

Nos. A04-886 and A04-890

State of Minnesota
In Supreme Court

Kandiyohi County Board of Commissioners and
the County of Kandiyohi and Duinick 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.

RESPONDENT KANDIYOHI COUNTY'S BRIEF

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STATEMENT OF THE CASE

Co-Respondent Duininck Bros. Inc. applied in 2003 for two separate conditional use permits to operate gravel pits in Kandiyohi County ("County").¹ The County Board voted to require the preparation of discretionary Environmental Assessment Worksheets ("EAW" or "EAWs") prior to action on the permit requests. The County Board acted as the Responsible Government Unit ("RGU") in preparation and consideration of the EAWs.

Environmental review was completed in the spring and early summer of 2003. The County Board considered all information generated in the Environmental Review process. Action on the EAWs was delayed on several occasions so the County Board could more carefully review the data generated in the EAW process. The County Board concluded preparation of an Environmental Impact Statement ("EIS") was not required prior to action on the permit requests. The Board found:

There were no environmental effects identified which cannot be adequately addressed by the developer or resolved through ongoing application of existing regulations and permits . . . A negative declaration is made on the need for an EIS.

See AR 148 and 152.

¹ Kandiyohi County regulates the use of land through a zoning ordinance. Gravel extraction is a conditional use under pertinent provisions of the ordinance. This means the permit would be subject to a public hearing process, and the County Board would have the authority to impose conditions and limitations on the proposed use.

Appellants initiated a district court declaratory judgment action challenging the County Board's negative EAW declarations. Appellants alleged in their district court complaint two causes of action:

- 1) That a mandatory Environmental Impact Statement ("EIS") must be prepared in conjunction with the Duininck proposals.
- 2) That the Kandiyohi County Board's negative declarations on the Environmental Assessment Worksheets prepared for the two proposed projects were arbitrary and capricious.

The parties brought cross motions for summary judgment. By order dated February 19, 2004, the district court concluded that the Duininck proposals did not require the preparation of a mandatory EIS.² The district court also rejected Appellant's argument that the County Board's declarations were arbitrary because the Board failed to consider "cumulative impacts". The district court noted that the requirement in Minn. Rules 4410.1700, subp. 7 that the RGU consider the "cumulative potential effects of related or anticipated future projects" in determining the need for an EIS is not synonymous with the definition of "cumulative impacts" in Minn. Rule 4410.0200, subp. 11.

Notwithstanding the above, the district court concluded that the County Board's determination not to require preparation of discretionary Environmental Impact Statements was arbitrary and capricious. The district court concluded that "a combination of danger signals suggest that the agency has not taken a 'hard look' at the

² Appellants did not file a Notice of Review contesting the district court's determination that the proposed projects did not fall within the mandatory EIS provision in EQB Rule. Their Petition for Review and Brief do not address the issue.

salient problems.” The district court also concluded, presumptively, that Appellants had met their burden of presenting tangible evidence that the proposed projects would have the potential for significant environmental effects.

Both Kandiyohi County and Duinick Bros., Inc. appealed the district court’s decision. The appeals were consolidated by order of the Court of Appeals.

By decision filed January 11, 2004, the Court of Appeals reversed the district court. The Court of Appeals concluded that the Administrative Record contained substantial evidence supporting the County’s decision not to require EISs on the projects. Though it noted that Appellants continued to attach an expansive definition to the phrase “cumulative potential effects of related or anticipated future projects” as contained in the EIS decisional criteria in Minn. Rules 4410.1700, subp. 7, the Court of Appeals did not directly address the district court’s rejection of Appellant’s synonymity argument.

STATEMENT OF FACTS

In 1998, Willmar Realty Corp. applied to Kandiyohi County for a conditional use permit (“CUP”) to operate a gravel pit on an approximately 32 acre parcel of land in Section 13 in Dovre Township (“ELW/Dovre Township Pit”). The application was withdrawn because ingress and egress requirements had not been resolved with MnDOT. SAR 5.

In November 2001, Willmar Realty Corp. applied again for a CUP to operate a gravel pit on the land in Section 13 in Dovre Township. SAR 66. Willmar Realty later requested that consideration of the application be delayed until October 2002. SAR 67-68.

In March 2002, the Minnesota Department of Transportation prepared an Environmental Assessment for proposed intersection improvements at the intersection of Kandiyohi County State Aid Highway 9 and State Trunk Highway 23: the same area as Co-Respondent Duinicks proposed gravel pits. SAR 7-65. The MnDOT project, also located within the Eagle Lake Watershed, included lowering of the grade of the intersection to within 10 feet of identified groundwater. MnDOT solicited comments from other state agencies, including the DNR. Based on its own Environmental Review analysis, MnDOT concluded that the project and the attendant reduction of the separation of ground surface and ground water to 10 feet would have:

No impact on Eagle Lake

SAR 26. This is true even though the intersection, as stated above, is also within the watershed that drains to and recharges Eagle Lake.

On October 7, 2002, the Kandiyohi County Planning Commission voted to recommend that the County Board deny the Willmar Realty CUP request for the Dovre Township parcel. SAR 71. On October 15, 2002, the Kandiyohi County Board accepted the Planning Commission's recommendation, and denied the CUP request for the ELW/Dovre Township Pit. SAR 66.

On November 11, 2002, Appellant Duininck Bros., Inc. applied for a separate CUP to operate a gravel pit on an approximately 17 acre parcel of land in Section 17 of Green Lake Township ("CA/Green Lake Township Pit"). SAR 151.

On December 9, 2002, the Kandiyohi County Planning Commission voted 5-1 to recommend that the Kandiyohi County Board require an EAW for the CA/Green Lake

Township CUP application. SAR 165. On December 17, 2002, the Kandiyohi County Board voted to require preparation of an EAW on the CA/Green Lake Township Pit. SAR 169. The Kandiyohi County Board voted on March 18, 2003 to deny the CA/Green Lake Township Pit CUP application because an EAW had not been prepared. SAR 174.

In the spring of 2003, after the County Board's denial of the pending CA/Green Lake Township Pit CUP application, a discretionary EAW for the CA/Green Lake Township Pit proposal was prepared and disseminated. AR 3.³ Also in the spring of 2003, a discretionary EAW for the ELW/Dovre Township Pit proposal was prepared and disseminated. AR 23. The EAW documents for the two proposals were published in the EQB Monitor on April 24, 2003, and comments were solicited as part of the EAW process.

During the comment period, the County received letters from neighboring residents. The County also received comment letters on each of the proposed projects from the Minnesota Department of Natural Resources, Minnesota Historical Society, and Minnesota Pollution Control Agency. AR 14-15; AR 19; AR 35-36; AR 40; AR 44-107. The varied questions or comments raised or provided during the comment period were responded to at three different times. See AR 109 (June 13, 2003 letter); AR 115 (June 23, 2003 letter); AR 122 (July 17, 2003 letter).

On July 28, 2003, the Kandiyohi County Board adopted written Findings of Fact concerning the two EAWs. The Board concluded with respect to each proposal:

³ A landowner considering a project is entitled under EQB Rules to undertake environmental review prior to submission of land use requests to the local zoning authority.

There were no environmental effects identified which can not be adequately addressed by the developer or resolved through ongoing application of existing regulations and permits A negative declaration is made on the need for an EIS.

See AR 148 and 152.

This litigation followed.

STATEMENT OF THE ISSUES

1. Is the phrase “cumulative potential effects of related or anticipated future projects” in Minn. Rules 4410.1700, subp. 7 synonymous with the definition of “cumulative impacts” in Minn. Rules 4410.0200, subp. 11, which refers to unrelated as well as related projects, and to past and present, as well as anticipated future projects.
2. Is there substantial evidence in the Administrative Record supporting the Kandiyohi County Board’s negative EAW declarations.

ARGUMENT

I. INTRODUCTION

Appellants’ Petition for Review presents to the Supreme Court two issues. First, Appellants challenge a specific statement in the Court of Appeals’ decision which Appellants (and Amicii) argue is contrary to law. See Appellant’s Petition for Review, p. 1. Second, Appellants assert that the Court of Appeals’ decision in this case is contrary to its holding in Dead Lake Ass’n, Inc. v. Otter Tail County, Appellate File No. A04-717, 2005 WL 221773.

With respect to the first argument, Appellants assert that the Court of Appeals espoused a legal standard that is contrary to existing law when it stated:

...It [Kandiyohi 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.

It is critical to note that a lynchpin of Appellant's argument is the presumption that the County was required, in applying the criteria in Minn. Rule 4410.1700, subp. 7 and ascertaining the need for an EIS, to conduct a "cumulative impact" analysis, i.e. an analysis of the aggregate impact of past, present and future projects by any proposer related or unrelated to Co-Respondent Duininck Bros., Inc. Appellants specifically characterize this "straw that broke the environmental camel's back" or "death from a thousand cuts" standard as contrary to the RGU's obligation to consider "cumulative impacts", as defined in Minn. Rules 4410.0200, subp. 11, in determining whether an EIS must be prepared.

The key presumptive issue for determination by the Supreme Court, as it relates to Appellant's first argument, is whether the EIS decisional criteria in Minn. Rules 4410.1700, subp. 7 require an RGU to identify and analyze "cumulative impacts" in determining whether an EIS should be prepared. Stated another way, this Court must determine whether the definition of "cumulative impacts" is synonymous with the phrase "cumulative potential effects of related or anticipated future projects" as specifically contained in EIS decisional criteria in Rule 4410.1700, subp. 7.

The County takes no position on the challenged statement of the Court of Appeals and/or whether the statement is consistent or inconsistent with the concept and definition of “cumulative impacts” in Minn. Rules 4410.0200, subp. 11. Contrary to Appellants’ and Amiciis’ arguments, the County has never advocated in this litigation a “straw that broke the environmental camel’s back” or a “death from a thousand cuts” argument. Whether the cited sentence in the Court of Appeals’ decision is consistent with the definition of “cumulative impacts” is irrelevant because “cumulative impacts” are not a decisional criteria in Minn. Rules 4410.1700, subp. 7. The County has consistently taken the position that cumulative impacts are not a decisional criteria in Rule 4410.1700, subp. 7.

Moreover, the County has not asserted in this litigation an argument that the terms “impacts” and “effects” are different. Nor has it asserted that the phrases “cumulative impacts” and “cumulative effects” are different. The focus of Appellants and Amicii on comparing and contrasting these specific words and phrases is misguided. Instead, the key issue for the Supreme Court requires the Court to determine whether analysis of the aggregate effects of past, present and/or future related or unrelated projects is the same as an aggregate analysis that focuses on only related or anticipated future projects.

It is the County’s position that Appellants are palpably incorrect in suggesting the phrases “cumulative potential effects of related or anticipated future projects” and the definition of “cumulative impacts” are synonymous; It is the County’s position that Amicus Environmental Quality Board’s (“EQB”) advocacy and enforcement of an EIS decisional criteria that contradicts the clear and express terms of Minn. Rules 4410.1700,

subp. 7 is violative of the Administrative Procedures Act, Minn. Stat. Ch. 14; It is the County's position that the environmental wisdom of a more comprehensive aggregate analysis in determining the need for an EIS is not a matter for this Court, but instead is one appropriately considered in the APA process via proposed amendments to Minn. Rules 4410.1700, subp. 7.

Finally, with respect to Appellants' second argument, Appellants challenge the substantive decision of the County that an EIS need not be prepared in this case. Appellants argue specifically that the Court of Appeals' decision in this case is contrary to its decision in Dead Lake Ass'n, Inc. v. Otter Tail County, Appellate File No. A04-717, 2005 WL 221773.

It is the County's position that its negative EAW declarations are supported by substantial evidence in the Administrative Record. It is the County's position that the Court of Appeals' Dead Lake decision is distinguishable, factually and legally, from this case.

II. STANDARD OF REVIEW AND BURDEN UNDER MEPA

Minnesota courts have consistently limited the scope of judicial review of administrative decisions made under MEPA. Courts are precluded from interfering with agency determinations made under MEPA unless the agency has exceeded its jurisdiction, proceeded on an erroneous theory of law, acted in an arbitrary or capricious manner, or there was evidence to support the agency decision. Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 827 (Minn. 1977); MPIRG v. Minneapolis Environmental Quality Council, 306 Minn. 370, 378-79, 237 N.W.2d 375, 382 (Minn. 1975); Iron

Rangers for Responsible Ridge Action v. IRRRB, 531 N.W.2d 874, 880 (Minn. Ct. App. 1995).

The legislative goal of MEPA is to force agencies to evaluate environmental considerations before making decisions on projects. No Power Line, Inc. v. Minnesota Environmental Quality Council, 262 N.W.2d 312, 327 (Minn. 1979). MEPA, and the EQB rules adopted pursuant to MEPA, establish procedural requirements to ensure that the goal of MEPA is realized. However, MEPA does not dictate particular results. MEPA does not require that projects have no environmental consequences. See, e.g., Coon Creek Watershed District v. Minnesota Environment Quality Board, 315 N.W.2d 604, 605 (Minn. 1982); No More Power Line, 262 N.W.2d at 325-27; Reserve Mining, 256 N.W.2d at 830. See also Minn. Stat. § 116D.03, subd. 1 (requiring government agencies to consider significant environmental consequences “to the fullest extent possible”).

Preparation of an EAW, and the EIS determination, is essentially an information-gathering and analytical process. Engaging in the EAW process assures the public that the agency has indeed considered environmental concerns in the decision-making process.

It is the RGU that has been vested with the legislative discretion to determine whether a given project “has the potential for significant environmental effects.” No More Power Line, 262 N.W.2d at 325. In exercising its discretion, the RGU is held to the arbitrary and capricious standard enunciated in Reserve Mining, 256 N.W.2d at 830.

Procedurally, in conducting environmental review under MEPA, an EAW is prepared. The RGU reviews the EAW. Comments are solicited, and considered. See Minn. Stat. § 116D.04, subd. 2. After review of the data collected, it is the RGU's responsibility to determine whether the evidence provided or gathered in the process demonstrates that there is the potential for significant environmental effects.

The EQB Rules have identified four very specific decisional factors which the RGU is required to consider in evaluating evidence produced in the EAW process and determining the need for an EIS:

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

Minn. R. 4410.1700, subp. 7.

Of note in this case are decisions of our appellate courts that have considered the above standards and applied them to challenges of negative EAW declarations. Of particular import are: 1) those decisions that assess the quality and quantity of evidence necessary to reverse a negative declaration, and 2) those decisions that consider the mitigating factors that ongoing regulations will have on the concerns expressed.

It is an opponent's obligation, in challenging a negative EAW declaration, to point to "specific facts [in the environmental review Record] which establish the existence of a

genuine issue . . .” White v. Minnesota Department of Natural Resources, 567 N.W. 2d 724 (Minn. Ct. App. 1997) (bracketed material added). It is not enough to rely on general expressions of concern or question, or unsupported factual assertions. Id.

In Iron Rangers for Responsible Ridge Action v. IRRRB, 531 N.W.2d 874 (Minn. Ct. App. 1995), an environmental group challenged the St. Louis County Board’s determination that an EIS was unnecessary for a golf course development. The group rested its claims on several concerns.

The environmental group first asserted that the proposed project would cause “forest fragmentation” that would ruin habitat for certain forest-dwelling birds. Second, the environmental group asserted the project, and the forest fragmentation, would negatively affect the barren strawberry population, a plant listed as “of special concern.” Id., p. 881. Both these allegations rested, as is the case here, on the Minnesota Department of Natural Resources’ comment letter, which pointed out that the project could adversely affect these resources.

The Court of Appeals in IRRRB rejected the appellant’s claims. In doing so, the Court commented on the quality of evidence necessary to meet the burden of demonstrating irrationality in the negative EAW declaration. The Court stated:

The MCEA has not shown scientific data documenting the DNR concerns about forest fragmentation, and the County had to make a reasoned analysis of the evidence before it.

Id. At 881.

In short, a challenging party has to offer more than general statements of concern about what might happen if the project is undertaken. The challenging party must point

to specific and tangible evidence in the Record which supports the concern, and which was irrationally ignored by the RGU.

Similarly, in White v. Minnesota Department of Natural Resources, 567 N.W.2d 724 (Minn. Ct. App. 1997), a citizens' group challenged the DNR's determination that an EIS was not required prior to construction of a segment of the Northshore Trail. The DNR had prepared the EAW, and issued a negative declaration on the need for an EIS. In White, the challenger relied on evidence suggesting that certain rare and sensitive plants might be endangered during the project, and that the plants "would be sacrificed" if the project was undertaken. Id. at 735.

Again, as in IRRRB, the Court of Appeals commented on the quality of evidence necessary to demonstrate irrationality and successfully challenge a negative EAW declaration. The Court stated:

Testimony that rare and sensitive plants may not be protected if discovered is not evidence that such plants exist or that DNR failed in its responsibility to consider rare and sensitive plants when preparing the EAW. Appellants cannot avoid summary judgment by providing evidence of a mere possibility of harm to rare and sensitive plants. They must provide specific facts of a genuine issue for trial.

Id.

Existing court decisions are also important in this case as they relate to application of the "ongoing regulatory authority" component of the EIS decisional criteria. In MCEA v. Minnesota Pollution Control Agency, 644 N.W.2d 457 (Minn. 2002), this Court considered MCEA's challenge to a negative EIS declaration by the MPCA. The project at issue was proposed by Boise Cascade. The project required two separate

permits from the MPCA. The EAW process identified a number of potentially significant environmental effects inherent to the project. However, the MPCA concluded that the effects could be mitigated through future permitting processes. Notwithstanding the specific evidence in the Record of potentially significant environmental effects, this Court upheld the MPCA, stating:

. . . on this Record, we conclude that there are assurances that reasonable mitigation measures will be in place when the permit is issued.

Id.

In two further decisions, the Court of Appeals specifically concluded that a county CUP process provides for adequate mitigative measures in the context of a challenge to a negative EAW declaration. In both cases, the negative EAW declarations were sustained.

In IRRRB, supra, the MCEA specifically alleged the county “improperly relied on the CUP process” as mitigation, and that “the county’s negative declaration for an EIS was improperly based on mitigation through the CUP process.” Id. At 884. Rejecting the assertion, and finding the CUP process to constitute a proper forum for mitigation, this Court stated:

We affirm the county’s findings because they are supported by substantial evidence in the Record and they are not arbitrary and capricious.

Id.

Likewise, in EIO v. Minnesota Pollution Control Agency, 1998 WL 389079, the appellant challenged a negative EAW declaration. The project at issue involved a feedlot.

The Court of Appeals focused on the MPCA's findings concerning mitigation by ongoing regulatory authority. Specifically, the MPCA had considered likely environmental effects and then determined that mitigative measures would address those effects. The mitigative measures included a DNR water appropriation permit, compliance with existing feedlot rules, a stormwater discharge permit, a conditional use permit from the county, and preparation of operational plans. Id., p. 3.

Finally, in reviewing and applying the EQB's rules to this particular dispute, the Court is guided by the statutory canons of construction in Minn. Stat. Ch. 645. In particular, where an agency rule is plain on its face, the rule must be applied as promulgated and written. See, e.g., In the Matter of Minnesota Independent Equal Access Corporations Application, 477 N.W.2d 516, 520 (Minn. Ct. App. 1992). A court may not look beyond the face of the rule to ascertain agency intent where the rule is clear. Id.

In summary, several key legal principles apply in this case. First, courts require more than anecdotal expressions of concern in order to interfere with a negative EAW determination. Second, courts must defer to the decision of an RGU so long as there is substantial evidence in the EAW Record supporting the decision. Third, a county CUP process can provide for mitigation of potential environmental effects, even if found to exist. Finally, an unambiguous agency rule must be applied according to its plain meaning.

III. THE CUMULATIVE IMPACT ANALYSIS IS NOT PART OF THE DECISIONAL CRITERIA IN MINN. RULES 4410.1700, AND THE COUNTY'S NEGATIVE EAW DECLARATIONS ARE NOT ARBITRARY FOR FAILURE TO CONSIDER CUMULATIVE IMPACTS

A. History of NEPA and MEPA

In 1970, Congress adopted the National Environmental Policy Act ("NEPA"). 42 U.S.C. §§ 4331-45370F. Under NEPA, federal agencies must prepare a "detailed statement" of the "environmental impact" of a proposed action. 42 U.S.C. §§ 4332(c)(i)-(iv).

NEPA is procedural in nature. Consequently, NEPA provided for the creation of the Council on Environmental Quality ("CEQ"). The CEQ promulgated administrative regulations which constitute the substantive heart of federal environmental review.

Following the adoption of NEPA, a number of states adopted state environmental policy acts. Currently, fifteen states have enacted and enforce such acts.⁴ An additional 13 states have adopted only limited scope statutes or executive orders in the environmental review area.⁵

⁴ Cal Pub Res Code §§ 21000-21174; Conn Gen Stat §§ 22a-1 to 22a-1h; Hawaii Rev Stat §§ 343-1; Ind Code Ann §§ 13-1-10-1 to 13-1-10-8; Md Nat Res Code Ann §§ 1-301 to 1-305; Mass Gen Laws Ann Ch. 30; §§ 61, 62-62II; Minn Stats Ann §§ 116D.01-116D.07; Mont Code Ann §§ 75-1-101 to 75-1-105; 75-1-201; NY Envntl Conserv Law §§ 8-0101 to 8-0117; NC Gen Stat § 113A-1; PR Laws Ann tit 12, §§ 1121-1127; SD Codified Laws Ann §§ 34A-9-1 to 34A-9-12; Va Code §§ 3.1-18.8, 10.17-107 to 10.17-112, Wash Rev Code §§ 43.21C.010-43.21C.910; Wis Stat Ann § 1.11.

See, e.g.,

⁵ Michigan, see Michigan Executive Directive 1971-10, as superseded by Michigan Executive Order 1973-9, as superseded by Michigan Executive Directive 1971-10, as superseded by Michigan Executive Order 1973-9, as superseded by Michigan Order 1974-4 (May, 1974); New Jersey, see New Jersey Executive Order No. 53 (Oct. 15, 1973); Texas, see Policy for the Environment (Mar. 7, 1972), published in Environment

In the states with regulatory schemes generally patterned after NEPA, the states require preparation of Environmental Impact Statements for actions that will have a significant effect on the environment. However, the similarity between the laws ends there. State laws differ in both the procedural and substantive determinations they require. They differ in the definition of an "action" covered by the law. They differ in whether local agencies are governed by the law. They differ in the standards for determining environmental significance. And, they differ in the standards of judicial review.

The Minnesota State Environmental Review program was established by the adoption of MEPA in 1973. See Minn. Stat. Ch. 116D. Companion legislation created the EQB. See Minn. Stat. Ch. 116C.

The EQB adopted provisional rules in 1974. Under these provisional rules, it was the EQB itself that determined, on a case-by-case basis, which projects had the potential for significant environmental effects.

In 1977, the EQB provisional rules were amended to reflect learning experiences during the three effective years of the provisional rules. The new rules delegated the obligation to make determinations on the need for an EIS to local and other state agencies, subject to appeal to the EQB.

for Tomorrow; The Texas Response, updated by the Environment Policy—Guidelines and procedures for Processing EISs, (Nov. 1975); Utah, see State of Utah Executive Order (Aug. 27, 1974).

In 1980 and 1981, the EQB adopted comprehensive revisions to its agency rules.

Included in the new rules were the following:

1. The definition of “related action” and adoption of the “related action” concept.
2. The definition of “phased action” and adoption of the “phased action” concept to include substantially certain future projects.
3. Adoption of the criteria for determining whether an action has the potential for significant environmental effects including the key criteria of “cumulative potential effects of related or anticipated future projects.”

See App. pp. A-68 to 74

Importantly, the criteria for determining whether an action has the potential for significant environmental effects have remained unchanged since their adoption into rules in 1981. In particular, the criteria “cumulative potential effects of related or anticipated future projects” has been in place, unchanged, since 1981.

B. The EIS Determination Criteria Under Rule 4410.0700, subp. 7

As indicated above, Minnesota Rule 4410.1700, subp. 7 establishes four specific criteria for determining whether a project has the potential for significant environmental effects, thus triggering the requirement for an EIS. The rule states:

Criteria. In deciding whether a project has the potential for significant environmental effects, the following factors shall be considered:

- A. type, extent, and reversibility of environmental effects;
- B. *cumulative potential effects of related or anticipated future projects;*
- C. the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority; and

- D. the extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.

See Minn. R. 4410.1700 subp. 7 (emphasis added).

In contrast, Minnesota Rules 4410.0200, subp. 11 states:

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.

While Minn. R. 4410.1700 subp. 7 governs the threshold determination of when an EIS is necessary, Minn. R. 4410.0200, subp. 11 applies once an agency determines that an EIS is required, and is pertinent for purposes of the EIS and EIS scoping process. These two provisions of the Minnesota Rules are not synonymous.

By its plain meaning, Minn. R. 4410.1700, subp. 7, only requires the County to consider the potential aggregate effects of *related or anticipated future projects* in determining whether to require an EIS. This is a significantly more narrow inquiry than that contained in the definition of "cumulative impacts," which requires the consideration of aggregate effects of the project *in addition to other past, present, and reasonably foreseeable future projects* regardless of what person undertakes the other projects, and regardless of the relatedness of the projects; while consideration of the actual criteria in Minn. Rules 4410.1700, subp. 7 requires an aggregate analysis only of related or

anticipated future projects, analysis of *cumulative impacts* requires consideration of past projects as well, without consideration for whether these projects are related to the project under consideration. By their plain meanings, the definitions contained in these two sections of the EQB rules are simply not synonymous.

It is not the case that the phrase “cumulative impact” is left an orphan in Minn. Rules Ch. 4410 (through this would be the EQB’s fish to fry). Minn. Rules 4410.3800 authorizes the preparation of a Generic EIS where the EQB has determined that an area study is more appropriate than a case-by-case project study. In such a context, the Rules, Minn. Rule 4410.3800, subp. 5(G), do literally require a more comprehensive study of the “cumulative impacts” of various projects in the area or region. The key distinction is that the EQB must act as RGU on such an EIS, unless a local government consents to act as RGU.

Finally, both Appellants and Amicis fail to address this Court’s decision in EIO v. Minnesota Pollution Control Agency, 1998 WL 389079. As indicated in Kandiyohi County’s brief, the EIO decision directly addresses the proper interpretation of the “cumulative potential effects of related or anticipated future projects” EIS decisional criteria. Appellants in EIO argued the RGU must consider the impact of other unrelated past, present and future feedlots in the area. Rejecting the argument, the Court of Appeals stated:

Minn. Rules 4410.700, subp. 7B requires a governing agency to consider “related or anticipated future projects.” Appellant confuses the existence of other agricultural operations, in the area with the cumulative effects of future operations, in the area with the cumulative effects of future operations, there is no evidence of

the latter and thus the MPCA, Inc. considering both phases of the Scherping project, properly considered the cumulative effect of this project.

C. The EQB May Not Enforce Decisional Standards that Differ from its Validly Adopted Rules

The Administrative Procedure Act (“APA”), Minn. Stat. Ch. 14, requires an agency to adopt its rules in accordance with the procedures specified in the Act. Minn. Stat. 14.05, subd. 1. The purposes of the APA are: (1) to provide oversight of powers and duties delegated to administrative agencies; (2) to increase public accountability of administrative agencies; (3) to ensure a uniform minimum procedure; (4) to increase public access to governmental information; (5) to increase public participation in the formulation of administrative rules; (6) to increase the fairness of agencies in their conduct of contested case proceedings; and (7) to simplify the process of judicial review of agency action as well as increase its ease and availability. Minn. Stat. § 14.001. Under the APA, a rule “means every agency statement of general applicability and future effect...adopted to implement or make specific the law enforced or administered by it...” Minn. Stat. 14.02, subd. 4.

Interpretive rules are those rules which are promulgated to make specific the law enforced or administered by an agency. Minnesota-Dakotas Retail Hardware Association v. State, 279 N.W.2d 360 (Minn. 1979). The EQB’s interpretation of “cumulative potential effects” as synonymous with “cumulative impacts” falls within the definition of “interpretation” subject to the rule making procedures of the APA. See, e.g., Hanna Mining Company v. Minnesota Public Utilities Commission, 375 N.W.2d 550 (Minn. Ct. App. 1985) (holding that a statement of criteria for determining what constituted

“significant investments” in and expenditures for energy conservation improvements fell within the definition of an interpretive rule for which the Public Utilities Commission was required to follow specific adoption procedures); Dullard v. Minnesota Department of Human Services, 529 N.W.2d 438, 445 (Minn. Ct. App. 1995) (stating it is inappropriate for agencies to adopt policy in a case-by-case method covering issues of broad social and political importance); Springborg v. Wilson and Company, 73 N.W.2d 433, 493 (Minn. 1955) (stating although adoption of an administrative rule was a discretionary function, once a rule is adopted the agency does not have the discretion to disregard it); Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency, 469 N.W.2d 100, 106 (Minn. Ct. App. 1991) (stating a substantial change to a particular standard adopted into a rule requires new rule making procedures). When an agency adopts a policy that is inconsistent with its administrative regulations, and does so without following the APA procedures, the court will invalidate the agency’s action. Elm Homes v. Minnesota Department of Human Services, 575 N.W.2d 845 (Minn. App. 1998).

Amicus EQB argues that this Court should simply defer to the EQB’s interpretation of “cumulative impacts” as synonymous with “cumulative potential effects of related or anticipated future projects”. Minnesota agencies’ authority to promulgate rules, however, is restricted to compliance with the Minnesota Administrative Procedures Act, § 14.05, subd. 1 (1996). “Rules must be adopted in accordance with specific notice and comment procedures established by statute ...and the failure to comply with the necessary procedures results in invalidity of the rule.” White Bear Lake Care Ctr. V.

Minnesota Dep't of Pub. Welfare, 319 N.W.2d 7, 9 (Minn. 1982.) When an agency adopts policies that are inconsistent with its administrative regulations, and does so without following required APA procedures, the court will invalidate the agency's action. Cable Communications Bd. v. Nor-West Cable Communications Partnership, 356 N.W.2d 658, 667-68 (Minn. 1984). As a general rule courts defer to an agency's interpretation when the language subject to construction is so technical in nature that only a specialized agency has the experience and expertise needed to understand it, Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 824 (1977), or when the language is ambiguous. Abbott's Estate v. Dancer, 6 N.W.2d 466 (Minn. 1942). But courts should not defer when the language employed or the standard delineated is clear on its face. Wenzel v. Meeker County Welfare Board, 346 N.W.2d 680, 684 (Minn. App. 1984). See also In the Matter of Minnesota Independent Equal Access Corporation's Application, 477 N.W.2d 516, 520 (Minn. App. 1992) (stating, "When statutory language is clear and unambiguous, the letter of the law shall not be disregarded under the pretext of pursuing the spirit"); Gust v. Minnesota Department of Natural Resources, 486 N.W.2d 7, 9 (stating, "Although an agency's interpretation may be persuasive, it does not preclude a different construction by the courts"). Consequently, Appellants urging that this Court consider the "intent" of the EQB Rules (Appellants' brief, pp. 13-16), and the EQB's urging that this Court defer to its interpretation (EQB brief, p. 8) are spurious.

If the agency's interpretation corresponds with the plain meaning of the rule that it is construing, then the agency has not promulgated a new rule and has not violated the MAPA. Mapleton Community Home, Inc. v. Minnesota Dep't of Human Servs., 391

N.W.2d 798, 801 (Minn. 1986). However, when an agency's interpretation runs counter to the promulgated rule, the agency has violated the APA. Id.

In this case, the EQB's interpretation is not true to the plain and clear language of the rule requiring an agency to consider the "cumulative potential effects of related or anticipated future projects" under Minn. R. 4410.1700 subp. 7. For example, Minn. R. 4410.1700, subp. 7 requires that the RGU in determining the need for an EIS, consider only related projects. Consequently, "unrelated" projects need not be considered, in an aggregate sense, by the RGU according to the express terms of the decisional criteria in Minn. R. 4410.1700. Similarly, Minn. R. 4410.1700 imposes a prospective view on the RGU's analysis by requiring it to consider impacts of reasonably foreseeable projects. More specifically, the RGU is required to consider the potential cumulative effects of "anticipated future projects." The RGU is not required by the express terms of Minn. R. 4410.1700 to look backwards or at pre-existing projects.

In contrast, the concept of "cumulative impacts" urged by Appellants and the EQB in this case is completely different in nature from the express language in the EIS decisional criteria as defined by Minn. R. 4410.1700. "Cumulative impacts" is defined by Minn. R. 4410.0200, subp. 11 as the impact on the environment which may result from ". . . other past, present, and reasonably foreseeable future projects regardless of what person undertakes the other projects. . . ." (Emphasis added.) In very simple terms, the express EIS decisional criteria, as they relate to other similar projects, require connectedness, and a forward look. In contrast, the concept of "cumulative impacts"

requires no connectedness, and looks both forward and backward – a significantly broader analysis.

When focusing on the actual criteria for the EIS determination, the Administrative Record is clear that the County properly evaluated the existence of related or anticipated future projects, and determined none existed. Similarly, the Court of Appeals properly concluded there was no Record evidence of related or future projects that the County failed to consider, in a cumulative sense, along with the Duininck proposals. At page five of its decision, the Court of Appeals specifically noted:

. . . the County specifically analyzed the project in light of the rule requirement that it consider connected and placed actions as part of the same project. We cannot conclude the County acted arbitrarily or capriciously.

Id.

Amicus EQB argues that even its own EAW form and its staff-promulgated guideline documents use the terms cumulative effects and cumulative impacts interchangeably. See EQB Amicus Brief at p. 10-11. Under the APA, however, adoption of a form or a guideline document do not constitute adoption of rule, because, the form or guideline document was not adopted according to the public procedures in the APA. Minn. Stat. § 14.03, subd. 3(2).

Finally, in further recognition that the phrase “cumulative potential effects of related or anticipated future projects” and “cumulative impact” are not synonymous, the Environmental Quality Board has recently considered revising the language of the EIS criteria contained in Minn. R. 4410.1700, subp. 7. In a document dated October 21, 2004

titled "*Environmental Review Rules: Housekeeping, Technical and Other Procedural Revisions Identified by EQB Staff*" the EQB notes, contrary to its position in its Amicus Brief, that the wording in Minn. R. 4410.1700, subp. 7 is not consistent with the definition of cumulative impacts. The EQB recommended changing Minn. R. 4410.1700, subp. 7, item B so that the criteria do require an RGU to consider cumulative impacts in the EIS determination. See App. p. A-84. In a subsequent version dated November 18, 2004 and titled "*Environmental Review Rules: Possible Major Process Revisions Complied by EQB staff from Past Reform Study Efforts*", the EQB again recommended requiring the analysis of cumulative impacts in EIS need decisions stating "Increasing pressure to do something to better define RGU responsibilities. An intellectual challenge as well as likely controversial. What to do not at all clear – no obvious and easy solutions." App. p. A-86. Finally, in a third draft dated February 2, 2005, titled "*Minnesota Environmental Quality Board Proposed Revision of Rules Governing the Environmental Review Program,*" the EQB again recognized that the language in Minn. R. 4410.1700, subp. 7, item B is not consistent with the definition of "cumulative impacts" See App. p. A-88. The EQB proposes a prospective amendment to Rule 4410.1700, subp. 7, Item B to require consideration of "cumulative impacts" in the EIS determination. The EQB has the need for a rule change on a "court case".

Obviously, the EQB has recognized that, despite its apparent interpretation of the phrase "cumulative potential effects of related or authorized future projects" and the definition of "cumulative impacts" as synonymous, the terms in fact do not mean the same thing.

Amicus National Wildlife Federation and the Minnesota Center for Environmental Advocacy argue that federal courts have found that the requirement to engage in cumulative impacts analysis applies to an EA as well as to an EIS. These cases, however, rely on analysis under NEPA, not under MEPA. As is acknowledged in the amicus briefs, the NEPA rules define “cumulative impact” in terms nearly identical to those contained in the EQB rule. Amicus Brief at 9. However, CEQ regulations, unlike EQB Rules, specifically require the consideration of “cumulative impacts”. App. p. 75. The cases cited by Amicii under NEPA are thus easily distinguishable. For example, in Habitat Education Center, Inc. v. Bosworth, as attached to the National Wildlife Federation amicus brief, the Eastern District of Wisconsin held that the Forest Service failed to satisfy the requirements of NEPA by failing to consider the cumulative impacts of other logging projects in the area. As a result, the Court found that the EIS conducted by the Forest Service was insufficient. Habitat Education Center at 9-10. But in this case, however, the question is whether the County complied with the requirements of the MEPA, which require consideration of “cumulative potential effects of related or anticipated future projects,” and not whether the County conducted an adequate EIS under NEPA, requiring analysis of the “cumulative impacts” of the project. As a result, whether numerous federal courts have required an analysis of “cumulative impacts” in an EA under NEPA is simply not relevant under the specific language provided in MEPA.

IV. THE COUNTY'S NEGATIVE DECLARATIONS ON THE NEED FOR AN EIS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD

Appellants in this case also challenge the substantive decision of the Kandiyohi County Board acting as RGU that evidence gathered in the EAW process did not demonstrate that an EIS should be required for either of the Duinick project proposals. Specifically, Appellants argued at district court and the Court of Appeals that the EAW Record supports a conclusion that the two proposed projects will have significant environmental effects on:

- 1) air quality;
- 2) groundwater quality; and
- 3) surface water quality.

For the reasons discussed below, Appellants' assertions are without merit. A close review of the EAW Record demonstrates Appellants offered nothing more than statements of general concern and anecdotal conjecture. The Court of Appeals correctly affirmed the substantive negative EAW declaration. Also for the reasons discussed below, the Dead Lake decision is inapposite to this case.

A. Air Quality Concerns

Perhaps the best example of the anecdotal approach of Appellants in their opposition to the proposals involves the issue of air quality. Appellants asserted at district court and the Court of Appeals that the existence of air quality issues warrants reversal of the County Board's negative EAW declarations. However, a review of the EAW Record demonstrates that Appellants completely failed to offer into the Record tangible evidence supporting such a concern.

It is certainly every landowner's prerogative to express concerns and opposition to a project that the landowner feels will have an adverse impact on his or her enjoyment of property. The general expression of opposition or concern, however, does not itself constitute tangible or substantive evidence. Minnesota courts have consistently held that "NIMBY" opposition in and of itself is an insufficient basis to support denial of a land use request. Instead, it is the opponents' obligation to offer the reasons for opposition, and to, more importantly, offer specific probative evidence in support of the reasons.

In the present case, approximately 30 comment letters were submitted by private citizens. Only five of these 30 letters touch on the issue of air quality. One letter simply poses the question "what is the cumulative impact on air quality?" AR 51. Another asserts, without substantive factual or scientific support, that the projects may cause "human health hazards from . . . ambient particulate and pollutants." AR 65. The third letter again simply poses the question "what are the sources . . .and any proposed measures to mitigate the adverse effects of odors, noise and dust?" AR 77. The fourth letter also asks "what plans have been made to minimize . . .air pollution?" AR 87. Finally, the fifth letter expresses only a general concern; indicating that the author ". . .is concerned about the dust, odor and noise." AR 90.

Importantly, the Minnesota Pollution Control Agency, the agency charged with responsibility for identifying and dealing with air quality issues, also submitted a comment letter in response to the two EAWs. The MPCA's two page letter (AR 55-56) makes no mention of potential air quality problems that would be presented by either of

the proposals. The absence of any demonstrative concern on the MPCA's part constitutes "substantial evidence" supporting the negative EAW declaration concerning air quality.

Moreover, Duininck Bros., Inc. directly responded to the comments received, and addressed the questions raised by the citizen comments. Specifically, Duininck Bros., Inc. indicated its intent to control dust emissions through the use of water.⁶ AR 111.

In summary, the EAW Record contains a small number of citizen letters which express only general anecdotal concerns relating to air quality. There is no evidence in the Record of air quality standards, or of anticipated violation of the standards by the proposed projects. The issue of air quality was not ever raised in the MPCA comment letter. As in IRRRB, supra p. 5 Appellants have produced "no scientific data" documenting their concerns. The project proposer identified operational mitigations that would in any event be used to address the general concerns of Appellants. There is substantial evidence in the EAW Record supporting the County's negative EAW declaration as it relates to air quality.

B. Groundwater Quality

Appellants also alleged at district court and the Court of Appeals that the County Board's negative EAW declarations should be reversed because of the alleged anticipated adverse impact of the proposed two pits on groundwater quality. The district court erroneously concluded Appellants met their burden of producing tangible probative evidence supporting the concerns. The Court of Appeals correctly concluded that "the

⁶ In fact, the EAW documents themselves describe the operational controls to be used to address issues of odor, noise and dirt. AR 8, AR 29.

County had substantial evidence to support its determination that the groundwater would not be affected by the proposals.”

Many of the citizen comment letters collected in the EAW process, as with the air quality issue, only posed the question: “what studies have been done concerning groundwater?” For the reasons discussed above, these statements of question do not constitute substantive evidence; they cannot serve as a basis for reversing the County Board’s negative EAW declaration.

In the EAW documents Co-Respondent Duininck reported, based on borings and its activities in the area, that the water table on the proposed project sites was approximately 60 feet below the ground surface at one location, and 80 feet at the other location. AR 7, AR 28. The gravel extraction would end at 30 feet, leaving a separation of 30 and 50 feet, respectively, between the final excavated elevation at the project sites and the reported water table depth on the specific parcels. Importantly, neither Appellants, nor any other individual or agency, provided evidence in the EAW Record that contradicted the proposer’s information concerning the water table elevation on the two specific parcels which are the subject of this lawsuit. The Court of Appeals correctly noted that none of the commentators introduced into the Record any federal, state or local standards establishing a separation distance requirement between a finished gravel pit elevation and groundwater.⁷ The Court of Appeals correctly noted that nothing in the Record supported a conclusion that gravel pits threaten groundwater quality. Moreover,

⁷ Ironically, the DNR even issues permits that allow certain gravel mining operations into the water table.

the Court of Appeals correctly noted the complete absence of scientific data or standards supporting Appellant's concerns. See IRRB, supra, p.5. Instead, Appellants simply expressed concern about the reduction of the separation distance between ground surface and the water table.

Appellants argued vigorously at district court that the MnDOT EAW for the 23/9 interchange project, located directly adjacent to the ELW/Dovre site, should be included in the EAW Record, and the district court allowed it. Appellants also allude to the MnDOT EAW in their Supreme Court brief. Id. p. 9. Ironically, the MnDOT EAW is instructive as it relates to significant environmental impacts (or the lack thereof) relating to a separation between a final project elevation and water table and any direct correlation to groundwater quality concerns, or concerns regarding impact on Eagle Lake.

The MnDOT EAW indicates that the water table was determined to be at a depth of 35 feet at the location of the interchange project. SAR 27. The interchange project lowered the pre-existing elevation of TH 23 by 25 feet. SAR 19. Thus the separation distance between the final elevation of the MnDOT interchange project and the estimated level of groundwater that would recharge Eagle Lake was only 10 feet (in contrast to 50 feet and 30 feet with the subject parcels)! Yet MnDOT determined that the TH23 project would have "...no impact on Eagle Lake." SAR 26. The MnDOT EAW resulted in a negative EAW declaration, and the project has been constructed. Furthermore, the MnDOT EAW Record reflects no comment letter from the DNR to MnDOT expressing a concern about the 10 foot separation, even though the DNR would have been notified as a potential commenting agency.

At the Court of Appeals, Appellants argued the significance of a 1980 study on the hydrology of Cafe Lake. While the 1980 Hydrologic Budget Study indicates groundwater recharges Eagle Lake (and accounts for 22% of its water) it does not indicate that gravel extraction would adversely affect groundwater quality. Neither does it opine standards for separation of ground water and water table.

Aside from citizen comments, the DNR submitted a two page comment letter during the environmental review process. The DNR comment letter states that the separation distance between the “bottom of the excavation sites and groundwater reserves may not be sufficient to fully filter contaminants, particularly if the soils are course . . .” AR 106. (Emphasis added) But the DNR letter contains no data supporting a conclusion that the soils on the project site are “course” as that term is used on the DNR letter. To the contrary, the Record contains the opinion of the Minnesota Department of Health, which opined that the gravel pit projects would not impact wells and water quality in the area. AR 142.

As indicated previously, in Iron Rangers for Responsible Ridge Action v. IRRRB, 531 N.W.2d 874 (Minn. Ct. App. 1995), the plaintiff alleged that the Giants’ Ridge project should be enjoined because it would destroy habitat used by certain wildlife species. In that case, the MCEA, as in the present case, relied on DNR comments in the environmental review process.

The IRRRB case involved 250 acres of wildlife and vegetative habitat proposed for development. The DNR generally asserted in the environmental review process that elimination of the habitat might negatively impact the floating marsh marigold, the bur

reed, forest-dwelling birds, neotropical migrant songbirds, and the barren strawberry. The DNR offered no specific evidence in the EAW process (or later), however, that populations would be negatively impacted by loss of the 250 acres of habitat.

In this case, the DNR, as in the IRRRB case, expressed an opinion about what “might” happen. The DNR’s speculation is itself based on a presumption of soil type (coarse) that may or may not exist at the depth of excavation; The DNR comment letter offers no scientific data supporting its general statements; the DNR comment letter offers no standards, rules, statutes, or studies supporting its general statement. The DNR comment letter is contradicted by the opinion of another state agency, the Minnesota Department of Health, which opined no impacts on well and water quality were expected to occur.

Ultimately, this Court must determine, on a de novo basis, whether the private citizens’ statements of concern and question, and the DNR’s statement of what may or may not be a sufficient separation distance are adequate substantive evidence to, as a threshold matter, overturn the decisions of the County Board, taking into consideration the very narrow standard of review discussed herein and the evidence in the Record that supports a contrary conclusion. It is the County’s position that this quantum of “evidence” does not itself collectively constitute adequate evidence by which Appellants could meet their presumptive burden required by law. There is substantial evidence in the Record to support the County Board’s determination not to require an EIS based on asserted concerns of groundwater impact.

C. Surface Water Quality

Appellants' finally alleged at district court and the Court of Appeals that surface water concerns warrant reversal of the County Board's decision. Review of the EAW Record also reveals the meritless nature of this claim.

Surface water drainage patterns in the pertinent area of the Eagle Lake Watershed carry surface water overland toward Eagle Lake, carrying sediment it picks up along the way.⁸ The un rebutted evidence in the EAW Record indicated that the project parcels would be mined in a fashion that directs all run off back into the property. AR 111. Thus the County Board logically concluded there was a lack of evidence that supported a conclusion an EIS should be required due to surface water quality concerns. In fact, retaining waters on site that would otherwise drain offsite improves surface water quality concerns.

D. Other Varied Allegations

Many of the questions posed by private commentators during the EAW process related to operational considerations. The commentators expressed a legitimate desire to know how dust would be handled, what hours of operation would exist, how erosion would be dealt with, and the like. As previously noted, Minn. R. 4410.1700, subp. 7 indicates one of the criteria to be considered by the RGU in determining whether an EIS should be prepared is the extent to which environmental effects can be mitigated by ongoing regulatory authority. The Kandiyohi County Zoning Ordinance contains a section on mining that places significant operational controls on the pit operator. The

permit can only be issued for up to 10 years. The applicant must submit Mining and Reclamation plans that are approved by the County Board itself. “The plans must address dust, noise, possible pollutant discharges, hours and duration of operation, and anticipated vegetation and topographic alterations. The plans must “identify actions to be taken during operation to mitigate adverse environmental impacts, particularly erosion.” The plans must clearly explain how the site will be rehabilitated after extracting activities end. The plans must identify setbacks from property lines. The County Ordinance requires the applicant to post a bond to assure performance consistent with the Ordinance. AR 155-56. In this regard, the County Board properly concluded, as part of its Findings, that these varied concerns would be adequately addressed through “ongoing regulatory authority,” i.e. the County CUP process. The CUP provisions constitute adequate “. . . assurances that reasonable mitigation measures will be in place . . .” MCEA supra, p. 9.

E. The Dead Lake Decision

In their Petition for Review and their Brief Appellants suggest the Court of Appeal’s decision in this case is inconsistent with its decision in Dead Lake Ass’n, Inc. v. Otter Tail County, Appellate File A04-717, 2005 WL 221773. In their brief, Appellants argue that the Dead Lake case parallels the present case, but with a different result. For the reasons discussed below, Dead Lake is distinguishable both factually and legally.

In Dead Lake, a developer proposed to construct a 151 unit cluster residential/commercial development on a shallow Natural Environment Lake in Otter Tail County. The County, acting as RGU, prepared an EAW, which noted that a number

⁸ Again, it is only the ELW/Dovre Township Pit that is within the Eagle Lake Watershed.

of significant environmental effects would result from the project, including those effects resulting from the impacts of boat traffic on the shallow lake.

The Otter Tail County Board thus acknowledged the potential significant environmental effects that would result from the large development, but still made a negative EAW declaration. The Otter Tail Board decided that the impacts would be dealt with when they arose.

In the present case, the Kandiyohi County Board, determined that the EAW record evidence did not demonstrate that the gravel projects had the potential for significant environmental effects. The Board did not, like the Otter Tail Board in Dead Lake, acknowledge the potential for significant environmental affects, but elect to address the impacts later. Instead, the Kandiyohi Board concluded the EAW Record evidence did not demonstrate the potential for significant environmental effects in the first instance.

The Dead Lake decision is not a remarkable decision that establishes a new legal proposition. Instead, it reiterates the concept of “deferral” established by the Court of Appeals in Trout Unlimited Inc. v. Minn. Dept. of Agric. 528 N.W.2d 503 (Minn. Ct. App. 1995), rev. denied (Minn. April 27, 1995). In Trout, the Court of Appeals reversed a negative EAW declaration for a proposed irrigation project adjoining a trout stream. The reversal was based on the fact the RGU recognized the potential for significant environmental effects, but nevertheless deferred the consideration of the impacts to future permitting processes. The Court of Appeals in Dead Lake concluded that the Otter Tail County Board likewise deferred consideration of environmental effects to the future.

The Kandiyohi County Board in this case did not “entirely fail to consider an important aspect of the problem”. Neither did it “defer” consideration of environmental effects to a future date. Rather, it considered the evidence in the EAW record, and concluded that there was not the potential for significant environmental effects such that an EIS was required. Reversal of the negative EAW declarations is not justified on the basis the Dead Lake decision mandates it.

CONCLUSION

For the reasons discussed herein, this Court should sustain the decision of the Court of Appeals. The Court of Appeals correctly concluded there is substantial evidence in the Record to sustain the negative EAW declarations. The Court of Appeals correctly let stand the district court's determination that the "cumulative impact" definition in EQB Rules is not synonymous with the phrase "cumulative potential effects of related or anticipated future projects". The Court of Appeals decision in this case is not inconsistent with the Dead Lake decision.

Respectfully submitted,

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Dated: _____

6/1/05

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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).