

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.

**BRIEF OF RESPONDENTS
R. GORDON NESVIG AND D.R. HORTON, INC.**

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INTRODUCTION

Appellant MCEA challenges the adequacy of just one aspect of the 450-page Alternative Urban Areawide Review (“AUAR”) environmental review document at issue in this case: an alleged failure to consider “cumulative impacts.” MCEA ignores that the entire AUAR environmental review process was specifically designed to assess the cumulative environmental impacts that might occur from anticipated development of a large geographic area, such as the 667 acres involved in this case. As the Minnesota Environmental Quality Board explained, “when cumulative impacts . . . are likely to be significant, review can often be better accomplished through the Alternative Urban Areawide Review process” (See *infra*, pp. 25-27.)

The AUAR in this case extensively studies the possible cumulative environmental impacts that could result from the multi-stage development planned to take place on this large area of mostly undeveloped land, located in a rapidly urbanizing part of the metropolitan area. The administrative record amply satisfies the “substantial evidence” standard of review which this Court must apply.

STATEMENT OF THE ISSUE

Whether the administrative record contains substantial evidence of the adequacy of the AUAR review concerning cumulative environmental impacts, to support the City of St. Paul Park’s decision, in its role as the Responsible Governmental Unit, to adopt the final AUAR.

The trial court held that the record contains substantial evidence to support the City’s assessment of cumulative impacts.

Most apposite cases:

- Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency, 644 N.W. 2d 457 (Minn. 2002)
- Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)

REGULATORY BACKGROUND

I. THE AUAR REVIEW PROCESS.

The Minnesota Environmental Policy Act (“MEPA”), Minn. Stat. § 116D.01 et seq., establishes the policies and basic procedures for conducting environmental reviews to determine whether significant environmental effects may result from major governmental actions. Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency, 644 N.W.2d 457, 462 (Minn. 2002). Minnesota’s Environmental Quality Board (“EQB”) is responsible for implementing MEPA’s goals, and has promulgated a comprehensive set of rules to be used for the environmental reviews contemplated by MEPA. Minn. R. 4410.0200 et seq. Initially, the EQB established two methods of environmental review: an Environmental Assessment Worksheet (“EAW”) (Minn. R. 4410.1000 et seq.) and an Environmental Impact Statement (“EIS”) (Minn. R. 4410.2000 et seq.).

In 1980, the Legislature amended MEPA to authorize the EQB to promulgate rules authorizing “alternative forms of environmental review” allowing review “in a more timely or more efficient manner to be utilized in lieu of an environmental impact statement.” 1980 Minn. Laws ch. 447, § 4 (codified at Minn. Stat. § 116D.04, subd. 4a). The EQB thereafter promulgated rules for forms of “alternative” environmental review that could be used in lieu of an EIS. Minn. R. 4410.3600 et seq. The “alternative

review” procedures “address substantially the same issues as the EAW and EIS process and use procedures similar in effect to those of the EAW and EIS process.” Minn. R. 4410.3600, subp. 1.

1. The AUAR Process Was Designed to Address Cumulative Impacts.

One of the alternative forms of environmental review established by the EQB is the “Alternative Urban Areawide Review Process” (“AUARP” or “AUAR”).” See Minn. R. 4410.3610. As EQB guidance documents explain, the AUAR process was specifically designed to apply “to the review of residential and commercial/industrial projects in areas undergoing rapid urban growth, such as in the suburbs of the Twin Cities.” (Horton App. 18.)¹ In particular, the process was designed to be used in urban areas where future development is contemplated and will be guided by the provisions of a comprehensive plan. Unlike an EIS, which focuses on a specific project, the AUAR focuses on a geographic area and assesses the environmental effects that may occur if the area is developed as anticipated by the comprehensive plan:

The basic idea of the proposed AUARP process is to allow review of anticipated residential and commercial development in a geographic area irrespective of the individual ownership of the parcels within the area or the owners’ individual development schedules. Instead of focusing on a specific project, the review would focus on a geographical area and the “project” would be whatever the residential or commercial development is expected to be, based on the comprehensive plan. If there were a specific project (or projects) ready for review within the area, it could be included in

¹ References to pages of the Appendix of Respondents D. R. Horton and Gordon Nesvig are in the form “Horton App. ___.” References to Appellant’s Appendix are in the form “A. App. ___.” The portions of the administrative record that are not contained in either appendix are referred to as “A.R. ___.”

the review, but the review could also be done before any specific projects were proposed.

(Horton App. 19.)

When the EQB drafted the AUAR rules, it specifically noted that one of the main purposes of an AUAR is to permit analysis of the cumulative environmental effects that could occur from phased development over the geographic area being studied. The AUAR is designed to permit study of the “incremental impacts accumulating from a series of sequential projects; development typical of the rapidly growing suburbs of the Twin Cities metropolitan area.” EQB Guide to Minnesota Environmental Review Rules, at p. 15. (Horton App. 8.) The working group that developed this area-wide approach for conducting environmental review of future development scenarios recognized that the AUAR process is “an excellent tool for review of the cumulative impacts of multiple projects in a given area.” (Horton App. 20.)

2. An AUAR Provides a Plan to Avoid or Mitigate Environmental Impacts.

A key feature of the AUAR review document is the mitigation plan, the “mitigation measures that will be imposed upon future development within the area in order to avoid or mitigate potential environmental impacts.” Minn. R. 4410.3610, subp. 5C. (In contrast, environmental review under an EIS does not require the creation of a mitigation plan). Under the AUAR review process, once the potential environmental effects of future development in a defined geographic area have been assessed, and a mitigation plan to prevent or ameliorate harm to the environment that might be caused by expected development has been created, the Responsible Governmental Unit (“RGU”)

need not repeat the environmental review process when a specific project is later proposed within that area, as long as the specific project is consistent with the AUAR and, in particular, the mitigation plan. See Minn. R. 4410.3610, subp. 5E (“upon adoption of the environmental analysis document and the plan for mitigation, . . . projects and associated infrastructure within the area that are consistent with the assumptions of the document and that comply with the plan for mitigation are exempt from review under parts 4410.1100 to 4410.1700 and 4410.2100 to 4410.2800.”)

The RGU’s approval of an AUAR does not mean, however, (as MCEA implies in its brief), that development options studied in an AUAR are approved in all respects. To the contrary, any future development plan must still go through all necessary approval processes. An environmental review document such as an AUAR provides those who must make future decisions on specific project proposals the information, such as a natural resources inventory and technical analyses of identified issues, which they will need concerning environmental aspects of those decisions. For example, MCEA’s brief makes much of the fact that a portion of the property at issue in this case is located in the Mississippi River Critical Area, and has a “rural open space designation.” Approving the AUAR does not mean that the designation is automatically changed. Rather, the AUAR simply provides information that will be useful to decisionmakers concerning future land use decisions.

3. All Interested Agencies Participate In The AUAR Process.

In conducting an AUAR, the RGU prepares a draft environmental analysis addressing various development scenarios. Minn. R. 4410.3610, subp. 5. The draft

document is published and is distributed to a list of governmental agencies at the federal, state and local levels, as well as any other interested parties. Id. subp. 5A. Interested agencies and parties then have an opportunity to provide written comments to the RGU, with a copy to the EQB. The regulations require the RGU to revise its environmental analysis based on the comments received during the comment period. Id. subp. 5C. The revised AUAR environmental analysis is then resubmitted to any persons who commented on the draft document, to EQB staff, and others, and objections may be filed. Id. subp. 5D. If an objection is filed, the RGU must consult with the objecting agency. If the objection cannot be resolved, the rules require the EQB to sustain or overrule the agency's objection. Id. subp. 5F, 5H. If no objection is filed, or if the objections are resolved, the RGU shall adopt the final AUAR. Id. subp. 5E.

II. THE MISSISSIPPI RIVER CRITICAL AREA.

In 1973, the legislature enacted the Critical Areas Act, Minn. Stat. § 116G.01 et seq., under which “natural systems which perform functions of greater than local significance” are identified. Minn. Stat. § 116G.02. Contrary to the arguments of MCEA and the DNR in this case, the Critical Areas Act does not mandate particular land uses. Rather, the Act provides a framework to assist local units of government to develop their own plans for such critical areas:

The state should identify these areas of critical concern and assist and cooperate with local units of government in the preparation of plans and regulations for the wise use of these areas.

Id. Once the local unit adopts its own critical area regulations and plans, they are submitted to the DNR for review and approval, and when they are approved, it is those

local plans and regulations that govern land use in a critical area, not any state rules or regulations. Minn. Stat. § 116G.12, subd. 4.

Plans and regulations adopted by local units for designated critical areas are not static. Desired changes to the local plans and regulations can be made:

If the local unit of government finds it necessary or desirable to amend or rescind plans and regulations that have been approved by the board, it shall resubmit its plans and regulations, together with any recommended changes thereto, for review and approval by the board.

Minn. Stat. § 116G.10, subd. 1.

Pursuant to the Critical Areas Act, the governor, by executive order, designated the Mississippi River Corridor as a critical area in 1976. By Executive Order 79-19, the designation was continued. (A. App. 127.) Executive Order 79-19 provides “Standards and Guidelines” for use by local units of government in preparing their plans. The Standards and Guidelines do not prohibit development of property, but instead include performance standards, requiring that certain topics be covered in the local plans, such as plans for protecting bluffs, plans for managing runoff, procedures for reviewing site-plans, provisions requiring that navigational channels be maintained, and provisions requiring the identification of areas that would be suitable for certain uses, including barge slips, recreational uses, and industrial and commercial development. (A. App. 140-43.)

Of the 667 acres studied in the AUAR in this case, slightly more than half lies within St. Paul Park, and the remainder lies within Grey Cloud Island Township. Both the City and the Township have established plans and regulations for the portions of the

critical area within their boundaries. Their plans have been approved by the appropriate state agencies.² Neither plan prohibits development of land within the critical area. Neither plan requires the property at issue in this case to remain vacant or in an undeveloped state. Instead, the critical area plans adopted by both the City and the Township allow land in the critical area to be developed.³

In this case, the AUAR studied the effects of one development scenario that was consistent with the Township's zoning ordinances, including its critical area plan. (A.R. at SPP5807.) Moreover, as noted, a local unit of government may change its critical area plan to meet changing land use needs. The AUAR in this case also studied the effects of development of the property at higher densities than the Township's plan would currently allow. The information generated in the AUAR about the effects of higher-density development will be useful to local and state decisionmakers if proposals are made to change the current critical area plans.

² Until 1995, the Metropolitan Council was responsible for assisting communities in developing critical area plans and ultimately approving their plans. Since 1995, the Minnesota Department of Natural Resources has had that responsibility.

³ For example, the Township's plan allows the portion of the subject property remaining in the Township to be developed by subdividing it into separate 10-acre parcels, each of which would have separate, private, septic systems, and approximately 19 of which could extend to the shoreline of the river and have separate docks on the river. (Horton App. 88).

STATEMENT OF FACTS

I. THE PROPERTY.

The property at issue in this case consists of 667 acres of land located in Washington County. (Horton App. 85.) The property is bordered on the north by the City of St. Paul Park; on the east by the City of Cottage Grove; on the south by Grey Cloud Island Township; and on the west by the Mississippi River. (Id.) The eastern portion of the property is located within the City of St. Paul Park. In ongoing annexation proceedings, the owner of the property and the City of St. Paul Park jointly seek to annex the remainder of the property to St. Paul Park.

Surrounding land uses are mixed. Residential housing borders the site on the northern and eastern sides. (Horton App. 84.) A number of heavy industrial uses exist in the immediate vicinity of the property. Two auto salvage yards border the northern side of the property. (Id. 32.) The Ashland Oil Refinery is located on the river, in the critical area, less than one mile upstream from the property. (Id. 84.) A petroleum tank farm is located just east of the property. (Id.) Less than one mile downstream of the property is an active (and expanding) gravel mining operation (shown on the southeast corner of the aerial photograph, Figure 5-2). (Id.) Farm fields exist to the southeast of the site. (Id.)

The site itself is mostly undeveloped, “consisting of active agricultural fields, old pastures, and old fields.” (Horton App. 98.) Two farmsteads and outbuildings lie in the central portion. (Id.) The western portion consists of wooded areas, bluffs, pastures, and

islands and backwaters of the Mississippi River. (Id.) In the backwater area is a “manure lagoon” created by discharges from two now-defunct stockyard operations. (Id. 42-43.)

The existing structures on the site include railroad tracks, several burned down barns, and older farm buildings. Old pastures were found to contain some native species of prairie grass, but they have been disturbed by “mowing, the dumping of yard waste and farming practices.” (Horton App. 115.) A portion of the site, not owned by Respondent Gordon Nesvig, is a junkyard.⁴ (Id. 118-19.) A wood-chipping business leases part of the site, and keeps piles of wood and wood chips on-site. (Id. 131, photo 14.) Site photographs in the AUAR include: farm buildings and silos (id. 126, photo 1); fields (id., photo 2); old agricultural fields and unused pastures (id. 126-27, photos 3-6); pastures in both fair and poor condition (id. 128, photos 7-8); forests, oaks, springs and bluffs (id. 129-30, photos 9-12); Mississippi backwaters (id. 131, photo 13); a junkyard (id. 132, photo 15); and a bay on the Mississippi River (id., photo 16). Figure 10-1 of the AUAR defines the areas on different types of land cover found on the property. (Id. 87.)

The property is addressed in a comprehensive land use development framework adopted by the Metropolitan Council in January of 2004 called the “2030 Regional Development Framework” (the “2030 Development Framework”). (Horton App. 269.) The 2030 Development Framework recognizes that the population of the metropolitan

⁴ The portion of the site not owned by Nesvig contains “farm dumps include[ing] glass, metal, tires, assorted construction materials and miscellaneous residential wastes . . . dilapidated vehicles such as dump trucks, cars, buses, boats and snowmobiles . . . lawn mowers, a toilet and various household debris.” (Horton App 118-19.)

area grew by more than 350,000 people in the 1990s and that “[b]y the year 2030, we expect the region to add nearly 1 million people – the equivalent of having two Denvers plunked down within the boundaries of the seven-county metro area.” (*Id.* at 271.) The Framework is an attempt to determine, in an orderly fashion, where that growth may best occur.

The Metropolitan Council’s 2030 Development Framework classifies the entire 667 acres as a “developing community.” (Horton App. 273.) The classification contemplates development of the entire property at urban densities, defined by the Metropolitan Council as a minimum of three to five units or more per acre. Using these urban densities, the Metropolitan Council’s household forecast contemplates a minimum of 2,200 single and multi-housing units over the 667 acres. (*Id.* 29, 274.)

II. THE ENVIRONMENTAL REVIEW PROCESS.

The City of St. Paul Park and the Township of Grey Cloud Island initiated environmental review of the property in March of 2003 by similar resolutions enacted by each jurisdiction. (Horton App. 3, 5.) The resolutions jointly designated the City of St. Paul Park to act as the RGU to conduct the review,⁵ and authorized environmental review by way of an AUAR to assess the potential environmental effects of anticipated

⁵ Under the rules, the local governmental unit is the “RGU” (responsible governmental unit) for conducting the environmental review. Minn. R. 4410.3610, subd. 1. In its brief, MCEA suggests that the City was not the proper RGU, and that the Township should have performed that role. (MCEA Brf. at 2, n. 1.) However, the Township passed a resolution to make the City the RGU. (Horton App. 5.) Much of the property studied in the AUAR is already located in the City, and annexation proceedings currently underway seek to bring the remainder into the City as well.

development over this large geographic area to the density levels dictated by the Metropolitan Council's 2030 Development Framework. (Id.) The review then commenced under the procedures established in Minn. R. 4410.3610, subp. 5.

A. Preparation of the Draft AUAR.

The EQB created a guidance document to assist responsible governmental units in preparing AUAR reviews. The guidance document, entitled "Recommended Content and Format - Alternative Urban Areawide Review Documents," sets forth the specific items to be included in an AUAR and explains how that document differs from an EAW. (Horton App. 11.) An AUAR must evaluate a wide variety of topics, such as an identification of fish, wildlife, and ecologically-sensitive resources, an analysis of the impact of traffic, the impact of vehicle-related air emissions, dust, odor and noise, and effects on views and other potential environmental aspects of development.

After the City, acting as the RGU, ordered the preparation of the AUAR, a team of consultants, including planners from Dahlgren, Shardlow & Uban, Inc. ("DSU") and environmental experts from Applied Ecological Services ("AES"), began working with the RGU to gather the information and perform the analyses needed to draft the AUAR. DSU worked with the RGU and consulted with a number of professionals including engineers, urban planners, traffic and environmental analysts, natural resource and wildlife analysts, archeologists, geologists, and legal counsel. (Horton App. 31.)

On May 1, 2003, the “Rivers Edge Draft Alternative Urban Areawide Review and Mitigation Plan” (“Draft AUAR”) was completed. (A.R. at SPP5000.)⁶ The Draft AUAR, which is nearly 200 pages in length, addressed each of the areas required for an AUAR. The Draft AUAR recognized that the exact scope and density of developments on the property has not been determined to date, and therefore the AUAR “covers the possible impacts through a ‘worst case scenario’ analysis,” meaning the maximum possible development. (A.R. at SPP5007.)

The Draft AUAR assessed the required topics under three different development scenarios: (1) development under the “rural residential” zoning and land use in existence in the Township, including the Township’s critical area plan, which would allow a maximum of 52 housing units on 10-acre lots, each with separate, on-site septic systems and individual access to the river; (2) development under the urban densities contemplated by the Metropolitan Council in the 2030 Development Framework, which would involve 1,800 housing units plus a mixed use Village Center consisting of 600 housing units and 83,000 square feet of non-residential uses, all connected to central sewer lines, and (3) development at similar urban densities as in scenario no. 2, except excluding the 600 residential units in the Village Center, leaving 1,800 housing units and 83,000 square feet of non-residential uses. (A.R. at SPP5006.) Using these three

⁶ The written record of the AUAR process was compiled by the City and provided to the District Court as the administrative record for the Court to review in response to MCEA’s lawsuit. Citations to portions of the administrative record which are not included in Horton’s Appendix are designated as “A.R.” followed by the bates-numbered page of the record.

development scenarios, the draft AUAR considered all aspects of environmental effects that could result, and proposed a “mitigation plan” to address the potential environmental effects identified in the AUAR. (A.R. at SPP5079-5085.)

B. Public Dissemination of the Draft AUAR.

The RGU sent the Draft AUAR, including the draft Mitigation Plan, to the EQB for review and comment on May 14, 2003. (A.R. at SPP5195, 5631.) The RGU also sent it for review and comment to twenty other federal and state agencies and local units of government, including the United States Environmental Protection Agency, U.S. Fish and Wildlife Service, U.S. National Park Service, U.S. Army Corp. of Engineers, Minnesota Department of Agriculture, Minnesota Board of Water and Soil Resources, Minnesota Department of Health, Minnesota Department of Natural Resources, Minnesota Department of Public Services, Minnesota Department of Transportation, Minnesota Historical Society, Minnesota Pollution Control Agency, Metropolitan Council, South Washington County Schools – District No. 833, South Washington Watershed District, Washington Conservation District, Washington County, City of Cottage Grove, City of St. Paul Park, and Grey Cloud Island Township. (A.R. at SPP5522.)

In addition, many private citizens and environmental groups reviewed the Draft AUAR. The EQB published notice of the Draft AUAR in its publication, the EQB Monitor. The Draft AUAR was made available to the public electronically for review and comment via the Internet. See <http://www.dsuplan.com/case-studies/CurrentProjects.htm>. It was also available in hard copy at St. Paul Park’s City Hall, at the Township’s Town Hall, and at various public libraries in the area.

Thereafter, the RGU and the AUAR technical team conducted a series of public open houses and workshops to explain the Draft AUAR, discuss the nature of the process, and answer questions. (Questions and answers that frequently arose during the open houses are reproduced in the administrative record at SPP6070-80.) The RGU then conducted additional workshops to receive further comments. (A.R. at SPP5631, 6080.) The City also held meetings with various governmental agencies to review and discuss the Draft AUAR. (A.R. at SPP5522, 5523.)

The RGU and the environmental consultants also gave site tours of the AUAR area to state agency staff, non-profit organization staff, local government decision-makers, and local and regional governmental staff before, during and after the Draft AUAR comment period. (A.R. at SPP5522.)

C. Comments to the Draft AUAR.

Five agencies provided written comments on the Draft AUAR: the Minnesota Department of Natural Resources, Minnesota Historical Society, Minnesota Department of Transportation, U.S. National Park Service, and the Metropolitan Council. Five local units of government commented: South Washington Watershed District, Washington County, City of Cottage Grove, Washington Conservation District, and Grey Cloud Island Township. Four non-profit agencies provided written comments: MCEA,⁷ Friends of the Mississippi River, Friends of the Bay, and the Sierra Club. Six individual

⁷ MCEA's comments are found at A.R. at SPP5997-98. Other environmental and government agencies made similar comments. (A.R. at SPP5759, 5762, 5766, 5767, 5789.) These comments were helpful in the environmental review, and all were addressed in the Mitigation Plan. The City incorporated MCEA's comments as well as those of other organizations into the Final AUAR. (Id.)

citizens also submitted comment letters. (A.R. at SPP5521-22.) All comment letters are appended to the Final AUAR. (A.R. at SPP5968-6068.)

The RGU and the AUAR technical team then met with many of the commenting agencies to discuss their comments, develop strategies to address their comments, and develop further mitigation measures. Meetings were held on a “topic” basis. The RGU and the AUAR technical team met with the DNR, National Park Service, Watershed District, Metropolitan Council, and Washington County on August 11, 2003 to address the topic of river ecology. (A.R. at SPP5522.) The RGU and technical team met with various agencies on August 25, 2003 to address comments concerning traffic and transportation issues. (Id.) Similar meetings with interested agencies took place on September 8, 2003 and October 7, 2003 to address, respectively, issues of stormwater management and groundwater issues, and issues related to “viewshed,” i.e., scenic views. (Id.)

As discussed below, all of the comments were addressed in the Final AUAR to the satisfaction of all of the agencies and governmental units.

D. Final AUAR.

On November 6, 2003, the RGU and the AUAR technical team completed a draft of the final AUAR document entitled “Rivers Edge Final Alternative Urban Areawide Review and Mitigation Plan” (the “Final AUAR”). With the changes and additions prompted by the comments, the document more than doubled in size to over 450 pages in length. (A.R. at SPP5625-6080.) It was considered a “draft” of the Final AUAR at that

time because it had not yet been approved. Ultimately, it was revised to include changes based on further input from the City, the Township and the DNR.

The draft Final AUAR differs substantially from the original Draft AUAR. As required, it specifically incorporated comments and changes suggested by the environmental and government agencies (including the DNR) that reviewed the Draft AUAR, as well as comments and suggestions made by the non-profit organizations and individuals who commented in writing or at the many meetings, workshops and open houses.⁸ The City highlighted the changes made from the Draft AUAR to the draft Final AUAR in a document that uses strikeouts and underlining to show the changes. (See A.R. at SPP5189-5362.)

In response to comments, the Final AUAR included additional analysis on a number of issues. For example, a number of comments suggested that the AUAR “should discuss and evaluate the impacts [of the anticipated development] on views from the river at several vantage points.” (A.R. at SPP5636.) In response, the Final AUAR included a computer-simulated visual analysis of the maximum density scenario studied (scenario 2) from seven different vantage points on the river, including the main channel, backwater channels, the bay and the island owned by the National Park Service. (Horton App. 139-147.)

⁸ The manner in which the comments to the Draft AUAR were addressed and resolved in the Final AUAR is easily tracked. The Final AUAR sets out in detail each and every comment made by an agency or a member of the public. (A.R. at SPP5326-5362.) The Final AUAR then provides a detailed response to each comment, and identifies the place within the Final AUAR or the Mitigation Plan where changes were made to address the subject matter of the comment, as appropriate. (Id.)

Similarly, development scenarios 2 and 3 originally contemplated a river access area on the bay,⁹ with a paved boat access ramp and one or two docks, a pedestrian boardwalk and a service building. (A.R. at SPP5014.) Several state agencies provided comments on that part of the plan, and in particular, potential impacts to the bay. Comments suggested that motorized boat use was not appropriate for the bay because its shallow depth could result in sediment re-suspension that might possibly affect fresh water mussels that may be located downstream from the AUAR study area. (A.R. at SPP5198.) To mitigate potential impacts to the bay and off-site areas, the proposed boat access, ramp, docks, mixed use building and parking areas were eliminated, and the proposed Village Center was moved further away from the bay. (Id.) In this same fashion, all substantive comments from agencies and the public that warranted further changes to the AUAR were addressed.

The draft Final AUAR also made substantial changes to the “Mitigation Plan” in response to comments received from agencies and the public. For example, comments from several sources stated that a 40-foot bluffline setback was not adequate to protect sensitive resources such as oak savanna, cliff/bluffs, flood plain and seepage areas. (Horton App. 82, comment 3.) In response, the Mitigation Plan increased the setback requirement to 100 feet. The Mitigation Plan now requires the City and Township to “[r]equire a 100-foot road and structure setback to the bluffline to protect ecologically

⁹ The bay is the round inlet at approximately the mid-point of the property’s shoreline. (Horton App. 84, 132; photo 16.)

sensitive resources such as the river, river bluffs . . . woodlands and oak savanna.”

(Horton App. 72.)

Recognizing the habitat value of the river corridor, the Mitigation Plan also prohibits development activities in sensitive areas. One hundred percent of the riverine habitat and more than 80% of the wooded, wetland and prairie habitat are required to be preserved under the Mitigation Plan. (Horton App. 38.)

Similarly, recognizing the geographical bluffline features of the area, in addition to the increased 100-foot setback from blufflines, the Mitigation Plan mandates that “river bluffs will be preserved in perpetuity through public dedication and/or conservation easements.” (Horton App. 51.) The Mitigation Plan also calls for the removal of structures from slopes greater than 18% and from most areas greater than 12%. (Id.)

In the end, the RGU concluded that the responses made in the Final AUAR to comments from governmental agencies, local units of government, and the public, sufficiently addressed each of the relevant comments.

E. Response to Objection From the DNR.

Following its revisions to the Draft AUAR, the rules require the RGU to submit the draft Final AUAR (which addresses all comments) to the EQB and all agencies and members of the public who provided comments. State agencies then have 10 days to object if they have evidence the AUAR is somehow inadequate. Minn. R. 4410.3610, subp. 5D.

On the last day of the objection period for the Rivers Edge AUAR, the DNR submitted an objection letter. (A. App. 23.) Nearly two weeks later, on April 12, 2004 it sent another letter supplementing its earlier objection. (Horton App. 204.) The DNR's letters referred to issues of open space, bluffline recommendations, the potential for dredging, habitat restoration, cumulative impacts to migratory birds, impact of development on seeps and springs, groundwater research clarification, water conservation plans, water related land use management districts and plans, water surface use, "viewshed," and mitigation plans. (Id.) Thus, cumulative impacts were among the issues presented by the DNR for further review before the draft Final AUAR could be adopted.

The DNR and the RGU then held additional meetings and discussions together with the AUAR's technical team. (Horton App. 181-192.) Two staff members of the EQB were present at the meetings along with the DNR staff members to discuss the requirements of an AUAR, and they were satisfied with the approach taken by the RGU. (Id. 183, 192.)

On April 26, 2004, the RGU provided a detailed point-by-point response to the DNR's objections. (Horton App. 149-95.) The response contained proposed additional revisions to the Final AUAR and Mitigation Plan to address the DNR's objections. (Id. 170-178.) The response included notes of meetings between the City, the AUAR technical team, the EQB and the DNR that took place on April 14 and 15, 2004. (Id. 181-92.) It also included a technical memorandum from environmental consultants, and letters to and from other agencies concerning the DNR's objections. (Id. 193-208.)

As a result of these meetings, discussions, and eventual modifications to the Final AUAR, the DNR withdrew its objections to the final AUAR on May 4, 2004. (Horton App. 209.) In doing so, the DNR averted a hearing on its objections before the EQB, as afforded under Minn. R. 4410.3610, subps. 5G and 5H. No other state agency objected to the Final AUAR. Therefore, the EQB was never called upon to adjudicate any objections to the adequacy of the Final AUAR. The DNR's formal withdrawal of its objections brought the administrative review process to conclusion, and provided evidence to the RGU that all of the DNR's objections, including the cumulative impacts issue it previously raised, had been resolved satisfactorily by the final changes to the AUAR and Mitigation Plan.

III. APPROVAL OF FINAL RIVERS EDGE AUAR.

The City adopted the Final Rivers Edge AUAR on May 17, 2004. (A.R. at SPP5625.)

IV. MCEA'S LAWSUIT.

On June 14, 2004, MCEA filed a lawsuit raising a variety of challenges to the Rivers Edge AUAR.¹⁰ Subsequently, through stipulations, most of the claims raised by the MCEA in its Complaint were withdrawn.¹¹ Following the parties' stipulation dated November 19, 2004, the only remaining count left in MCEA's Complaint was Count I, based on MEPA, Minn. Stat. § 116D.04, subd. 10.

¹⁰ The DNR, having withdrawn its objections to the AUAR, neither commenced a lawsuit challenging the AUAR nor sought to appear in the MCEA's lawsuit as a party or an amicus curiae.

¹¹ MCEA also voluntarily dismissed the Township from its suit.

Count I of the Complaint originally alleged two things: (1) that the City, acting as the RGU, erred as a matter of law in choosing to use an AUAR to conduct environmental review instead of an environmental impact statement; and (2) that the AUAR was inadequate to address environmental effects. (A. App. 37.) In October of 2004, Respondents filed motions for summary judgment on the first of these two issues. MCEA did not oppose Respondents' motions, but instead stipulated to dismiss with prejudice its first allegation under Count I, (i.e., its argument that the City erred in selecting the AUAR process as opposed to an environmental impact statement). (Horton App. 213.) Thus, the issue of whether the RGU improperly used an AUAR instead of an EIS was no longer in the case. Instead, having waived its objection to the use of an AUAR instead of an EIS, MCEA presented only one issue to the district court: its challenge to the adequacy of the AUAR. (A. App. 63.)

On April 20, 2005, the district court issued its summary judgment ruling rejecting MCEA's challenge to the adequacy of the AUAR. The district court found that the City's adoption of the Final AUAR on May 17, 2004 was not arbitrary and capricious, but was based on substantial evidence in the record. (A. App. 117.)

In its appeal to this Court, MCEA has further reduced the scope of its claim. It now challenges only one narrow aspect of the adequacy of the AUAR, alleging that the AUAR does not contain substantial evidence analyzing cumulative effects of the various development scenarios studied in the AUAR. All other adequacy challenges have been waived.

ARGUMENT

I. THE STANDARD OF REVIEW IS WHETHER THE RGU'S DECISION IS SUPPORTED BY "SUBSTANTIAL EVIDENCE."

This Court must defer to determinations made by qualified agencies and can overturn their decisions only if not supported by substantial evidence. See Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency, 644 N.W.2d 457, 466 (Minn. 2002). A decision is supported by substantial evidence when it is supported by "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." Cable Communications Bd. v. Norwest Cable Communications P'ship, 356 N.W.2d 658, 668 (Minn. 1984). Moreover, "the substantial evidence test requires a reviewing court to evaluate the evidence relied upon by the agency in view of the entire record." White v. Minnesota Dept. of Natural Resources, 567 N.W.2d 724, 730 (Minn. Ct. App. 1997).

Appellate courts defer to an agency's expertise in fact-finding and will affirm the agency's decision so long as it is lawful and reasonable. In re Intra-LATA Equal Access Presubscription, 532 N.W.2d 583, 588 (Minn. App. 1995). Courts recognize that this required deference extends to a local governmental unit performing environmental review as an RGU. See Citizens Advocating Responsible Development v. Kandiyohi County Bd of Comm'rs., No. C8-03-1428 (Minn. Ct. App. January 11, 2005), review granted (Minn. March 29, 2005).

Even if a court might have reached a different decision based upon its own review of the evidence, it cannot substitute its own opinion for that of the agency. “If an administrative agency engages in reasoned decision making, this court will affirm, even though it may have reached a different conclusion had it been the fact finder.” City of Owatonna v. City of Faribault, 672 N.W.2d 921, 926 (Minn. Ct. App. 2004). A court can overturn an agency’s determination only if the agency “(a) relied on factors not intended by the legislature, (b) entirely failed to consider an important aspect of the problem, (c) offered an explanation that runs counter to the evidence, or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency’s expertise.” Minnesota Center For Environmental Advocacy, 644 N.W.2d at 464.

Here the City, acting as the RGU, adopted the Final AUAR on May 17, 2004, finding that it met the required adequacy standards. (A.R. at SPP6082.) The EQB, which has the expertise and ultimate authority to determine whether an alternative form of environmental review is adequate, participated extensively in the Final review of the AUAR, including the process whereby the DNR’s objections to the final AUAR, including its discussion of cumulative impacts, were considered and resolved. (Horton App.181, 192.) The EQB was satisfied with the adequacy of the AUAR, as were the 20 other agencies that reviewed it. Deference is owed to the City’s adoption of the AUAR.¹²

¹² Given that judicial review of an AUAR consists of a review of the administrative record for substantial evidence to support the RGU’s decision, it is remarkable that MCEA failed to include any portion of the AUAR under review in its appendix. As shown below, review of the AUAR demonstrates its adequacy.

II. SUBSTANTIAL EVIDENCE EXISTS IN THE RECORD CONCERNING CUMULATIVE IMPACTS.

A. The AUAR Process Is Specifically Designed to Consider Cumulative Impacts.

In 1988, the EQB developed the AUAR process specifically to permit better review of “incremental impacts accumulating from a series of sequential projects; development typical of the rapidly growing suburbs of the Twin Cities metropolitan area.” EQB Guide to Minnesota and Environmental Review Rules, at p. 15. (Horton App. 8.) The AUAR is designed to study “a development scenario or several scenarios for an entire geographical area” as long as the area is covered by an acceptable comprehensive plan. (Id.)

In creating the AUAR process, the EQB recognized that development over a large geographic area can have cumulative environmental effects. The common example identified by the EQB is the gradual urbanization of undeveloped land, in which “each subdivision by itself may have only a minor effect, but after many subdivisions have been developed, the character of the land is completely changed.” (Id. at p. 5) (A. App. 166.) The EQB working group that studied and recommended the AUAR process concluded that the AUAR process was well-suited for environmental review of potential development of rapidly urbanizing areas precisely because of the fact that it permits assessment of the “cumulative impacts” of development:

[The AUAR] is an excellent tool for review of the cumulative impacts of multiple projects in a given area.

(Horton App. 20.)¹³

In its guidance document, the EQB recognizes that an AUAR is a superior tool for assessing cumulative impacts from the overall development that might occur over a geographic area:

When cumulative impacts from concurrent or future projects are likely to be significant, review can often be better accomplished through the Alternative Urban Areawide Review process or the related actions EIS.

(A. App. 166) (emphasis added).¹⁴

Also, because the AUAR, by its very nature, is an analysis of cumulative environmental impacts over a large geographic area, the EQB explained in its recommended content and format for AUAR documents that the question dealing with “cumulative impacts” does not need to be answered for an AUAR:

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

(Horton App. 16, ¶29.)¹⁵

¹³ Other benefits of the AUAR identified by the EQB working group are that it allows cities to better integrate environmental review into their comprehensive planning process, it allows planners to look at the “big picture,” it allows environmental issues to be reviewed early in the planning process so that problems can be avoided, and it forces projects to be designed in an environmentally conscientious manner. (A. App. 175.)

¹⁴ The “related actions EIS” refers to Minn. R. 4410.2000, subd. 5, which authorizes a single EIS to cover independent projects with cumulative impacts occurring over the same geographic area. According to the EQB, the related actions EIS, like the AUAR, “is one tool available for an RGU to deal with situations with significant cumulative impacts.” *Id.* (A. App. 166.)

In this case, the AUAR was well-suited to evaluate cumulative impacts of development occurring within the 667-acre AUAR study area. If the RGU had anticipated that this large area of land would develop over a number of years in, for example, 60 sequential developments, each consisting of 10 acres, then no one would fault the RGU for assessing the cumulative environmental impacts from those separate developments through use of an AUAR. That is exactly what an AUAR is designed to do -- study cumulative impacts of various developments over a large geographic area. Nothing changes simply because the large geographic area in this case is mostly under one person's ownership and will be developed over a multi-phase development plan that takes place over a number of years. The AUAR is precisely the tool that the EQB believes should be used to determine the total and cumulative effect of developing such a large area of land, as it agreed in this case.

In sum, MCEA's argument that the RGU failed to consider cumulative impacts as part of the AUAR misses the point. The AUAR, by its very nature, considers cumulative impacts, and the RGU, the EQB, and the 20 other agencies who reviewed the AUAR, including the DNR, were satisfied with the AUAR's analysis.

B. The AUAR Did Not "Ignore" Cumulative Impacts.

In its brief, MCEA incorrectly asserts that "The AUAR Admits That Cumulative Impacts Were Ignored." (MCEA Brf. at 26.) That is flatly wrong. The basis for this alleged "admission" is the AUAR's response to topic no. 29 on the EAW form. The

¹⁵ The quoted guidance document was the document in existence at the time that the AUAR in this case was created. The EQB currently uses a revised guidance document.

Rules require the EAW form to be used both for an AUAR and an EAW. (A.R. at SPP 5735, 5582.) The EQB's format for an EAW contains a question, topic no. 29, inquiring about cumulative impacts. This question is relevant to an EAW because an EAW is the document used to determine if a full-blown EIS is required. The existence of significant cumulative impacts is a factor bearing on the need for a full EIS. Minn. R. 4410.1700, subp. 7B. However, that question is redundant with respect to an AUAR, because as discussed above, an AUAR by its very nature assesses cumulative impacts. Therefore, the AUAR in this case correctly points out that a separate answer to topic no. 29 is not required because the topic is covered within the AUAR as a whole. This is not an "admission" that cumulative impacts were "ignored" as MCEA contends. The AUAR process was specifically designed to assess potential cumulative environmental effects, and this AUAR did assess such potential effects.

C. The AUAR Contains Substantial Evidence Analyzing Cumulative Environmental Effects.

As the District Court properly concluded, the AUAR contains an extensive analysis of possible environmental effects that could result from a phased development of single family housing, multi-family housing and commercial development within the large AUAR study area. The analysis includes effects on river ecology, wildlife migration, bald eagles, river mussels, water quality and many other topics.

For example, topic no. 11a of the AUAR required the City to "identify fish and wildlife resources and habitats on or near the site and describe how they would be affected by the project," and to "describe any measures to be taken to minimize or avoid

impacts.” (Horton App. 34.) The AUAR addresses this topic in a number of ways. First, the AUAR includes a natural resources inventory conducted by an expert consultant, Applied Ecological Services, which studies both vegetative and wildlife features present in the area. (Horton App.90-138.) The AUAR discusses the nature of wildlife habitats, including short grassland, tall grassland, savanna, woodland and wetland habitats present in the AUAR study area. It then discusses in detail the potential impacts for development on all wildlife, including bald eagles and mussel species in the river. (Horton App. 34-41.) It discusses how development may affect each of the habitats and how development may affect wildlife migration. (Id.) The Mitigation Plan contains specific requirements and limitations on any future development in order to mitigate such effects.

Similarly, topic 11b of the AUAR inquires about all “endangered, threatened or special concern species, rare plant communities or other sensitive ecological resources ... on or near the site,” and requires a description of how future development within the AUAR study area could affect such resources. (Horton App. 39.) The AUAR identifies such resources, discusses possible impacts, and sets forth a mitigation plan to address such potential impacts. (Id. 40-41, 72-74.)

In a similar manner, the AUAR identifies other potential environmental effects that could result from future development contemplated within the 667-acre geographic area studied in the AUAR, including “physical impacts to water resources.” (Horton App. 42-45.) The AUAR identifies existing water resources including the river, seepage areas and springs, the bay or the river, and wetland areas. (Id.) It discusses the impact to such resources that could result from future development of the property. The Mitigation

Plan details not only ways to reduce possible impacts, but ways to further improve water quality above current levels. For example, the Mitigation Plan calls for the cleanup and restoration of the “manure lagoon” on the property that was created by past discharges from a long-defunct stockyard operation. (Horton App. 42, 75-76.) It also calls for stormwater management measures that will improve water quality in the bay and river. (Horton App. 79-80.)

The possible cumulative environmental impacts studied in the AUAR from future development that may occur also includes other water issues, such as impacts to region-wide water resources. (Horton App. 46-49, 76-78.) The AUAR’s focus includes evaluation of surface water usage. (Id. 52.) It includes evaluation of erosion and sedimentation on water quality. (Id. 53-56, 78-79.) It includes evaluation of surface water runoff and wastewater issues. (Id. 57-69, 79-81.) The AUAR further includes an evaluation of possible cumulative impacts to traffic in the study area and surrounding communities under the various development scenarios included in the AUAR. It evaluates possible cumulative environmental impacts from vehicle-related emissions, stationary source emissions and dust, odors and noise impacts from future development activities. (A.R. 5867-5903.)

In sum, far from lacking “substantial evidence” of potential effects that development of the 667-acre study site might cumulatively have on the environment, the AUAR contains extensive analysis of such potential effects. The District Court properly concluded that substantial evidence existed in the record to uphold the adequacy of the AUAR’s analysis of potential cumulative environmental impacts.

III. THE RGU WAS NOT OBLIGATED TO INCLUDE THE ENTIRE MISSISSIPPI RIVER CRITICAL AREA IN THE AUAR STUDY AREA.

At various points in this litigation, MCEA has taken wildly different positions about the proper scope of the AUAR study area. In the district court, it argued that the RGU should have studied the development of this area in connection with all other development occurring throughout the entire state of Minnesota. (A. App. 106.) (MCEA Response to Summ. Judg. Brf. at 15.) In its brief to this court, MCEA argues at one point that the AUAR is inadequate because it did not consider possible cumulative effects of this project taken together with all past, present and future development of the entire Mississippi River Critical Area corridor, a 72-mile portion of the Mississippi River stretching from Dayton, Minnesota to south of Hastings, and spanning five counties i.e., it “is silent on effects to the Mississippi Critical Area as a whole should the River’s Edge development proceed.” (MCEA Brf. at 28.) Elsewhere, it argues that AUAR needed to consider the cumulative impact of all developments occurring along the entire nationwide course of the Mississippi River. (MCEA Brf. at 25.) The MCEA’s position is unsupported.

A. The RGU Is Responsible for Selecting the Boundaries of the AUAR Study Area, And Its Selection of Boundaries Is Entitled to Judicial Deference.

Under the governing rules, the RGU has the authority to determine the boundaries of the AUAR study area -- the area within which the cumulative impacts of development will be studied:

The RGU shall adopt an order for each review under this part that specifies the boundaries of the geographic area within which the review will apply. . . .

Minn. R. 4410.3610, subp. 3. The RGU's decision on the boundaries of the AUAR study area can be challenged by any reviewing agency. If a challenge occurs, the EQB ultimately must determine if the designation of the boundaries for the study area is appropriate. Minn. R. 4410.3610, subp. 5H. Here, no reviewing agency challenged the RGU's selection of the boundaries for the AUAR study.

Like any other decision of the RGU, the RGU's selection of the boundaries for the AUAR study area is entitled to significant deference by any court reviewing that decision. See e.g. In re American Iron Supply Company's Proposed Metal Shredding Facility in Minneapolis Minn., 604 N.W.2d 140, 146 (Minn. Ct. App. 2000) (holding that the manner in which an agency chooses to go about determining cumulative potential effects is within the agency's discretion and will not be reversed unless arbitrary and capricious). A reviewing court should not substitute its own judgment for that of the RGU and can reverse only if the RGU's decision is arbitrary and capricious. Id. As the United States Supreme Court has explained, in interpreting the "cumulative impacts" analysis required by the National Environmental Policy Act, the question of whether that analysis should encompass activities on a regional basis is a question solely for the responsible governmental unit conducting the environmental review:

The determination of the region, if any, with respect to which a comprehensive [environmental impact] statement is necessary requires the weighing of a number of relevant factors . . . and is properly to the informed direction of the responsible federal agencies.

Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976). “[D]etermination of the extent and effect of [cumulative environmental] factors, and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.” Id. at 413-14 (emphasis added).¹⁶

B. There Was Nothing Arbitrary or Capricious About the RGU’s Selection of the Boundaries for the AUAR Study Area.

The RGU in this case selected the boundaries for the AUAR study area, as it was authorized to do under Minn. R. 4410.3610, subp. 3. The boundaries it selected comprise the 667-acre geographic area under consideration for development. That is the area where all proposed development activities will take place in the future. Any possible environmental effects would be expected to be greatest within the boundaries of the 667-acre AUAR study area, although some off-site effects also are possible, and are

¹⁶ Under federal law, the deference owed by courts to decisions about the scope of the cumulative impacts analysis is well established. See Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944, 959 (9th Cir. 2003) (“under NEPA [courts] defer to an agency’s determination of the scope of its cumulative impacts review”); Inland Empire Public Lands Council v. United States Forest Serv., 88 F.3d 754, 764-764 (9th Cir. 1996) (environmental group’s challenge that the geographic scope of an agency’s study area for cumulative impacts was “too small” is subject to review under an arbitrary and capricious standard of review); Custer County Action Ass’n v. Garvey, 256 F.3d 1024, 1037 (10th Cir. 2001) cert. denied 534 U.S. 1127 (2002); Peshlakai v. Duncan, 476 F. Supp. 1247, 1259 (D.D.C. 1979) (“the determination of a region, if any, with respect to which a comprehensive treatment of [cumulative] environmental impacts is necessary . . . is a task assigned to the special competency of the appropriate agencies”); Homeowners Ass’n. of Southwest Jefferson County, Inc. v. Costle, 468 F.Supp. 405, 408-409 (W.D. Ky. 1979) (same); Georgia River Network v. U.S. Army Corps of Engineers, 334 F.Supp. 2d.1329, 1342-1343 (N.D. Ga. 2003) (“Identification of the geographic area for an environmental assessment is a task assigned to the special competency of the appropriate agencies”); Hoosier Environmental Council Inc. v. U.S. Army Corps of Engineers, 105 F.Supp. 2d 953, 980-81 (S.D. Ind. 2000) (agency’s decision that study area for cumulative impacts from proposed river casino need not extend to the entire Ohio River was reviewable under abuse of discretion standard).

analyzed and discussed in the AUAR and, where appropriate, addressed in the Mitigation Plan.

The EQB participated in the RGU's review of the area to be studied for environmental impacts and never required that a larger geographic area be studied. In fact, neither the EQB nor any of the 20 agencies that reviewed the draft and final AUAR complained about the geographic scope of the study.

While the RGU might have chosen to expand the boundaries of the AUAR study area to encompass the entire state of Minnesota (as MCEA previously advocated), the entire 72-mile Critical River area, or the entire Mississippi River (as MCEA currently argues), the RGU certainly was not compelled to do so. It is within the RGU's discretion to determine whether state-wide or region-wide boundaries for an environmental review would be appropriate and feasible. See, e.g., Kleppe, 427 U.S. at 415 (“practical considerations of feasibility might well necessitate restricting the scope of comprehensive [environmental impact] statements”).

Moreover, the type of region-wide environmental review of the entire 72-mile critical area corridor was previously conducted by the United States Department of the Interior, National Park Service in 1995 when it adopted a Comprehensive Management Plan for the Mississippi National River and Recreation Area (“MNRAA”). The MNRAA area has the same boundaries as the MRCA. To evaluate the Management Plan, the National Park Service created an environmental impact statement for the entire critical area corridor. (Horton App. 217.) The EIS was based on three different scenarios, and on planning assumptions that “the metro area is growing and much of the land in the

[Mississippi River] corridor is developed or will be developed in the next 10-15 years.” (Id. at 232.) The EIS for the Mississippi River corridor contains an assessment of “cumulative impacts” that could result from the scenarios studied. (Id. at 251, 254, 255, 258, 259, 263, 267.) A chart in the MNRAA environmental impact statement summarizes those potential impacts. (Id. 268.) The information from this EIS is available to federal, state and local decisionmakers to assist their evaluation of development proposals within the Critical Area.

Here, the City, acting as RGU, selected an appropriate boundary area for the AUAR study – the area in which environmental effects would be greatest. MCEA never explains how it would be feasible for City of St. Paul Park to undertake a region-wide environmental analysis of all past, present and future development throughout the 72-mile critical area corridor in the Twin Cities metropolitan area, or even more burdensome, the feasibility of undertaking such a review of the entire Mississippi River. It does not explain why such a massive study would need to be undertaken each time someone proposes a project within the critical area, or why the EIS for the corridor previously prepared by National Park Service is inadequate. Nor does MCEA ever explain what additional information, not already known by or available to agencies that will make decisions about the future development within the AUAR area, would be expected to be learned.¹⁷ In other words, MCEA has not demonstrated the feasibility or the benefit of such a massive undertaking. MCEA fails to explain how any additional

¹⁷ Other than the issue of migratory birds, MCEA does not discuss any other cumulative impact that would be further explored by expanding the study area.

information that might be generated by exponentially expanding the boundaries of the study would justify the enormous costs of doing so. A solid rationale exists supporting the selection of the AUAR study area boundaries. The RGU's decision was not arbitrary or capricious.

C. The Rules Governing the Use of Environmental Impact Statements Are Not Applicable to an AUAR.

MCEA argues that the RGU had no discretion to determine the scope of the AUAR study area, and was compelled by law to evaluate all past, present and future projects within the entire 72-mile MRCA or the entire Mississippi River itself. While, as discussed previously, an AUAR automatically includes a thorough analysis of the cumulative environmental effects that could result from all development that might take place within the large area studied in an AUAR, the rules governing AUARs do not require the type of sweeping analysis of past, present and future development activities outside of the AUAR study area that MCEA asserts.

Recognizing that the AUAR rules do not support its contention,¹⁸ MCEA attempts to build an elaborate argument to read a non-existent requirement into the AUAR rules. The ultimate source of the requirement that MCEA seeks to impose is an inapplicable

¹⁸ MCEA's underlying concern appears to be with the AUAR rules themselves, rather than with the content and adequacy of this particular AUAR. However, this Court is not the forum in which MCEA can challenge the EQB's rules, or the legislature's decision in MEPA not to require a region-wide environmental assessment whenever a development project is proposed in the MCRA.

federal rule promulgated by a federal agency under a federal statute, the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq.¹⁹

MCEA’s argument is convoluted, but appears to go as follows. According to MCEA, an AUAR must be “equivalent” to an Environmental Impact Statement under state law, i.e. under MEPA. Although the rules promulgated by the EQB under MEPA do not require an EIS to assess cumulative impacts from past, present and future developments over a large, regional area (or even a small area) (see Minn. R. 4410.2000), the rules do contain a definition of “cumulative impacts.” Minn. R. 4410.0200 subp. 11. MCEA views that definition as similar to the definition of “cumulative impact” found in federal regulations promulgated by the Council on Environmental Quality pursuant to federal law, NEPA. 40 C.F.R. § 1508.7. Extending its argument, MCEA next asserts that because the state and federal rules contain similar definitions of “cumulative impacts,” that must mean that the substantive federal rule under NEPA which requires an analysis of cumulative impacts in a federal EIS (see 40 C.F.R. § 1508.25(a)(2)) must also be applicable under the state rules for EISs, and by extension to AUARs, under MEPA. In this way, MCEA attempts to extend a federal rule, 40 C.F.R. § 1508.25(a)(2) applicable to an EIS prepared under federal law to an “alternative” form of environmental review, an AUAR, governed by state law.

¹⁹ The federal statute, NEPA, does not apply to decisions of state or local agencies. NEPA is designed to permit decision-makers on the federal level to better understand the environmental effects of decisions made by federal agencies. 42 U.S.C. § 4332(A).

MCEA's argument fails for a number of reasons. First, an AUAR need not be "equivalent" in all respects to an EIS. The Legislature in 1980 authorized the EQB to develop "alternative forms of environmental review." 1980 Minn. Laws ch. 447, § 4 (codified at Minn. Stat. § 116D.04, subd. 4a). The alternative form of review would allow review "in a more timely or more efficient manner to be utilized in lieu of an environmental impact statement." Id. The EQB designed the AUAR process to be such an "alternative" form of review. Its rules state that an AUAR should have "a level of analysis comparable to an EIS." Minn. R. 4410.3610 subp. 4. However, the rules obviously do not require an AUAR to be identical to an EIS. If that were true, an AUAR would cease to be an "alternative" form of review. Thus the first assumption in MCEA's argument -- that all requirements of an EIS must also be present in an AUAR -- is incorrect.

Second, MCEA's assumption that an EIS requires a far-ranging regional or national "cumulative impacts" analysis in each instance is also incorrect. The phrase "cumulative impacts" appears in the EQB's rules exactly twice. It is defined in Minn. R. 4410.0200, subp. 11, and it is mentioned in Minn. R. 4410.1700, subp. 7B as one of the criteria that should be considered in evaluating the need for an EIS. It is simply a consideration for determining whether an EIS should be required for a project. Thus, none of the Minnesota Rules concerning EIS preparation, none of the rules concerning AUAR preparation, and none of the other rules concerning environmental review, require an RGU to evaluate potential "cumulative impacts" on a region-wide or national basis as MCEA claims.

Third, even if MCEA could somehow equate the requirements of state law under the rules promulgated by the EQB with the wholly-different requirements of federal law, which arise under a different set of rules promulgated by a federal agency, it has failed to show that the far-reaching analysis it says is required in this case is even required by the federal rules under NEPA. The federal rules themselves do not set forth any requirement that cumulative impacts need to be assessed on a region-wide or national basis, as MCEA argues. Under federal law, the “identification of the geographic area within which [cumulative environmental impacts] may occur is a task assigned to the to the special competency of the appropriate agencies.” Kleppe v. Sierra Club, 427 U.S. 390, 414 (1976). See also, cases cited in footnote 16.

In Kleppe, several environmental groups sued federal agencies responsible for authorizing coal leases for mining on federal lands. The groups argued that the agencies could not issue permits for individual coal leases without first conducting a comprehensive EIS that studied the cumulative impacts of all proposed coal-related projects over the entire “Northern Great Plains region,” extending across a number of states. The Supreme Court disagreed, holding that the federal agencies acted well within their discretion to limit the EIS study areas for the individual projects, and were not required by NEPA or NEPA’s administrative rules to conduct a region-wide study of all effects from all coal-related projects in the region.

In short, nothing in the federal regulations relied on by MCEA mandates the RGU to exercise its discretion in favor of conducting a region-wide or national analysis of the cumulative impacts from all past, present and future development within the 72-mile

MCRA or the entire Mississippi River. Nothing in the AUAR rules requires an environmental review of such a large area. The RGU's decision to draw the boundaries for the AUAR study area around the 667-acre study area instead of the entire 72-mile MCRA or instead of the entire Mississippi River was well within the RGU's discretion. It was a decision that met with the EQB's approval and was acceptable to the 20 other agencies that reviewed the draft and final AUARs. The RGU's decision was not arbitrary and capricious.

IV. THE DNR'S ARGUMENTS MISS THE POINT.

A. The DNR Previously Waived Any Objection To The Scope of Cumulative Impacts Analysis in the AUAR And Should Not Be Permitted to Complain About The Scope Of The AUAR On This Appeal.

The arguments raised by the DNR in its amicus brief (to the extent they differ from MCEA's arguments) represent a procedurally improper attempt to take a second bite at the apple. The DNR previously waived any objections to the AUAR and should not now be allowed to re-raise these objections through another party's appeal.²⁰

The rules governing environmental review under an AUAR mandate specific procedures for resolving any objection to an AUAR filed by an agency. First, the RGU, the objecting agency, and the EQB must meet to attempt to resolve the issues raised in the objection. Minn. R. 4410.3610, subp. 5F. Next, the RGU must submit a written

²⁰ The Rules contain strict time limits for an agency to pursue its objections. Minn. R. 4410.3610, subp. 5D through 5H. The purpose is to bring finality to the environmental review process, avoid endless delays and remove uncertainty about moving forward with development plans. Here, however, by submitting an amicus brief to resurrect objections it withdrew more than one year ago, the DNR would entirely negate those time limits.

response to the objection to the EQB Chair, addressing each of the issues raised in the objection. Id. The RGU then must either revise the AUAR or explain why the objection is not relevant. Id.

Thereafter, the Rules require the objecting agency either to withdraw its objection in light of the explanation from the RGU or continue its objection. Minn. R. 4410.3610, subp. 5G. “If the objecting agency continues to object, the EQB Chair shall place the matter on the agenda of the next regularly scheduled EQB meeting or of a special meeting.” Id. Thereafter, the EQB is charged by law with the duty of determining “whether the environmental analysis document and plan of mitigation are adequate” Id.

On March 31, 2004, the DNR submitted an objection letter. (Horton App. 196.) On April 12, 2004, the DNR sent another letter supplementing its earlier objection letter. (Id. 204.) Both letters specifically addressed the “cumulative impacts” issue that the DNR now raises with this Court.

As required by the Rules, the DNR and the RGU held additional meetings and discussions to address the DNR’s objections. (Horton App. 103-114.) Two staff members of the EQB were present at the meetings with the DNR to discuss the requirements of an AUAR and were satisfied with the approach taken by the City. (Id.)

As required by the Rules, on April 26, 2004, the RGU provided a detailed response to the DNR’s objections. (Horton App. 149-208.) The response included a point-by-point response to the DNR’s comments, including its comments concerning “cumulative impacts.” (Id. 155-169.) It contained proposed additional revisions to the

Final AUAR and mitigation plan to address the DNR's objections, and included notes of meetings between the City, the AUAR technical team, the EQB and the DNR that took place on April 14 and 15 to address the DNR's objections. (Id. 170-178; A.R. at SPP5595-5606.)

Following those meetings, the DNR chose not to pursue its objections. Instead, pursuant to Minn. R. 4410.3610, subp. 5G, the DNR formally withdrew its objections on May 4, 2004. (A.R. at SPP5623.) Specifically, the DNR sent a letter to the RGU stating:

The purpose of this letter is to inform the RGU of our decision to withdraw our objection to the Rivers Edge Final AUAR and Mitigation Plan in accordance with Minnesota Rules 4410.3610, subpart 5(G).

Id. No other state or federal agency objected to the Final AUAR.

As a result of the DNR's withdrawal of its objection, the process established by the Rules for considering and resolving objections came to an end, without further ruling by the EQB. Because of the DNR's withdrawal, the EQB was not required to consider and resolve the DNR's objections under Minn. R. 4410.3610, subp. 5H. Instead, with all objections resolved and withdrawn, the RGU approved the Final AUAR, as revised.

Having withdrawn its objections, and having avoided the administrative process by which its objections would be addressed and resolved by the EQB, the DNR should not now be permitted to circumvent the EQB's authority to consider and resolve agency objections to an AUAR. That is precisely what would happen if the Court were to permit the DNR to resurrect its prior withdrawn objections on this appeal.

B. Whether An EIS Rather Than An AUAR Should Have Been Used Is Not An Issue In This Case.

The DNR argues in its brief that the use of an AUAR instead of an EIS to conduct the environmental review was somehow improper. (Amicus Brf. at 11.) That argument should be rejected for three reasons. First, it is not an issue in this case. MCEA's complaint originally challenged the decision of the RGU to conduct review under an AUAR rather than an EIS, but dismissed that claim from this action by Stipulation after the Respondents moved for summary judgment. (Horton App. 183.) Second, the EQB, which has authority to determine the adequacy of an AUAR, agreed that the AUAR was the appropriate tool for the environmental review. Finally, the DNR raised this objection in its March 31, 2004 objection letter. It thereafter met with the EQB and was advised by the EQB that the use of an AUAR was appropriate. The DNR thereafter withdrew its objection to the allegedly improper use of an AUAR and should not be allowed to revive that argument.

C. The Critical Area Designation Was Fully Considered By the RGU.

The DNR next argues that during the environmental review in this case, "the critical area designation [was] all but ignored" (Amicus brf. at 8.) In fact, the AUAR repeatedly acknowledges the critical area designation. (See e.g. Horton App. 50, 69A.) Indeed, "scenario no. 1" studied in the AUAR is the development scenario permitted under the Township's DNR-approved critical area plan. In other words, the AUAR studied the environmental effects of developing the property under the very same

land use plan that has been approved by the DNR for the critical area. The critical area designation certainly was not “ignored” in the AUAR.

D. The AUAR Amply Considered Potential “Impacts Occurring Outside of the Project Area.”

The DNR also incorrectly claims that the AUAR “Ignores Impacts Occurring Outside of the Project Area.” (Amicus Brf. at 9.) In preparing the AUAR, the City received advice and recommendations from state and regional governmental agencies, as well as national and local environmental groups, and answered detailed questions on potential impacts not only to the 667-acre area subject to future development, but to the surrounding community. (A.R. at SPP5754-5792; 5736-5753.)

Analysis of possible environmental effects occurring beyond the AUAR study area boundary can be found throughout the AUAR. For example, the off-site effects that development at maximum potential densities might have on migratory birds is addressed in the AUAR and the Mitigation Plan. (Horton App. 38, 82.) Similarly, the extensive analysis in the AUAR of utilities, infrastructure, transportation, sewage treatment, and stormwater management all take into consideration the off-site effects of the project. (A.R. at SPP5696-5719.) Indeed, the AUAR addresses the positive effects that development of the property will have on areas outside of the AUAR study area, such as the stormwater management system that is designed to use infiltration basins to reduce the amount of storm water runoff going into the river to levels below those that currently exist. (Horton App. 57-61.) This will improve water conditions affecting the river, both within and down-stream of the AUAR study area. The effect of potential development

on regional water resources also is addressed throughout the AUAR, both by the City and other agencies that provided comments. (See, e.g., A.R. at SPP5680-5683, 5741-43, 5811-5815, 5974-80.) In addition, the following possible off-site effects are also addressed in the AUAR:

1. Habitat Fragmentation.

The AUAR discusses impacts to the MRCA and addresses the very topics that MCEA and the DNR argue are missing, including “habitat fragmentation.” For example, in its comment letter, the DNR commented upon the potential for habitat fragmentation and requested that the 40-foot bluffline setback proposed in the draft AUAR be enlarged to 100 feet to avoid “fragmenting habitats into isolated and small patches.” (A.R. at SPP6045.) The Final AUAR followed the DNR’s recommendation and increased the bluffline setback to 100 feet, preserving and mitigating potential environmental impacts to the river corridor. (Horton App. 73, 82.) Similarly, changes were made to trail corridors to avoid habitat fragmentation:

Habitat fragmentation has been minimized along the river corridor by limiting trail corridors and cross-through roadway sections. Two proposed roadways that cross through bluff areas follow existing areas of disturbance (e.g. field road and old building foundation locations). Restoration of the habitat along the bluff will enhance wildlife habitat in some locations that are currently degraded. The trail that was previously proposed along the bluff slope north of the bay has been eliminated from the design to reduce human intrusion, noise, and erosion of the bluff.

(Horton App. 82.) The record contains other such evidence. (A.R. at SPP5647, 5674, 5685-5688, 5722-5724.)

2. Effects on Slope and Shoreline.

The briefs of MCEA and the DNR also discuss the significance of the bluffs, and the effect on the entire river corridor that would result if the bluffs were “destroyed.” The AUAR and Mitigation Plan address those issues. The Mitigation Plan requires a public dedication or conservation easement of the bluffs, extends the structure setback from the bluffs to 100 feet, removes structures from slopes greater than 18% and removes structures from most areas greater than 12%. (Horton App. 51.)

The AUAR also addresses shoreline impacts. One-hundred percent of the shoreline areas will be preserved through public dedication and/or conservation easements, and active restoration of the shoreline will occur. (A.R. at SPP5686-5687.) The AUAR provides a Mitigation Site plan under MRCA. (A.R. at SPP5826.) It also recognizes that development within the corridor may require permits, which would necessitate additional analysis by the DNR, the City and Township. (A.R. at SPP5654, 5656.)

The AUAR also assessed the vegetation along the river and its relation to the Mississippi National River and Recreation Area (which is identical to the Critical Area corridor), the Metropolitan Council Regional Parks and Open Space System, the Washington County Greenway Corridor and the open space preserved under the different development alternatives. (A.R. at SPP5722-5723, 5666-5667, 5788.)

3. Migrating Wildlife.

The DNR’s main point appears to be that the AUAR does not adequately study “migratory waterfowl and many other bird species that do not limit themselves to [the]

250 acres” located in the critical areas designation. (Amicus Brf. at 10.) However, the AUAR contains an assessment of birds found within the area, including species that reside in short grassland, tall grassland, savanna, woodland/forests, wetlands and migratory species. (Horton App. 37-38.) It also discusses bird habitat. (A.R. at SPP5671, 6004.) In addition, the AUAR analyzes the impact development may have on migratory birds, ultimately concluding that “development of the property will affect local populations of migratory birds that depend on grasslands and agricultural habitats such as meadowlarks, field sparrows, and mourning doves.” (Horton App. 38.) This analysis was conducted even though the environmental researchers hired by the City found that within the AUAR area, only a “small percent . . . has migratory bird breeding and migratory bird habitat potential.” (A.R. at SPP5575.)

The AUAR also includes analysis on the negative repercussions that development may have on the migratory bird population, and noted preservation and restoration measures made to mitigate this impact. Notably, the two most important habitat areas for birds will be preserved:

[A]ll riverine habitat and over 80 percent of the wooded, wetland, and prairie habitat will be preserved. Natural community restoration within the river corridor will improve habitat for migratory bird species and other wildlife. The provision of upland buffers extending to 100 feet landward the bluffline will help mitigate potential impacts on many migratory birds.

(Horton App. 38.)

The DNR and the RGU met on April 14 and April 15, 2004 to discuss impacts to migratory birds and recommended changes to the AUAR to provide a better understanding of the potential impacts development may have on this population. (A.R.

at SPP5575-5576.) These recommendations were added to the Final AUAR along with an inclusion of a comprehensive Mitigation Plan providing for strict measures to minimize the impact to birds and wildlife. (Horton App. 40-41, 72-74.)

4. Bald Eagles.

The Final AUAR contains extensive discussion of bald eagles, the only bird species found within the subject property identified by the DNR as threatened or of special concern. (A.R. at SPP5133.) The AUAR contains a map of their nesting sites (A.R. at SPP5809), an analysis of the potential impact to their nesting sites (A.R. at SPP5668, 5672-5673), and mitigation measures to help lessen and avoid these impacts. (A.R. at SPP5675.) In addition, research was conducted on the present disturbances to bald eagles in the area. (A.R. at SPP5672-5673, 5668.) This included human impacts on birds:

The presence of intrusive human activities within the vicinity of the nest [recreational motor boating, an on-site mulching operation and an auto wrecking facility] and data indicating the eagles returning to the nest demonstrate that the eagles using the nest may have become habituated or accustomed to those nearby human activities.

(Horton App. 34.)

The Mitigation Plan further contains a Natural Resource Restoration Plan, which will address vegetation screening around the birds' nesting sites. (Horton App. 82.) The mitigation measures also identify disturbance limits guidelines created by the DNR and Ontario Ministry of Natural Resources. (A.R. at SPP5668-5669.) Furthermore, the Mitigation Plan calls for roads, trails, and buildings to be moved away from the nest ("the

nearest structure being at least 500 feet from the nest”). It also creates limits on construction during nesting seasons. Finally, it calls for removal of the existing mulching operation to minimize impacts to the eagles. (Id.)

5. Fresh Water Mussels.

Both the Final AUAR and the Mitigation Plan addressed the environmental impact that potential development may have on the mussel species found within the AUAR area and downstream from the AUAR area. The AUAR examined where mussels species reside (A.R. at SPP5850), examined the potential cause of impacts to the mussels (A.R. at SPP5699, SPP5673-5674), and analyzed what part of the development proposals could impact the mussels. (A.R. at SPP5763, 5765.)

The Mitigation Plan was drafted in order to mitigate potential impact to mussels -- both those located on-site and down-stream. (A.R. at SPP5589.) For example, to avoid sediment disturbance of the river bed, the plan for a marina on the property was deleted. (A.R. at SPP5673.) Also, the AUAR addresses water quality as part of its reduction in storm water runoff below current levels. Following review and development of the Mitigation Plan, the AUAR concludes that “no potentially significant impacts to the mussels are anticipated due to infiltration-focused storm water management, erosion and sediment control, lack of boat ramps or a marina and a lack of dredging.” (Horton App. 39.) This assessment applies not only to the AUAR area itself, but to the potential impacts on downstream areas as well.

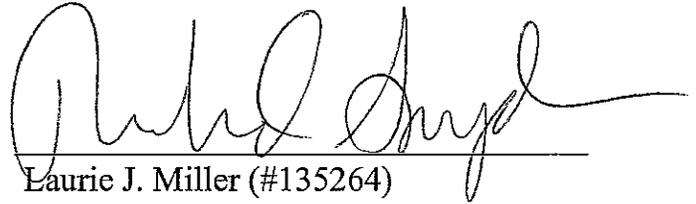
MCEA and the DNR disagree with the approach taken by the AUAR, and the RGU’s ultimate decision that the AUAR and the Mitigation Plan adequately address the

possible environmental issues associated with future development of this large area. However, under the applicable standard of review, a mere disagreement with the decision is insufficient. “Where there are technical disputes and uncertainties, the court must assume that the agency, or RGU has exercised its discretion appropriately.” Iron Rangers for Responsible Ridge Action v. Iron Range Resources, 531 N.W.2d 874, 881 (Minn. Ct. App. 1995). Substantial evidence in the record exists for the RGU to determine that the AUAR adequately addresses all relevant environmental issues. The mere disagreement by MCEA or the DNR is not enough of a basis for this Court to overturn the administrative decision below.

CONCLUSION

The AUAR and Mitigation Plan comprehensively studied the environmental effects that might occur from future development of a 667-acre area that the Metropolitan Council anticipates will be developed in the near future to help accommodate the area’s expected population growth. By its very nature, the AUAR studied the cumulative environmental impact that could result from the large developing area in question. The DNR initially objected to the AUAR, but thereafter formally withdrew its objection, allowing the AUAR to proceed to final adoption, without need for a hearing before the EQB. The DNR’s withdrawal of its cumulative impacts objection itself constituted substantial evidence on which the RGU could rely in adopting the Final AUAR. The record contains substantial evidence supporting the district court’s judgment affirming the RGU’s decision to adopt the Final AUAR.

Respectfully submitted,



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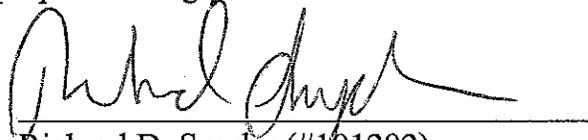
Dated: August 1, 2005

#31344763

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this BRIEF OF RESPONDENTS R. GORDON NESVIG AND D.R. HORTON, INC. conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and subd. 3(a)(1), for a brief produced with a proportional font. The font used in this brief is Times New Roman 13-point. The length of this brief is 12,378 words, exclusive of cover page, table of Contents and Table of Authority. This brief was prepared using Microsoft Word 2000.

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