squares being carved out of the whole.

The AUAR's studied avoidance of any cumulative assessment of impacts to the diversity of habitats on the property includes its failure to address the proposed violation of the Mississippi Critical Area and the Rural Open Space District designation for the Project property and applicable shoreland regulations. The AUAR fails to even mention or identify the enormously significant fact that the Project property is within the Mississippi Critical Area and all that entails for the first 47 pages of the AUAR. The first mention is in the so-called "mitigation plan" portion of the AUAR, *not* in the section of the AUAR describing the Project property and impacts thereto.

Finally, the AUAR ignores and is silent on the greater impacts to large bird species and the endangered and threatened mussel species on site. At no point does the AUAR assess the incremental destruction to the aesthetic of a natural river corridor from past, present and foreseeable urbanization projects throughout the metropolitan area.

The City's willingness to bless this AUAR with its total failure to assess cumulative impacts to the Mississippi Critical Area is clear legal error. It is entirely contrary to the very heart and soul of environmental review—to assess environmental damage, especially incremental damage that can take us unawares—before we inflict it. The City's approval of the AUAR should be

reversed and the matter remanded for supplemental environmental review of cumulative impact in accordance with the statutes and rules.

C. The Mitigation Plan Does Nothing To Alleviate The Errors Here And Is Itself Subject To Cumulative Impacts Analysis Requirements.

Compounding the inadequacy of the AUAR's analysis of impacts to the mix of habitats and the Mississippi Critical Area is the utterly specious and ill-conceived attempt at setting forth a "mitigation" plan for the Project. Instead of analyzing the impacts to the Mississippi River Critical Area as a whole from this large and intensive development, the AUAR proposes to "mitigate" the damage by simply changing the law and protective designation to suit the Project. (R. 5583, 5684, 5688). The "mitigation plan" for addressing the negative impacts from the Project on the Mississippi Critical Area is to change the current protective designation to suit the negative impacts. That is, the AUAR proposes "mitigating" the violation of the Rural Open Space Designation for this section of the Mississippi Critical Area, by changing it to allow for urban development. The only thing this mitigates is the potential illegality of the Project as proposed.

Further, the mitigation plan itself requires cumulative impacts analysis as it is an action related to the Project development that could have far-reaching consequences for the Mississippi Critical Area. This sets the stage for even further or "induced" development that can further damage the Mississippi Critical Area. Changing the critical areas designation for the City and/or Township will affect more than this property, fostering urbanization beyond the Project boundaries. As

a reasonably foreseeable part of this Project, the cumulative impacts of overall urbanization in this part of the river must be examined. There is no analysis of the impact of the “mitigation” plan. Again, the AUAR is utterly lacking in any assessment of the potentially far-reaching effects of this Project.

Finally, while mitigation is important in considering the potential for environmental effects from a project, mitigation measures must be more than vague statements of good intentions. *Iron Rangers for Responsible Ridge Action v. IRRRB*, 531 N.W.2d 874, 881 (Minn. Ct. App. 1995). Mitigation must “be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.” *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998). EQB’s rules require that an AUAR mitigation plan shall specify mitigation measures that will be imposed upon (not just explored by) future development within the area in order to avoid or mitigate impacts and the plan shall contain a description of how *each* mitigation measure will be implemented. Minn. R. 4410.3600, subpt. 5(C) (2003).

The AUAR’s statements regarding mitigation lack specificity (as pointed out by DNR’s comments). (R. 5619). At most, the AUAR provides that “strategies will be explored” for maintaining some (no detail) natural features on the site and relies on conclusory statements such as “revised setbacks will mitigate” effects with no explanation of how. (R. 5739). And, as noted above, the mitigation plan seeks not to repair or avoid environmental damage, but only to conform the law and planning documents to allow for the environmental damage.

It is an enormous irony that the AUAR the City felt comfortable approving proposed to “mitigate” effects to the Mississippi Critical Area without ever analyzing what effects there in fact will be to the Critical Area. MCEA urges the court to reject such contortions and remand this matter for analysis and mitigation in conformity with the law.

CONCLUSION

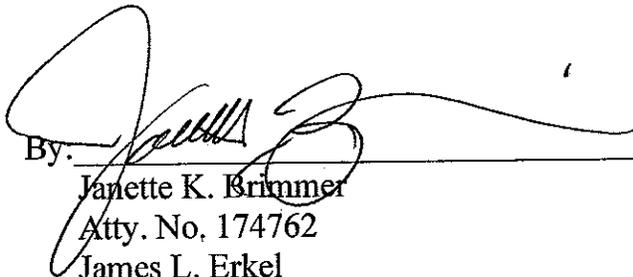
Horton and the City have sought to evade one of the most essential components of ensuring good government planning decisions that can help protect fast-dwindling natural resources: cumulative impacts analysis. Without this important tool, the City, and more importantly, the wider public and other government agencies, cannot fully understand the incremental damage we may be doing to a national resource, the Mississippi River, until it is too late. That is exactly what the environmental review laws were meant to address. Allowing the City and Horton to hide behind stretched concepts of “deference” and “discretion” and to hide behind an ambiguous guidance document from another agency, empties MEPA and its regulations of their meaning and import.

MCEA comes before this court requesting an order that the District Court’s decision that the City’s approval of the AUAR be reversed and that the matter be

remanded for further environmental review of cumulative impacts of the Project and the mitigation plan outside the Project boundaries.

RESPECTFULLY SUBMITTED

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