

NO. 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 REPLY BRIEF

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## INTRODUCTION

Respondents D.R. Horton, Inc. (“Horton”), Gordon Nesvig (“Nesvig”), and the City of St. Paul Park (“City”) shift all over the map in arguing that the City did not have to consider the potential for cumulative impacts of a proposed 667-acre development (“Project”) on the critical areas designation for the Mississippi River even though the Project would require substantial changes to the designation itself. In the end, their arguments rest on claims that no obligation exists to assess cumulative impacts beyond the study area selected for an alternative urban areawide review (“AUAR”) and that, even if such an obligation exists, the decision to assess some impacts of the Project that extend beyond the study area but not the possible cumulative effects on the Mississippi’s designation is excused by the deference that should be extended to agencies performing environmental review. The claims are based on mistakes of law and of fact and the District Court’s decision affirming the City’s approval of the AUAR should be reversed and remanded for additional environmental review of the possible cumulative impacts of the Project on the Mississippi’s critical area designation.

## ARGUMENT

### **I. ENVIRONMENTAL REVIEW REQUIRES THE ASSESSMENT OF ALL SIGNIFICANT EFFECTS OF A PROJECT INCLUDING RELATED CUMULATIVE IMPACTS.**

The Minnesota Environmental Policy Act (“MEPA”) mandates that the potential for environmental impacts of certain proposed projects be assessed prior to the issuance of the approvals and permits needed for the projects to proceed.

Minn. Stat. § 116D.04 (2004). In part, this obligation fulfills MEPA's requirement that the state's units of government

use all practical means . . . to create and maintain conditions under which human beings and nature can exist in productive harmony . . . improve and coordinate state plans, functions, programs and resources to the end that the state may . . . discourage ecologically unsound aspects of population, economic and technological growth, and develop and implement a policy such that growth occurs only in an environmentally acceptable manner(.)

Minn. Stat. § 116D.04, subs. 1 & 2 (2004). For this reason, courts require that state agencies take a 'hard look' at the environmental impacts of governmental action in an analytical and thorough fashion. *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457, 468 (Minn. 2002).

## **II. CUMULATIVE IMPACTS MUST BE CONSIDERED IN ALL FORMS OF ENVIRONMENTAL REVIEW INCLUDING AUARS.**

In general, environmental review looks at the significance of the direct and indirect effects a project will have on the environment. Minn. R. 4410.0200, Subp. 65 (2003). In many cases, particularly in regard to the process of urbanization, some of the most significant effects that need to be considered in environmental review represent the accumulation of effects from many different projects including the specific project being studied. Minnesota Environmental Quality Board, Guide to Minnesota Environmental Review (April 1998) ("MEPA Guidance") at 5 & 15-16. In its regulations implementing MEPA, the Minnesota Environmental Quality Board ("EQB") defines the term 'cumulative impact' as "the impact on the environment that results from *incremental effects of the project*

*in addition to other past, present, and reasonable foreseeable future projects* regardless of what person undertakes the other projects.” Minn. R. 4410.0200, Subp.11 (2003) (emphasis added).

Contrary to Respondents’ arguments, EQB’s regulations implementing MEPA require the consideration of cumulative impacts in assessing the potential for significant environmental effects in all forms of environmental review. In deciding if a detailed environmental impact statement (“EIS”) is required following the completion of a more abbreviated environmental assessment worksheet (“EAW”), a responsible governmental unit (“RGU”) must consider a number of factors including the “cumulative potential impacts effects of related or anticipated future projects(.)” Minn. R. 4410.1700 Subp. 7 (2003). EQB states that this consideration “implies that the RGU must take into account cumulative impacts when preparing the EAW so sufficient information about cumulative impacts is recorded and available for determining the need for an EIS.” MEPA Guidance at 5.

If an EIS is not preceded by an EAW, the regulations implementing MEPA require that the scoping decision for the EIS include an “identification of potential impact areas resulting from the project itself and from related actions” and that the EIS must include a “thorough but succinct discussion of potentially significant direct or indirect, adverse, or beneficial effects generated.” Minn. R. 4410.2100, Subp. 6 (2003) & Minn. R. 4410.2300, Item H (2003). Again, EQB explains that

these provisions “direct an RGU to identify cumulative impacts along with direct impacts” in an EIS. MEPA Guidance at 5.

Under MEPA, EQB may establish alternate forms of environmental review but the alternate forms must “*address the same issues and utilize similar procedures as an environmental impact statement.*” Minn. Stat. § 116D.04, subd. 4a (2004) (emphasis added). As a result, alternate forms established by EQB must consider cumulative impacts because an EIS must. As an alternate form, EQB established AUARs to deal with the accumulating impacts of a number of projects in a broad geographic area that might be missed if only separate project-specific forms of environmental review were performed. Minn. R. 4410.3610 (2003).

To perform an AUAR, an RGU selects the geographic area to be studied, defines the nature, location and intensity of development that is anticipated, and specifies a number of development scenarios that will be useful in assessing the environmental effects of various levels of development. The form of the AUAR “must be similar to that of an EAW, but must *provide for a level of analysis comparable to that of an EIS(.)*” Minn. R. 4410.3610, subp. 4 (2003) (emphasis added). This language reiterates MEPA’s requirement that alternate forms must address the same issues as an EIS and reinforces the conclusion that an AUAR must include a consideration of cumulative impacts.

**III. THE PROJECT AUAR IS INADEQUATE BECAUSE OF THE FAILURE TO CONSIDER CUMULATIVE IMPACTS RELATING TO THE MISSISSIPPI’S DESIGNATION.**

**A. Respondents Misread The AUAR Guidance And This Represents A Mistake Of Law.**

Respondents argue that an AUAR, by its very nature, assesses cumulative impacts in the study area selected by an RGU and that cumulative impacts beyond the study area may be disregarded. In support of this position, Respondents rely on guidance from EQB on the preparation of AUARs. Minnesota Environmental Quality Board, Recommended Content and Format Alternative Urban Areawide Review Documents (October 2, 2000) (hereinafter referred to as “AUAR Guidance”) (Horton App. 11-17). When the Project’s AUAR was undertaken, the AUAR Guidance stated that Item 29 of the EAW form relating to cumulative impacts “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.

The difficulty with Respondents’ position is that it seriously misreads the AUAR Guidance. To get to their result, Respondents rely on the language ‘does not require a response for cumulative impacts’ and disregard the limiting phrase ‘from related developments within the AUAR area.’ It is certainly true that EQB designed the AUAR to more efficiently deal with cumulative impacts of a number of projects within a study area but it is equally certain that cumulative impacts are not necessarily limited to ‘related developments’ or only play out in ‘a specified geographic area.’ By definition, cumulative impacts are the impacts of the project

in addition to other past, present, and reasonably foreseeable future projects, whether related or not.

Moreover, the interpretation by Respondents contradicts other portions of the AUAR Guidance. EQB states that an AUAR must include a detailed assessment of the traffic effects resulting from the various levels of development specified by the RGU. The assessment must be particularly detailed if “there is to be much commercial development in the AUAR area or if there are major congested roadways in the vicinity.” AUAR Guidance , Item 21. EQB continues by recommending that the AUAR include a description of the roadway system “including state, regional, and local roads to be affected by the development of the AUAR area.” *Id.* To reiterate its view that the required assessment is not limited to the study area selected for the AUAR, EQB makes the point that in the traffic analysis “the geographic scope must extend outward as far as the traffic generated would have a significant effect on the roadway system(.)” *Id.*

Even if the language is ambiguous, the interpretation of EQB should be given deference, not that of the City as RGU. As already noted, the discussion of traffic shows that EQB intended the consideration of issues of environmental concern not be limited to the study area selected by an RGU. EQB re-affirmed this interpretation when it recently revised its AUAR Guidance. Minnesota Environmental Quality Board, Recommended Content and Format Alternative Urban Areawide Review Documents (April 2005) (hereinafter referred to as “Revised AUAR Guidance”) (R. Brimmer Aff. Ex. B). In regard to cumulative

impacts, EQB repeated most of language from the AUAR Guidance but added language that specifically clarified its intent that the consideration of cumulative impacts is not limited to the study area selected by an RGU:

This item does not require a response for an AUAR with respect to cumulative impacts of potential developments within the AUAR boundaries, since the entire AUAR process is intended to deal with cumulative impacts from related developments within the AUAR area; it is presumed that the responses to all items on the EAW form encompass the impacts from all anticipated developments within the AUAR area.

However, the questions of this item should be answered with respect to the cumulative impacts of development within the AUAR boundaries combined with past, present, and reasonably foreseeable future projects outside of the AUAR area, where such cumulative impacts may be potentially significant. (As stated on the EAW form, these cumulative impact descriptions may be provided as part of the responses to other appropriate EAW items, or in response to this item).

Revised AUAR Guidance, Item 21.

As a result, Respondents are mistaken that the AUAR did not have to consider the potential for cumulative impacts beyond the study area designated by the City. This is a mistake of law in that the argument that the AUAR Guidance limits the consideration of cumulative impacts contradicts the plain meaning of the language relating to Item 29, conflicts with EQB's intent as reflected in AUAR Guidance and as clarified in the Revised Guidance, and would lead to the absurd result that cumulative impacts that would have to be studied in an EIS could be disregarded in an AUAR in violation of MEPA's requirement that alternate forms of environmental review must "address the same issues . . . as an environmental impact statement." Minn. Stat. § 116D.04, Subd. 3a (2004).

**B. The Project Requires Modification Of The Standards Under The Mississippi Designation But The City Failed To Consider The Cumulative Impacts That Might Result From The Modification.**

The second half of Respondents' argument is that even if cumulative impacts beyond the area selected for an AUAR must be studied, the AUAR for the Project included an assessment of some cumulative impacts and this Court should defer to the City's decision not to consider cumulative impacts relating to the Mississippi's critical areas designation. The difficulty with this argument is that almost all of the impacts highlighted by the Respondents are not cumulative impacts and the City's decision not to consider cumulative impacts relating to the Mississippi's designation is based on a mistake of law dealing with the AUAR Guidance and is so unreasonable based on the facts that it is not entitled to deference by this Court.

Respondents argue that the AUAR contains an extensive analysis of cumulative impacts and highlight issues relating to water, plants, and animals. However, it is clear from their description by Respondents that the AUAR assesses only the direct impacts of the Project, not the cumulative effects of the Project "in addition to other past, present, and reasonably foreseeable future projects(.)" Minn. R. 4410.0200, subp.11 (2003). For example, the AUAR states that the study area is part of the Mississippi Flyway, identifies, a number of species of birds that migrate through the study area, and development of the Project will affect local populations that may be dispersed to other land. Horton App. 34-35.

These impacts are specific to the Project and do not reflect the accumulation of other past, present, and reasonably foreseeable future projects. The AUAR notes in a general discussion that total habitat for some of the species is declining but there is no detailed assessment that the loss is already significant or how the effects of the Project interact with the effects of other projects that have been developed or that may reasonably be anticipated for development in the Flyway. The AUAR reflects none of the elements or methods recommended by EQB for a reasonable assessment of cumulative impacts. Minnesota Environmental Quality Board, Guide to Minnesota Environmental Review Rules 5 (April 1999); Council on Environmental Quality, Considering Cumulative Effects Under the National Environmental Policy Act 38-47 (January 1997). The AUAR contains a discussion of the accumulating effects of the Project and other actions only in regard to schools and traffic which the City is specifically required to consider by the AUAR Guidance.

Next, Respondents argue that having assessed some purported cumulative impacts, the City's decision not to address the issue of cumulative impacts relating to the Mississippi's critical area designation is entitled to deference by this Court. As already noted, this argument turns on the AUAR Guidance and a reading that contradicts its plain meaning, conflicts with EQB's intent, and would violate MEPA. In addition, it is so unreasonable given the facts that this Court should not defer to the City's decision.

The AUAR states that the standards and criteria for development in the Mississippi's critical areas designation must be changed if the Project is to proceed. In fact, the Project requires the modifications of standards that represent the highest level of protection provided by the Mississippi's designation. In its comments, MCEA argued that such a change required the City to consider the potential for cumulative impacts resulting from such change in the Mississippi's designation particularly if it opened other similarly protected areas to development at the levels studied in the AUAR. MCEA's concerns were reiterated by the U.S. Department of Interior and the Minnesota Department of Natural Resources which play critical roles in the Mississippi's designation.

With the modification assumed and the issue about it raised, the City refused to consider how the weakening of the standards would affect the nationally significant resources supporting the Mississippi's designation. The City failed to undertake any method for assessing the possibility of cumulative impacts relating to the weakening of the Mississippi's designation: the AUAR does not (i) identify other actions that might be reasonably anticipated if the standards were weakened, (ii) consider the resources protected by the designation, (iii) establish a baseline condition for the resources, (iv) identify cause-and-effect relationships between the actions and the resources, or (v) ascertain the significance of the effects of the actions on the resources. Council on Environmental Quality, Considering Cumulative Effects Under the National Environmental Policy Act 10 (January 1997). The complete lack of consideration relating to the possibility of cumulative

impacts that might result from modifying the standards of the Mississippi's designation shows that the City's decision is not supported by substantial evidence and reflects its will to push through the Project at all costs rather than the exercise of its judgment as required by MEPA.

### **CONCLUSION**

In the end, the AUAR is inadequate because the City refused to consider the possibility of cumulative impacts that might result from the modification of standards in the Mississippi's designation that would be necessary for the Project to proceed. The City's refusal is based on a misreading of the AUAR Guidance and the complete lack of consideration of possible cumulative impacts to the nationally significant resources protected by the Mississippi's designation. As a result, the City's decision is predicated on a mistake of law and is not supported by substantial evidence. The District Court's decision affirming the City's approval of the AUAR should be reversed and the matter remanded for further environmental review of the cumulative impacts of the Project using methods recommended by EQB.

**RESPECTFULLY SUBMITTED**

Date: 8/12/05

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