

A06-378

NO. A06-1069

State of Minnesota
In Court of Appeals

Watab Township Citizens Alliance,
Chuck B. Wocken, Clare M. Wocken, Barbara Wocken, Ernie Kruger,
Duane Popp, Laura Brand, Janice Buermann, Gary Buermann, Douglas J. Boser,
Jason A. Zwilling, Brian Zwilling, John Haus, Janice Haus, Barb Kirchner,
Delroy Rothstein, Donna Rothstein, Ann Kruger, Julie Johnson, Kevin Johnson,
Tanya R. Boser, David Johnson, Estelle Johnson, Roger Carstensen, Christine Carstensen,
Shawn Corrigan, LouAnn Corrigan, Marilyn C. Popp, Kathatine Allie, Penny Kassier,
Dale Behrend, John Waseka, Marla Waseka, Bryan Carstensen,

Relators,

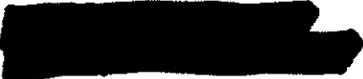
vs.

Benton County Board of Commissioners,
and the County of Benton, Minnesota,

Respondents.

RELATORS' BRIEF AND APPENDIX

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STATEMENT OF ISSUES

- I. STANDARD OF REVIEW ON THIS APPEAL.
- II. APPELLANTS FILED A VALID CITIZEN PETITION SUPPORTED BY MATERIAL EVIDENCE DEMONSTRATING THAT A PROPOSED RESIDENTIAL DEVELOPMENT MAY HAVE THE POTENTIAL FOR SIGNIFICANT ENVIRONMENTAL EFFECTS. RESPONDENT COUNTY REFUSED TO REQUIRE THE PROJECT PROPOSER TO COMPLETE AN ENVIRONMENTAL ASSESSMENT WORKSHEET. WHETHER MINNESOTA LAW INSTRUCTS RESPONDENT COUNTY TO REQUIRE AN ENVIRONMENTAL ASSESSMENT WORKSHEET BASED ON THE CITIZEN PETITION AND MATERIAL EVIDENCE?

Respondent County denied the Petition for an EAW. The District Court affirmed.

Minn. Stat. § 116D.04, subd. 2a(c).

Carl Bolander & Sons Co. v. City of Minneapolis, 502 N.W. 2d 203, 207 (Minn. 1993).

Minnesotans for Responsible Recreation v. Department of Natural Resources, 651 N.W.2d 533 (Minn.App. 2002).

Trout Unlimited v. Minn. Dep't of Agriculture, 528 N.W. 2d 903, 907 (Minn. App. 1995).

- III. THE ADMINISTRATIVE RECORD SHOULD NOT INCLUDE ANY INFORMATION COLLECTED AFTER THE COUNTY ISSUED ITS APRIL 19, 2005 ORDER DENYING THE CITIZEN PETITION.

The District Court included in the record material from January 2006.

White v. Minn. Dep't of Natural Resources, 567 N.W. 2d 724 (Minn. App. 1997).

- IV. MOREOVER, EXPANDING THE ADMINISTRATIVE RECORD TO INCLUDE ALL EVIDENCE GATHERED BETWEEN THE DENIAL OF THE PETITION AND THE APPROVAL OF THE FINAL PLAT INDICATES THAT THE COURT OF APPEALS SHOULD REQUIRE THE EAW.

The District Court refused to require the EAW.

Carl Bolander & Sons Co. v. City of Minneapolis, 502 N.W. 2d 203, 207 (Minn. 1993).

STATEMENT OF THE CASE

This case presents the question of whether, under the Minnesota Environmental Policy Act ("MEPA"), Respondent Benton County should require the proposer of a residential housing development ("Project") to complete an environmental assessment worksheet ("EAW") on the Project based on a Citizen Petition with material evidence.

In March 2005, over 25 individuals and members of Appellant Watab Township Citizen Alliance ("Citizens"), pursuant to their rights under MEPA, Minn. Stat. § 116D.04, subd. 2a(c), duly submitted a valid Citizen Petition to the Minnesota Environmental Quality Board ("EQB") seeking an EAW on the Project. The Petition and accompanying documents submitted to the EQB stated that the Project: a) has the potential to deplete the groundwater aquifer and negatively impact existing residential wells given the unique subsurface conditions in the area; b) has the potential to contaminate the surficial aquifer; c) has the potential to contaminate adjacent wetlands through the discharge of wastewater from the Project; d) has the potential to cause odors through the discharge of wastewater from the Project; e) has the potential to overwhelm local roads through increased traffic; and f) could only receive zoning approval through the impermissible use of "spot zoning" by allowing a relatively high density residential development miles from any City and in the middle of agriculturally zoned lands. Because of these concerns, Citizens maintain that the Project may have the potential for significant environmental effects, and requested that Benton County require an EAW.

In March, 2005, the EQB assigned the Petition to Benton County ("County") as the Responsible Governmental Unit ("RGU") for the Petition and any EAW. On April 19, 2005, the County refused to require an EAW on the Project. Pursuant to Minn. Stat. § 116D.04, subd. 10, Citizens filed this appeal action in District Court to appeal the County's decision not to require an EAW on the Project. Minnesota law provides that the RGU shall order the preparation of an EAW when a Citizen Petition "demonstrates that, because of the nature or location of a proposed action, there may be potential for significant environmental impacts." Minn. Stat. § 116D.04, subd. 2a(c). Citizens maintain that the County improperly denied the Petition as a matter of law. The Petition and related material met the standard for a citizen petition for the simple EAW.

Subsequent events revealed that neither the MPCA nor the DNR could permit the Project as initially proposed. The County applied an erroneous standard of review in denying the Petition and impermissibly considered future mitigation proposals to allow the Project to move forward outside the scope of the statutory environmental review process. The administrative record as of April 19, 2005 demonstrates that this decision was a result of the County's will, not any reasoned judgment. In a decision dated May 23, 2006, Judge James W. Hoolihan of Benton County District Court affirmed the County's decision not to require an EAW on the Project, considered as part of the administrative record events taking place in permitting on an amended application in January 2006 (8 months after the decision from which this appeal comes), and ordered summary judgment against the Citizens. The Citizens appeal that decision to this Court of Appeals.

For the reasons set forth herein, Citizens respectfully request that this Court of Appeals reverse the judgment of the District Court in this matter and to remand with instructions that Respondent County require an EAW on the Project. Minn. Stat. § 116D.04, subd. 1a(c). The Citizen Petition and supporting material evidence in this matter constitute a good faith demonstration that the Project may have the potential for significant environmental effects, thereby requiring an EAW under Minnesota law.

STATEMENT OF FACTS

The factual background on this appeal is set forth in the administrative record that was before Respondent County at the time of its decision on April 19, 2005. This administrative record was filed with the District Court and is available for review by this Court of Appeals. In determining the scope of the record, the District Court considered substantial additional information from a plat hearing in January 2006. The Citizens maintain that the information gathered and considered after the County issued its Finding of No Significant Impact on April 22, 2005 is not properly part of the administrative record and should not serve as a basis for this Court of Appeal's review of an April 19, 2005 decision, but will address this material since the District Court extensively relied on the later material. The Citizens' maintain that these subsequent events confirm that the Citizen petition constituted a good faith presentation of material evidence on a project that could not be permitted by MPCA or DNR as presented. The following is a brief summary of the pertinent facts for purposes of this appeal.

A. **The Parties.** 1. **Appellants.** Watab Township Citizen Alliance is a non-profit organization composed of citizens of Watab Township who reside near or own property

in close proximity to the proposed development. Many of these Citizens rely upon private wells for drinking water and other household uses. They know from their own experience and from the Minnesota Department of Natural Resources ("DNR") that the water quantity in the area is limited and that significant new uses have the potential to cause interference with their wells. The Citizens were also concerned with wastewater discharges from the Project to an adjacent wetland that was part of an impaired waterway system. These Citizens filed a petition with the EQB requesting that the County require the Project to complete a simple EAW to analyze the environmental effects.

2. Respondent County. The EQB designated Benton County as the Responsible Governmental Unit ("RGU") for the review of the Citizen Petition. The EQB selected the County as the RGU because the County is the governmental unit with the most authority over the Project based upon the County plat ordinance provisions. The County received the Citizen Petition from the EQB in March 2005, held a public hearing on April 15 and April 19, 2005 and denied the request to require an EAW at a public hearing on April 19, 2005. Respondent County issued Findings of Fact on April 22, 2005.

B. The Proposed Development. The Project, described as the "Lake Andrew Plat," consists of 75.3 acres located on parts of the N ½ SE ¼ and S ½ NE ¼, Section 26, Watab Township, Benton County, Minnesota. The Project Site is on a wetland approximately 1.5 miles east of the Mississippi River. The site was originally zoned "A-2" Agriculture, and the developer requested a zoning change to "R-3" Single Family and Multiple Dwelling Residence. (Zoning Map Amendment Application.) As initially proposed, the Project site would consist of 61 residential housing lots. The wastewater

treatment facility for the Project had a permitted and a physical capacity to serve 110 residential lots and would be constructed on the site, with the discharge from the facility designed to flow into an adjacent wetland and then on to the Mississippi River.

C. **Citizen Petition for an EAW.** On February 22, 2005, over 25 Citizens submitted a Petition for an EAW and related materials to the EQB. The Petition consists of a signature page with at least 35 signatures, a cover letter to the EQB signed by Charles Wocken (A11), a testimonial letter signed by Shawn and LouAnn Corrigan (A12), and two maps depicting the project site and various geographical features of the area (A13-14). Respondent County already had detailed site plans as part of the zoning amendment request and plat applications. On this appeal, Citizens file the Citizen Petition with supporting material evidence as part of the Appendix. The following is a summary of the pertinent environmental issues raised by the Petition and the attached material evidence in support of those concerns.

1. The Project Has the Potential to Deplete the Water Table. The testimonial letter of Charles Wocken submitted to the EQB notes that the Project site has a shallow depth to the granite bedrock which creates a potential for “water table depletion and contamination of the surficial aquifer.” A11. The Wocken letter states that the Project raises concerns “about the availability of water” and gives information about the depletion of water at the nearby Corrigan residence. In support of these contention, the Petition contains two maps. A13-A14. The first map, prepared by the DNR as part of the Minnesota County Biological Survey, identified granite bedrock outcroppings in the vicinity of the Project. A13. The second map, prepared by the United States Geological

Survey, identifies the location of four quarries and a gravel pit in the vicinity of the Project site. A14. The factual information in both maps support the Citizens' assertion that the site rests on shallow bedrock and thereby presents a unique subsurface that has a major effect on groundwater availability and flowage. The Citizen Petition also indicates a shortage of groundwater already experienced by residents.

In addition to the Wocken letter and the geographic maps, the Petition contains a testimonial letter from Shawn and LouAnn Corrigan that details well problems caused by the shallow bedrock and depletion of the water supply. A12. The letter details that the Corrigan's drilled three wells before finding sufficient water, and the final well was impaired by an agricultural well located on the Project site. The owner of the agricultural well that impaired the Corrigan's well had to drill 22 test wells before sufficient water was found. "A Citizen's Guide: The Petition Process," published by the EQB and cited by the District Court in its Decision, lists testimonial letters as examples of "material evidence" that should be submitted in support of a Citizen Petition. A151.

2. The Project Has the Potential to Negatively Impact the Adjacent Wetland.

The Wocken letter raised as an "additional concern is the discharging of waste water from the plat into the adjoining wetland." According to the Preliminary Plat, there are over 40 acres of wetland adjacent to the Project. As originally proposed, the Project would discharge the wastewater from the facility that was designed with a physical and permitted capacity of 110 units into the adjacent wetland. In addition, the increased surface runoff from the streets, homes, and lawns of the Project are a significant cause of nutrient loading. As indicated below, events subsequent to April 19, 2005 proved the

citizens correct with this concern. MPCA invalidated the Project's wastewater permit on August 24, 2005, because the Project proposed "to discharge to surface waters that are listed as impaired, or your proposed discharge is upstream of surface waters listed as impaired." A145-146.

D. DNR States That The Project May Have the Potential for Significant Effects.

Respondent County requested input from the DNR on the Citizen Petition in advance of the public input hearing on April 15 and the decisional meeting on April 19, 2005. On April 14, 2005, D. Lais of the DNR submitted an email to Respondent County and the Project. A19. The email provides in part:

"Based upon the recorded drawdown, there is going to be some impacts with nearby domestic wells. For example, the "Corrigan" well was drawn down below the pump setting. There was also notable drawdown in wells up to 750' from the well. Keep in mind also, that your test was ran [sic] for only 24 hours, which is likely not sufficient for unconfined aquifers, unless they reach an equilibrium much more quickly. In this case, it is not apparent that such an equilibrium was achieved. Based on the data, there will likely be interference issues with neighboring wells. These wells may have to be hooked up to the water supply or minimally, some may need the pumps lowered. I would recommend locating the pumping well carefully, and it should be located some distance away from the domestic wells to reduce the potential impacts." A19.

In addition to concerns with the impact on existing wells, the DNR expressed concern that the wells could impact the nearby wetland, and that further tests would be required to determine the extent of the impact. A19. The test results reviewed by DNR were based on a pumping rate of 230 gallons per minute.

E. The County Denies the EAW Petition. Respondent County held a "committee of the whole" meeting on April 15, 2005. A copy of the transcript of that meeting begins

in the Appendix on A20. The acting Chair opened the meeting and announced: "I appreciate you all coming out but this is not a public hearing so we're not going to be taking public testimony from anyone." A21. The director then discussed mandatory categories for EAWs. A23. The Developer of the Project had submitted a letter regarding mandatory categories (A17), which the director apparently read or paraphrased. A23-24. The director then discussed the standard for requiring an EAW in the discretion of the board. A24. Minn.R. 4410.4500 was cited. Later the board discussed the matter as a discretionary EAW. A48. The board reviewed the matter as a discretionary EAW. A53, A60, A67, A78. The County attorney was present during portions of the discussion. A54. Neither the director nor the attorney discussed the standard for requiring an EAW based on the citizen Petition and material evidence. The director compared the EAW and permitting process. A27. There was a discussion about the lack of information on the water supply. A29. At A31, the Board discussed another project using the waste system:

"If people want to talk about other connected actions in the future with phasing, um, this is what has been given to me. This is the project that I have and it will be totally an additional project. There is another project that is associated with the wastewater treatment system that will be utilized but that is about a half mile, a half mile away but the sewage treatment is going to be handled by this system."

Regarding water supply, the director stated:

"Water concerns on the total affected granite ledge. That's the biggest issue that I was just trying to discuss with you. Um, we don't have. I don't have all of the data that would say yes that we will be able to supply it, no we don't. The question becomes do we feel that the, um, process for an appropriations permit would be adequate to address that issue." A32.

With regard to the sewage system, Respondent County stated: "So any permits that a developer would have to get with MPCA, DNR, whomever or whatever agency really

don't have any impact on EAW whether it's passable or not." A37. The system was looked at on a flow basis for "Sixty-one lots on the Jarnot development and forty-eight lots on Mayhew Meadows." A40. This is a total of 108 lots. Respondent County discussed the mandatory category of 100 lots. A42. Respondent County also addressed wildlife impacts and a DVD available to the County. A43-44. The County understood that it had the option of completing an AUAR on the area and did not. A52.

On April 19, 2005, the County met again and voted to deny the Petition and refused to require an EAW on the Project. The transcript of the hearing is part of the Appendix beginning at A93. D. Popp presented information to the Board on the appropriate standard for the review of a Citizen petition for an EAW, as compared to a discretionary EAW by the Board. A94. D. Popp also presented information regarding the AUAR process discussed by the County for this Township based on the need for environmental review. A95. D. Popp presented that the permitting processes with the MPCA and the DNR was not a substitute for an EAW. A95-96. B. Sandy presented testimony on water issues. A99. The County attorney discussed case law regarding improper deferral of environmental review to permitting and the Minnesota rules. A105-112. The County attorney suggested this was a discretionary EAW situation and did not compare that with the petition based EAW. A117. The Board discussed the permitting requirements, a possible AUAR and voted against an EAW. A134-1141.

The County produced a Findings of Fact, Conclusions of Law, and Order dated April 19, 2005. A142. The Findings indicate that the County applied the standard of review used to determine whether a project merits an EIS, not whether a Citizen Petition

for an EAW has demonstrated that a project *may have the potential for significant environmental effects*. For example, in its Conclusion, the County states the following: “There are no elements of the project that pose the potential for significant environmental effects that cannot be addressed through the permit and regulatory processes.” A143. This finding contains two distinct parts. First, there are elements of the Project that pose the potential for significant environmental effects. Second, the County believes that those effects can be mitigated through regulation. The Conclusions do not use the term “may” and instead state that the “impacts from the project will not be significant.” A143. The Conclusions are that the Project “does not have the potential to cause significant environmental effects.” A144. This is the standard for an EIS.

F. **Subsequent Events.** The District Court considered a host of subsequent events as part of the review of the April 19, 2005 decision. Because the Project was planned in a manner that violated Minnesota law such that an NPDES permit could not issue, MPCA withdrew approval on August 24, 2005. A145-146. Jarnot continued to struggle with adequate water supplies and pumping levels and promised the DNR in writing to correct well interference issues. A147. Jarnot amended his application for the Project. The County put the matter on the agenda for amended preliminary plat, rezoning and final plat approval for January 17, 2006. A148. The agenda does not include revisiting the EAW decision. A149.

G. **The Declaratory Judgment Action and Motion for Summary Judgment.**

Citizens commenced this appeal pursuant to Minn. Stat. § 116D.04, subd. 10. A1. Citizens timely served the Complaint on the County. The Complaint sought a declaratory

judgment reversing the County's decision to deny the Citizen Petition and directing the County to require the preparation of an EAW on the Project. The Complaint is filed herewith as part of the Appendix. A1-6. The County filed an Answer to the Complaint, denying the allegations. A7-10. In the District Court, the Citizens and the County filed cross motions for summary judgment for December 2005. A167. The District Court heard the Motions on April 17, 2006. On May 23, 2006, the District Court denied Citizens' Motion for Summary Judgment and Granted the County's Motion for Summary Judgment, affirming the decision that no EAW was required on the Project. A169-191.

H. The Instant Appeal. Citizens commenced this appeal in , by filing a Notice of Appeal with the Court of Appeals. A192. Citizens assert that the Petition and material evidence contained in the Petition and in the administrative record demonstrate that the Project may have the potential for significant environmental effects. Citizens ask this Court of Appeals to reverse and remand with instructions to the County to require an EAW on the Project.

ARGUMENT

I. STANDARD OF REVIEW ON THIS APPEAL.

The Minnesota Supreme Court has held that "when reviewing actions by a governmental body, the focus is on the proceedings before the decision-making body . . . not the findings of the trial court. Carl Bolander & Sons v. City of Minneapolis, 502 N.W. 2d 203, 207 (Minn. 1993). *See also*, Citizens Advocating Responsible Development v. Kandiyohi County Board of Comm'rs, __ N.W. 2d __, (May 11, 2006). ("We review an agency's decision independently without according any special deference

to the same review conducted by the district court or appellate court.”) The Court of Appeals reviews the decision of the governmental body “on the basis of whether it was unreasonable, arbitrary, or capricious.” Swanson v. City of Bloomington, 421 N.W. 2d 808, 823-824 (Minn. 1977). The Minnesota Court of Appeals has held that:

An agency ruling is arbitrary and capricious 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.

Pope County Mothers v. Minn. Pollution Control Agency, 594 N.W. 2d 233, 235 (Minn. App. 1999). Alternatively, Minnesota Courts will find that an agency’s decision is arbitrary and capricious if, based on the failures of the agency to follow applicable law and procedure, “it represents the agency’s will, rather than its judgment.” Trout Unlimited v. Minn. Dep’t of Agriculture, 528 N.W. 2d 903, 907 (Minn. App. 1995).

Where a citizen petition represents a good faith presentation of material evidence establishing that a project may have the potential for significant environmental effects for purposes of Minn.Stat. Sec. 116D.04, subd. 1a(c), the Court will order an EAW. See, Minnesotans for Responsible Recreation v. Department of Natural Resources, 651 N.W.2d 533 (Minn.App. 2002); Carl Bolander & Sons Co. v. City of Minneapolis, 502 N.W.2d 203, 207 (Minn. 1993); Vasgaard, et al v. Murray County Board of Commissioners, et al, Court of Appeals Case No. 98C203000181 (Minn.App. 2003) (A206-221).

II. APPELLANTS FILED A VALID CITIZEN PETITION SUPPORTED BY MATERIAL EVIDENCE DEMONSTRATING THAT A PROPOSED RESIDENTIAL DEVELOPMENT PLAT MAY HAVE THE POTENTIAL FOR SIGNIFICANT ENVIRONMENTAL EFFECTS. RESPONDENT

COUNTY REFUSED TO REQUIRE THE PROJECT TO COMPLETE AN ENVIRONMENTAL ASSESSMENT WORKSHEET. MINNESOTA LAW INSTRUCTS THE COUNTY TO REQUIRE AN EAW BASED ON THIS PETITION AND MATERIAL EVIDENCE.

Under Minnesota law, where the petition for an EAW represents a good faith presentation of material evidence establishing that a project may have the potential for significant environmental effects, and is not frivolous, the RGU shall order the Project to prepare an EAW. Minn.Stat. Sec. 116D.04, subd. 1a(c). The EAW is an initial threshold study designed to disclose whether an EIS is appropriate. The EAW is only a "brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for a proposed action." Minn.Stat. Sec. 116D.04, subd. 1a(c); Minn.R. 4410.0200, subp. 24. An environmental impact statement ("EIS") provides a more detailed examination of the potential for significant effects.

Minn.Stat. Sec. 116D.04, Subd. 2a(c) establishes the petition-based EAW and provides in pertinent part as follows:

(c) An environmental assessment worksheet shall also be prepared for a proposed action whenever material evidence accompanying a petition by not less than 25 individuals, submitted before the proposed project has received final approval by the appropriate governmental units, demonstrates that, because of the nature or location of a proposed action, there may be potential for significant environmental effects.

When a petition requests the preparation of an EAW, the RGU must order the preparation of an EAW if the evidence demonstrates that, because of the proposed project's nature and location, it may have the potential for significant environmental effects. Minn.Stat. Sec. 116D.04, subd. 2a(c); Minn.R. 4410.1100, subp. 6; Minnesotans for Responsible Recreation, 651 N.W.2d at 537; Carl Bolander & Sons Co., 502 N.W.2d at

207. The RGU should deny the petition if the material evidence fails to demonstrate that the project might have the potential for significant environmental effects. Id.

Minnesota adopted its environmental review program in 1973 by the enactment of the Minnesota Environmental Policy Act ("MEPA"), which has similarities to the National Environmental Policy Act ("NEPA") at the federal level. Our Legislature set forth the purpose statement for MEPA in Minn.Stat. Sec. 116D.01, which calls for environmental review early in the process, and provides:

Purpose. The purposes of Laws 1973, chapter 412, are: (a) to declare a state policy that will encourage productive and enjoyable harmony between human beings and their environment; (b) to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of human beings; and (c) to enrich the understanding of the ecological systems and natural resources important to the state and to the nation.

Our Minnesota Legislature also set forth a policy statement in Sec. 116D.02:

Declaration of state environmental policy. Subdivision 1. The legislature, recognizing the profound impact of human activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resources exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of human beings, declares that it is the continuing policy of the state government, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which human beings and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of the state's people.

Subd. 2. In order to carry out the policy set forth in Laws 1973, chapter 412, it is the continuing responsibility of the state government to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate state plans, functions, programs and resources to the end that the state may:

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all people of the state safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
- (3) 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; . . .
- (6) develop and implement land use and environmental policies, plans and standards for the state as a whole and for major regions thereof through a coordinated program of planning and land use control;
- (7) define, designate, and protect environmentally sensitive areas; . . .
- (10) preserve important existing natural habitats of rare and endangered species of plants, wildlife, and fish, and provide for the wise use of our remaining areas of natural habitation, including necessary protective measures where appropriate; . . .

MEPA intends to involve citizens in the process of a review and comment on potential projects and the process of improving proposed projects. The Minnesota rules establish that MEPA should "provide the public with systematic access to decision makers, which will help to maintain public awareness of environmental concerns and encourage accountability in public and private decision making." Our Minnesota rules state that the primary purposes and objectives of MEPA include the public review of environmental documents **early in the review process**. Minn.R. 4410.0300, Subp. 3. This Minnesota rule states that environmental documents shall not be used to "justify a decision". *Id.* RGUs are to follow a process which provides "usable information to the . . . public concerning the primary environmental effects of a proposed project." *Id.* at Subp. 4.

This Court of Appeals can also determine our Legislature's intentions regarding the standard for requiring an EAW based upon a citizen petition from the October 1981 "Statement of Need and Reasonableness for the Minnesota Environmental Quality Board Proposed Environmental Review Rules" ("SONAR"). A222-228. In 1980, our Legislature

adopted laws emphasizing the role of the petition based EAW early in the process. This legislation created the ability for citizens to petition for an EAW by signatures of 25 or more people. Prior to that time, citizens only had the ability to petition for an EIS, through petitions containing signatures of 500 or more people. Following this legislation, the EQB substantially revised the Minnesota rules relating to the EAW and EIS process. Minn.R. Ch. 4410. In October 1981, EQB released its proposed revisions to environmental review rules as well as the SONAR on the proposed new rules, Ch. 4410. A The SONAR describes the legislative intent underlying the 1980 MEPA amendments, as well as the EQB's intent behind the proposed rules and the procedures for EAWs. The SONAR discusses the main elements of the Legislature's 1980 MEPA amendments, three of which emphasized the role of the EAW, as follows:

2. Establishment of specific thresholds for projects and impacts that will automatically require preparation of an EAW or EIS
4. Encouragement of citizen participation early in the process of environmental review to promote a non-adversarial process. The agency responsible for preparing the EAW must submit the EAW for a 30-day public review and comment period. The final decision on the need for an EIS is not made until after public comment has been received.
5. Establishment of a relaxed process of citizen initiation of environmental review to enable citizen involvement early in the process to promote non-adversarial interaction on controversial projects. . . . SONAR, page 3.

This last element refers to the Legislature's creation of the citizen petition for an EAW. Chapter 12 of the SONAR sets forth the "procedural rules relating to the preparation and review of the EAW." SONAR, p. 41, A222-228. These include the processes "relating to the determination of need for an EAW". Id. Chapter 12 provides

detailed direction for this Court as to the intent of our Legislature regarding this requirement and suggests that the "material evidence" requirement of the Petition process should be viewed as a safeguard against "frivolous" petitions. The SONAR states:

Minn.Stat. Sec. 116D.04, subd. 2a (c) requires the material evidence provision as a safeguard against the submission of frivolous petitions. This provision requirement should not be a comprehensive analysis of scientific evidence demonstrating potential adverse effects. Rather, the intent is to require a good faith presentation by the petitioners demonstrating a reasonable person standard that significant adverse environmental effects may result from the proposed action

...
The function of the material evidence provision is to bring legitimate concerns to the attention of the governmental unit. It is the responsibility of the governmental unit to appropriately consider these concerns in a manner that reflects the best interests of the public. If detailed information toward that end is required, it is the duty of the proposer and the governmental unit to obtain it. SONAR, pp. 46-47 (emphasis added), A222-228.

Chapter 12 of the SONAR directs that the petition for an EAW should not be a process involving a comprehensive analysis of scientific evidence. Moreover, Chapter 12 directs the focus upon the "good faith presentation" of the petition to bring legitimate concerns forward. Where the petition is not frivolous, then the agency should grant the petition and prepare an EAW. Chapter 12 of the SONAR directs that the EAW process itself, and not the decision on whether or not to grant the EAW petition, is the means for the proposer and the governmental unit to gather and assess more detailed scientific and other information on environmental effects. This is a procedural requirement of MEPA.

As directed by the 1980 Legislative amendments to MEPA, once the EAW is prepared, it is released for a 30-day public comment period. The RGU's decision on the adequacy of the EAW is made after the public comments are received and is based on the

public comments and other information available to the agency. This important change was discussed in the SONAR as follows:

“this aspect of the process is new. Under the current rules, either a negative or positive declaration was issued at the time the EAW was approved by the RGU. If a person disagreed with the declaration, the proper procedure was to challenge that declaration by appeal to the EQB. Under the proposed rules, the declaration is not made until after all public comments are received. The declaration is made on the basis of the comments and other information available. This delay in the actual decision promotes a less adversarial process. If a person believes the RGU’s decision is inconsistent with the record, the proper appeal is to the district court.” SONAR, p. 58.

“Under the current rules, the responsible agency made the decision, as to whether an EIS would be prepared for an activity, prior to release of the EAW. That decision was contained as a negative or a positive declaration in the EAW. If a party disagreed with the decision, their only recourse was to challenge the decision. The 30-day comment period functioned as a review period during which time the interested parties could decide if they wished to challenge the decision. . . .

The most significant changes relating to the process of deciding the need for an EIS are: 1) the shifting of the time of the decision to a point after comments have been submitted . . . The intended effective of these changes is to promote a more timely and effective process. A primary benefit of the proposed process is expected to be the promotion of a less adversarial setting in making decisions relating to environmental review.

Under the proposed rules, the EAW is released without a determination as to the need for an EIS. The 30-day comment period functions as an opportunity for interested parties to provide comments as to whether an EIS is needed. At the end of the 30-day comment period the RGU considers all comments and other information and makes either a negative or a positive declaration as to the need for an EIS. A public hearing or informational meeting is optional for the RGU. . . . This change has the effect of making the RGU directly responsible for its decisions.” SONAR, p. 59.

Here, in summary, MEPA required Respondent County in this appeal action to:

1. Review the Petition and the related material evidence;
2. Verify that the Petition and material evidence constitutes a good faith presentation;
3. Base its decision on the Petition and material evidence; and
4. Require an EAW so long as the Petition is not frivolous.

A. **The Statutory Burden of Proof When Petitioning for an EAW Is Different and Lower than the Burden of Proof When Determining Whether an EIS Must Be Prepared.**

Minnesota Statutes and Rules establish a two-tiered standard of review for determining whether an EAW or an EIS is required for a project. The lower burden is placed on a petition requesting the preparation of an EAW. First, an EAW must be performed if the project *may have* the potential for significant environmental effects. Minn. Stat. § 116D.04, Subd. 2a(c). (emphasis added). Minnesota Rules establish the procedure that an RGU must follow when considering a Citizen Petition requesting the preparation of an EAW.

The RGU shall order the preparation of an EAW if the evidence presented by the petitioners, proposers, and other persons or otherwise known to the RGU demonstrates that, because of the nature or location of the proposed project, the project *may have* the potential for significant environmental effects. The RGU shall deny the petition if the evidence presented fails to demonstrate the project may have the potential for significant environmental effects.

Minn. R. 4410.1100, subp. 6. (emphasis added). According to the plain language of the Rules, once a determination is made that a project may have the potential for significant environmental effects, the RGU must order the preparation of an EAW.

The environmental review rules state that an “EIS shall be ordered for projects that *have* the potential for significant environmental effects.” Minn. R. 4410.1700, subp. 1. (emphasis added). The standards are distinct and must be treated as such. Unfortunately, the District Court conflates the two standards, and allows the County to subject the Citizen Petition to the higher standard required for a decision on the need for an EIS.

The Minnesota Supreme Court made this distinction clear in Carl Bolander & Sons v. City of Minneapolis, 502 N.W. 2d 203 (Minn. 1993). In Bolander, the developer challenged the City of Minneapolis's finding that an EAW was required for the construction of a concrete recycling facility. Bolander attempted to avoid an EAW by claiming that the results would find that there would be no significant environmental effects. The Supreme Court rejected this argument, and made a clear distinction between the decision to require an EAW and the decision to require an EIS:

Bolander next argues that even if the project may have the potential for significant environmental effects, the EAW was unnecessary because it would merely discover that the project will not harm the environment. The threshold requirement of the statute, however, is whether the project *may* harm the environment. If it *will* not, this will be discovered during the EAW process, and a more extensive environmental impact statement will not be necessary.

Bolander, at 207 (emphasis added). The project proposer in the instant case made the same argument to the County that was rejected by the Court in Bolander and Respondent County adopted the wrong standard in its Conclusions. A143-144. In a letter given to the Board and read at the April 15, 2005, meeting, the developer stated:

Based on this information and the information previously provided for Lake Andrew development project it does not seem reasonable that an EIS would be ordered for the project for the magnitude therefore it is questionable why an EAW would be required to evaluate the needs for an EIS that is unlikely to be ordered for this project. A66.

The Supreme Court made it clear that it is not the role of the developer or of the RGU to predetermine what will be the outcome of an EAW. If a project may have the potential for significant environmental effects based on a citizen petition, then the RGU shall order the preparation of an EAW.

In the MRR decision, our Court of Appeals affirmed a District Court order for EAWs on various trail projects based on citizen petitions, without a detailed analysis of this issue because the DNR did not challenge that the trail projects may have the potential for significant environmental effects. Minnesotans for Responsible Recreation, 651 N.W.2d at 536. The Court of Appeal's reported analysis in MRR focused upon the District Court's order for EAWs on the trail system plans, which the Court determined were not projects within the meaning of MEPA.

In the Bolander decision, our Supreme Court summarily concluded that a project was subject to an EAW based on a petition. Carl Bolander & Sons Co., 502 N.W.2d at 207. In Bolander, the proposer of a recycling facility argued that the facility did not constitute a "project" and therefore was exempt from environmental review. Our Minnesota Supreme Court held without discussion that MEPA applied and that the project required an EAW as a matter of law.

This Court of Appeals recently in an unpublished decision addressed MEPA's requirement of an EAW based upon a citizen petition. Vasgaard v. Murray County Board of Commissioners, C2-03-181 (Minn. App. 2003). In the Vasgaard case, the Court looked at the Petition and the material evidence attached thereto with an eye towards each particular environmental issue discussed. This Court of Appeals identified that the Petition as to the proposed hog confinement barn established that the confinement may have the potential for significant environmental effects as to the air emissions and odors from the proposed facility, and ordered the EAW based on the Citizen petition. In so holding, the Court of Appeals addressed the standard for an EAW based on a citizen petition.

B. The County Improperly Considered Mitigation Efforts When Making Its Finding That No EAW Was Required and Relied on Whole on the subsequent permitting review as a substitute for the EAW.

The environmental review rules, Chapter 4410, detail the criteria that an RGU must consider when determining whether an EIS must be performed. The criteria for the more detailed EIS include, *inter alia*, “the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority.” Minn. R. 4410.1700, subp.

7.C. The environmental review rules do not expressly authorize the RGU to consider the impact of mitigation efforts or permit conditions in making the determination. Mitigation efforts are considered as part of the preparation of an EAW on a citizen petition. It is clear from the administrative record that the County improperly considered factors outside of the EAW regulatory framework when making a negative declaration on the need for an EAW and basically abdicated its duty to require environmental review where indicated in wholesale reliance on the permitting processes, as criticized in Trout. In its Findings of Fact, cited by the District Court in its Order, the County made the following statement: “The potential environmental effects of the proposal on water quantity and quality are subject to mitigation by ongoing public regulatory authority.” A143. In its Conclusion, the County also cited the importance of mitigation efforts in its decision: “There are no elements of the project that pose the potential for significant environmental effects that cannot be addressed through the permit and regulatory processes.” A143.

Both the County and the District Court erred as a matter of law by considering mitigation efforts as a factor in determining whether to order the preparation of an EAW.

The District Court cites this Court's holding in White v. Minn. Dep't of Natural Resources, 567 N.W. 2d 724 (Minn. App. 1997), for the proposition that it is appropriate for an RGU to consider mitigation when determining the need for preparation of an EAW. The District Court's reliance on White is misplaced because it is an EIS case based upon review of an EAW. The District Court cites the following passage from White: "Mitigation is an appropriate criterion to consider when determining the potential for significant environmental effects. Id. (quoting Minn. R. 4410.1700, Subp. 7.C)." (Order, p. 22) (internal quotations omitted). The White Court referenced the rules for determining whether an EIS was necessary. Those rules are not applicable in the instant case. The proper standard to be applied by the County is the standard of Minn. R. 4410.1100, subp. 6, that requires an EAW whenever the project may have the potential for significant environmental effects.

A number of district court opinions have addressed this issue and maintained the distinction between the two standards of review. While not binding on this Court, the holdings of the district courts are instructive, as they properly sustain the intent of the Legislature in creating the two standards. In Dodds v. Rice County, File No. C9-98-595 (Sept. 15 1998), citizens submitted a petition requesting that an EAW be performed on the construction of a hog feedlot. A194. Rice County, the RGU, denied the citizen petition, largely because it found that future mitigation and permitting efforts would address the potential environmental effects. The district court, relying upon the Supreme Court's holding in Bolander, rejected this argument and enjoined the county from issuing any permits to the project until an EAW was completed. The District Court found that

the County Board improperly applied the EIS standard because its Findings were

“expressed in terms of ‘is’ rather than ‘may.’ Dodds, at 8. The District Court continued:

This is more than a failure of grammar or phrasing. An analysis of the Board’s reasoning shows that the distinction between ‘is’ and ‘may’ is based on the Board’s confidence that whatever potential significant environmental effects *may* flow from the Fox Den project could be mitigated or reduced by operation of other County requirements.

Id., at 8-9. (emphasis in original). The court’s discussion on the importance of the two

statutory standards is instructive. Here, the County Conclusions make the same error.

A144 & 145. Respondent County used the EIS standard for the conclusion that the

project “does not have the potential to cause significant environmental effects.” Id. This

is an error of law, just as it was in Bolander, Dodds and Vasgaard. In the instant case, the

County is attempting to bypass the EAW process entirely and suggests that, if an EIS is

not likely, there is no purpose for an EAW. Its own Findings indicate that the Project

may have the potential for significant environmental effects that later regulatory projects

will mitigate, yet it refuses to order the preparation of an EAW. Instead, it looks to future

mitigation efforts which, it claims, will alleviate any of those impacts. This is not the

environmental review process established by the Legislature. The law is clear that upon a

finding that a project may have the potential for significant environmental effects, the

RGU shall order an EAW. The EAW process then becomes the proper forum for

discussion of mitigation efforts.

C. The County’s Decision to Deny the Citizen Petition Represents The County’s Will Rather Than Its Judgment On the Petition.

Respondent County did not view the process under the standard of review for an EAW based on a citizen petition under Minn.Stat. Sec. 116D.04, subd. 1a(c). Courts will find the decision of an RGU to be arbitrary and capricious if "it represents the agency's will, rather than its judgment." Trout, supra. There is substantial evidence in the administrative record that the County's decision was not based on a reasoned determination of whether the Project may have the potential for environmental effects, but rather on policy considerations outside of the environmental review process.

On April 19, 2005, the County Board denied the Citizen Petition. At this meeting, Commissioner Walter noted the fact that this was the first EAW Petition reviewed by the County Board, and that the decision might have future impacts for Benton County. "If we do [grant the petition] then we have set that precedence for any development. It might be three houses, six house [sic], eighteen houses, five hundred houses. And we may have one of these requests from every development we got. So keep that in mind also." A128. This statement reflects the concerns expressed by the developer and discussed at the Committee of the Whole meeting on April 15, 2005. Avoiding future costs and administrative burden is simply not a legitimate reason for denying an EAW Petition and is not a factor under the rules.

Further evidence in the record that indicates that the County Board operated outside of the statutory and regulatory parameters of the EAW process. At the Committee of the Whole meeting on April 15, 2005, the Department of Development Director discussed the County's decision-making process:

[P]art of what we have to do when we receive a petition is make a decision about that petition. Should it go forward? Or should we basically say that we have enough other processes in place to cover the issues that are being, that were brought forward in the petition. [T]hat is essentially what we are trying to assess today. Do we have enough findings of fact in our possession to [t]ell that we could adequately address the issues of the petition without doing an EAW and would an EAW bring forward any additional information that we think we wouldn't otherwise get through any other process. A27.

The EAW process established by the Legislature and the Environmental Quality Board is clear. Upon receipt of a valid Petition, the RGU must determine whether the project in question may have the potential for significant environmental effects. If the project may have such effects, then the RGU must order the preparation of an EAW. The statutes do not give the RGU the discretion to determine whether an EAW is the best process to answer the questions raised by the Petition, nor can it compare the statutory EAW process with its own procedures to determine which it prefers. The duty of the RGU is clear and straightforward, and by failing to meet the statutory mandate, the County Board acted arbitrarily in denying the Petition.

D. THE MATERIAL EVIDENCE CONTAINED IN THE CITIZEN PETITION MEETS THE BURDEN.

1. The Citizen Petition Contained Material Evidence. As noted in the Statement of Facts, the Citizen Petition submitted to the EQB contained the following information: a signature page with at least 35 signatures, a cover letter to the EQB signed by Charles Wocken, a testimonial letter signed by Shawn and LouAnn Corrigan, and two maps depicting the project site and various geographical features of the area. In, "A Citizen's Guide: The Petition Process," cited by the District Court in its Decision, the

EQB lists the following items as examples of “material evidence” that should be submitted in support of a Citizen Petition: maps, newspapers articles, site plans, photographs, testimonial letters, letters from expert agencies and environmental reports. See, A157. The testimonial letters and maps submitted by the Citizen Alliance constitute material evidence for purposes of the EAW Petition.

The County asserts that only the language contained on the signature page constitutes the Citizen Petition, and therefore, claim that the Citizen Alliance failed to meet its statutory burden. The language on the signature page is reprinted below:

We the undersigned hereby petition that Benton County, as the Local Governmental Unit (LGU) require an ENVIRONMENTAL ASSESSMENT WORKSHEET (EAW) for the Lake Andrew Plat proposed by Scott Jarnot for Section 26, Township 37 North, Range 31 West (Watab Township, Benton County). *The proposal includes 1) “spot zoning” within an Urban Transition township creating an R-3 zone surrounded by A-2 zoning four miles from the nearest city limits, and, 2) access of 61 additional homes onto township road 5th Avenue Northeast, a 19’-wide blacktopped road with no shoulders.*

(Citizen’s Petition, signature page) (emphasis in original). A15-16. In its Findings of Fact, the County states, “That the text of the petition identifies two concerns: ‘spot zoning’ and the sufficiency of the existing road . . .” (Order, p. 8). Finding number 7 also states, “Although not cited in the petition, petitioners have also raised concerns regarding availability of water for the proposed development and the potential harm caused by any discharge of waste, and waste odor . . .” (Order, p. 8). The District Court endorses the County’s interpretation in its own Order: “The concerns listed on the Petition for EAW were spot zoning and road access for 61 additional homes.” (Order, p. 4). This argument elevates form over substance.

Common sense dictates that all documents submitted to the EQB with the signatures must be considered as part of the Petition. The section of the Citizen's Guide cited by the District Court instructs petitioners to "attach supporting evidence" to the Petition. The cover letter submitted to the EQB listed the documents attached to the letter, including the signature page, and Mr. Wocken, the author of the letter, indicated that he was to be considered the contact person for the petitioners. The letter clearly stated that the petitioners were concerned with the "potential for water table depletion and contamination of the surficial aquifer" and the potential for contamination due to the discharge of wastewater. Finally, the County Board was already in possession of site plans for the project as a result of the ongoing permitting process. These documents constitute material evidence, and it simply makes no sense to ask a citizen to request copies from the County Board only to reattach them to a Petition for an EAW. In summary, Respondent County was looking for any reason not to require an EAW on the project, instead of considering the correct legal standard as to whether the Petition was not frivolous and met the minimum standard.

2. The Material Evidence Contained in the Petition Meets the Plaintiff's Burden. The County notes in its Response that site-specific information is required, and that "[t]here must be sufficient data presented to show that the project is capable of significantly impacting the environment." Minnesota Rules do imply that site-specific information is required—the Petition must include "material evidence indicating that, because of the nature or location of the proposed project, there may be potential for significant environmental effects." Minn. R. 4410.1100, Subp. 2.E. However, the

County provides no citation for its claim that *data* is required. The law requires that the Petition contain material evidence, and that is what the Citizen Alliance has provided. The Citizens provided a description of potential problems and maps of the area detailing this information. Indeed, MPCA could not permit the project as proposed. A145-146. This is another example of Respondent County bending Minnesota law to achieve a desired outcome of not requiring an EAW on a project for which Respondent County believed the MPCA and DNR permitting processes, together with the plat review, would handle all issues. This Court of Appeals has held that petitioners,

are not required to prepare a comprehensive analysis of scientific evidence demonstrating potential adverse environmental effects to have an EAW prepared. The EAW is a document that is intended to set out the basic facts, and the legislature did not hold petitioners for an EAW to a very high standard.

Vasgaard v. Murray County Board of Commissioners, C2-03-181 (Minn. App. 2003).

While not precedential, the logic of the Vasgaard holding is persuasive.

The Petitioners expressed their concern that the Project has the potential to impact water quality. This concern is supported by a number of site-specific factors. The site sits atop a granite shelf, which makes it difficult or impossible to drill deep wells to reach drinking water. This fact is asserted by the Wocken testimonial letter, an example of “material evidence” according to the documents cited by the District Court. Two maps, both of which constitute material evidence, support this fact. The maps demonstrate the presence of granite quarries, and granite outcroppings, both evidence of the shallow bedrock discussed in the testimonial letter.

The testimonial letter submitted by the Corrigan's and attached to the EAW Petition is also material evidence. It describes past, site-specific problems regarding the availability of well water. The Corrigan's assert that the drilling of an agricultural well on the proposed Project site depleted their well. The letter also demonstrates the difficulty other residents, living adjacent to the proposed Project site, had in finding adequate wells. Again, this constitutes site-specific, material evidence that the Project may have the potential for significant environmental effects. The DNR wrestled with the pumping issues and required the project to promise to address interference issues.

The Petition also expressed the concern that the Project may have the potential to negatively impact the adjoining wetland. A11. This concern is supported by a number of facts contained in the site plans already in the possession of the County. Fact 1: The Project proposes to build 61 new homes on the site. Fact 2: The site is adjacent to an existing wetland. Fact 3: The Project, as proposed, would discharge the wastewater of 61 homes into the wetland. Despite these facts, the County insists that the Petitioners have not demonstrated that the Project *may have the potential* for significant environmental effects.

The "Citizen's Guide" does not carry the force of law, but it is useful in determining what burden a group of petitioners must meet to fulfill the statutory obligation. The Guide asks the question, "How much supporting evidence do I need?" It responds by stating, "You should always try to include *at least some* supporting evidence relevant to the circumstances of the project." (Citizen's Guide, Step 4, p. 8) (emphasis added). It is important to remember that the Citizen's Petition is designed to give citizens

an opportunity to raise concerns about environmental impacts. The EAW Petition is the first step in environmental review, and the material evidence standard was included to prevent frivolous petitions, not to bar access to the process. As this Court stated in Vasgaard, “Appellants need only make a good-faith showing that there may be the potential for significant environmental effects.” Vasgaard, at 15.

III. THE ADMINISTRATIVE RECORD SHOULD NOT INCLUDE ANY INFORMATION COLLECTED AFTER THE COUNTY ISSUED ITS APRIL 19, 2005 ORDER DENYING THE CITIZEN PETITION.

The District Court erred as a matter of law in following the arguments of Respondent County in allowing all of the belated permitting activity up to January 2006 to be included as part of the administrative record of decision on the EAW petition. In Pope County Mothers, the Court of Appeals held that a reviewing court will not defer to the district court’s decision regarding the consideration of evidence outside of the administrative record. Pope County Mothers, at 239. The use of evidence obtained eight or nine months after the denial of the EAW petition violates both Minnesota law and the decisions of Minnesota Courts. Respondent County urged the District Court to consider this as a follow-up to their ill-conceived notion that the permitting processes were a substitute for environmental review. This Court of Appeals should only allow evidence outside of the administrative record upon a finding that the evidence in question meets the limited exceptions outlined by the Court of Appeals in White.

In reaching its decision, the District Court included in the administrative record information collected by the County nearly nine months after it denied the EAW Petition. The District Court bases its argument in support of this decision on the fact that the

County held a public meeting on January 17, 2006, at which “both the petitioners and respondent had an opportunity to reconsider the issue of an EAW.” (Order, p. 12). There was no reconsideration of the EAW at this January 2006 meeting. The District Court also failed to apply the standards for admitting evidence outside of the administrative record outlined by the this Court of Appeals in White because “the information contained in the Court file prior to and including the January 17, 2006, County Board meeting was presented to the RGU . . .” (Order, p. 12). Finally, the County has asserted that because the potential environmental impacts raised by the EAW Petition have been addressed to its satisfaction, there is no longer the need for an EAW. The “end justifies the means” approach is contrary to the clear language of Minnesota Statute and Rules outlining the environmental review process. Because the rationale supporting the decision to deny the EAW Petition is based entirely on information outside of the administrative record, the Court should reverse the District Court’s Order and remand the Petition to the County for the preparation of an EAW.

A. The County Could Not Legally “Reconsider” Its Decision To Not Require An EAW For The Project.

Despite the fact that it was not on the agenda, the District Court decision suggests that Respondent County reconsidered its EAW decision in January 2006. Minnesota Rules establish the only procedure that the RGU may follow when considering a Citizen’s Petition for an EAW. When the RGU is an elected board it has up to 30 days upon receipt of the Petition to make a decision regarding the need for an EAW. Minn. R. 4410.1100, subp. 7. After reaching its decision, the RGU must notify the EQB within 5

days, at which time the EQB will publish the decision in the EQB Monitor. Minn. R. 4410.1100, subp. 8. At this point, Minnesota Rules state that the decision of the RGU is final: "Decisions by a RGU on the need for an EAW, the need for an EIS and the adequacy of an EIS are final decisions and may be reviewed by a declaratory judgment action . . ." Minn. R. 4410.0400, subp. 4. There is no provision in statute or rule that allows an RGU to "reconsider the issue of an EAW." If the RGU was allowed to reconsider a final decision, the declaratory judgment action created in statute would be invalid as the cause of action would not be ripe.

The circumstances of the January 17, 2006, meeting further demonstrate that the meeting was not held to "reconsider" the issuance of an EAW. The published agenda for that meeting does not include any reference to the Petition for an EAW. The relevant text is printed below:

Continued Public Hearing to Consider Amendment of the Preliminary Plat of *Lake Andrew*, Rezoning 76.31 Acres from "A-2" Agriculture to "R-3" Single Family and Multiple Dwelling Residence and Approval of a Sixty-One (61) Lot Final Plat Entitled *Lake Andrew*, Submitted by Scott P. Jarnot, LLC.

(Plaintiff's Exhibit, Benton County Board of Commissioners Meeting, Tuesday, January 17, 2006, Agenda, Appendix). The meeting was held to approve the zoning amendment and the final plat. The agenda contains no public notice of a decision on the EAW Petition. The mere fact that members of the public and the Board discussed the EAW Petition does not mean that the issue was up for reconsideration. The County made the in decision in April, and the decision was final. The District Court erred.

At the January 17, 2006, meeting, the County approved the final plat for the Project. The County could only issue approval because the final decision on the need for an EAW had been made in April 2005. Minnesota Rules state that "a final governmental decision may not be made to grant a permit, approve a project, or begin a project, until . . . a petition for an EAW is dismissed." Minn. R. 4410.3100, subp.1.A. If the EAW was, as the District Court suggests, under reconsideration, the County could not have granted approval to the Project at that meeting. As noted earlier, the final decision to deny an EAW Petition must be made within 30 days, not nine months, of receipt of the Petition. That decision then must be submitted by the RGU to the EQB in writing. The Board made no such finding on January 17, 2006.

Neither the County nor the District Court are free to redesign Minnesota's environmental review process because they believe that the permitting processes are adequate for the public and believe that the environmental review process is mere extra baggage for developers. The Legislature has clearly outlined the procedures for environmental review and has good reasons for project improvements based on the environmental process. The County is obligated to follow them. The RGU must determine whether a project may have the potential for environmental effects within 30 days of receipt of the Citizen Petition. If the project may have the potential for environmental effects, the RGU shall order an EAW. If it denies the Petition, the decision is final and reviewable by the courts. This is the only procedure that is allowable by law.

The District Court states that “both parties acknowledged and stipulated that the January 17, 2006, County Board meeting, where the need for and [sic] EAW was again discussed, had the potential to moot this summary judgment motion.” (Order, p. 11). This statement is true only to the extent that a *denial* of the final plat or the proposed zoning amendment would have prevented the project from proceeding. Obviously, had the County Board not permitted the development, the decision on the need for an EAW would be moot. This in no way supports the County’s argument that the January 17, 2006, meeting somehow has the ability to extend the EAW review process an additional nine months. This is another “ends justify the means” basis for decision.

B. Consideration Of Evidence Outside Of The Administrative Record Is Only Allowed For Limited Purposes.

Minnesota Courts have outlined a clear process to determine when it is appropriate to consider evidence outside of the administrative record. See, White, supra. This Court of Appeals has held that “evidence submitted for the first time to the district court may only be considered for limited purposes.” White, at 734-735. The Court listed four instances when it is acceptable to consider outside evidence:

[T]he agency’s failure to explain its action frustrates judicial review; (2) additional evidence is necessary to explain technical terms or complex subject matter involved in the agency action; (3) the agency failed to consider information relevant to making its decision; or (4) plaintiff make a showing that the agency acted in bad faith.

White, at 735. None of the White factors apply in this case.

The District Court claims that the White factors are irrelevant because “the information contained in the Court file prior to and including the January 17, 2006,

County Board meeting was presented to the RGU and is part of the administrative record.” (Order, p. 12). Mere possession of documents compiled *after* a final decision has been made does not make them part of the administrative record. In White, the Court of Appeals stated that, “[p]ermitting a reviewing court to consider evidence outside the administrative record when reviewing an agency decision that must be based on the administrative record raises the possibility that the court will second-guess the agency on the basis of the additional evidence.” Id. at 734. In the instant case, the District Court attempts to cure a faulty decision by pointing to evidence collected after that decision was made. The District Court relied on inappropriate factors and essentially seeks to rewrite the law in Minnesota on the scope of the administrative record. The District Court did this on the urging of Respondent County, which sought to further justify the denial of the EAW petition by more reliance on the permitting process. You can see from the transcripts of the April 15 and 19, 2005 meetings the extent to which Respondent County intended the permitting process as a substitute. It was the last thing discussed before they voted to deny the petition and they put this in their Findings and Conclusions. The Trout case makes clear that such wholesale reliance on permitting is an error of law.

C. **It Is Improper For The County To Offer Post Hoc Justifications In Support Of Its Decision To Deny The Citizen Petition.**

The County spends considerable time arguing in the District Court that because the identified environmental effects caused by the Project were subsequently addressed by the developer, there is no need for an EAW. The County asked the District Court, in effect, to disregard Minnesota statutes and rules and to allow it to conduct the County’s

own process. It acknowledges that the Project may have potential environmental effects throughout the administrative record and in its Findings. It then argued to the District Court that because it addressed these concerns in the months after it issued the Findings, an EAW is “wholly inappropriate.” A review of the County’s actions reveal the significant environmental effects caused by the Project. These effects not only make an EAW appropriate, but require the County to grant the Citizen Petition’s request.

As a result of the material evidence presented by the Citizen’s Petition and the information provided by the DNR, the County, after denying the EAW Petition, required the developer to mitigate the impacts caused by the Project. After conducting “draw-down” tests to determine the impact on neighboring wells—tests that should have been done as part of the EAW process—the County asserted that any impacts are caused not by the new demands of the Project, but by the existing well settings of citizens bringing the Petition. The County also notes that the developer has unilaterally decided how to mitigate the issues to the citizens. Because these discussions occurred outside of the public process of an EAW, the citizens themselves have no input. The County then concludes that, “[t]here is nothing left to argue about. More to the point, there is no ‘significant environmental effect’ *remaining* that has not been mitigated.” The County admits that the Project may have potential environmental effects in its own pleadings, yet asserts that an EAW was not necessary.

The only means for the County to justify its decision to deny the Citizen Petition is to expand the administrative record beyond what is allowable by law. For example, the County states that, “[t]he DNR has certainly been satisfied, for it issued the Water

Appropriations Permit. This is a dead issue.” The decision to require an EAW is not part and parcel of the overall permitting process. If the issuance of a permit negated the need for an EAW, no EAW would ever be required for a permitted project. Similarly, a general discussion of the EAW process at a public meeting to approve a zoning amendment and final plat has no bearing on whether an EAW should have been prepared for a project. Statements made by the developer after the EAW has been denied cannot justify the initial denial.

By creating its own review process, the County avoided the requirements of an EAW. For example, the Petition raised concerns with the impact of the additional impact on the surrounding roads. The County claims that traffic is not an “environmental issue within the meaning of an EAW.” This statement is simply inaccurate. The Environmental Assessment Worksheet published by the EQB contains a section that specifically addresses “traffic.” A164. The language states: “Provide an estimate of the impact on traffic congestion on affected roads and describe any traffic improvements necessary.” Id. It is difficult to imagine a clearer statement that the impact on surrounding roads is an environmental issue within the meaning of an EAW. By denying the EAW, the County avoided a public discussion on this important issue.

The Worksheet also requires a determination on issues such as “odors, noise or dust during construction . . .” A164. (Worksheet, Item 24). By denying the EAW the County avoided addressing this issue. The Worksheet also requires an analysis of projects that generate “municipal solid waste.” (Worksheet, Item 20). The RGU must state “if there is a source separation plan” [and] “how the project will be modified for

recycling.” Denying the EAW and deferring that entire process to MPCA also avoid discussion of this issue.

Most importantly, denying the EAW eliminates the publication of findings and the public comment period. Minnesota Rules require that a completed EAW must be published by the EQB. Minn. R. 4410.1500. Publication of the EAW begins a 30-day public comment period, which gives citizens an opportunity to comment on the EAW, provide additional information to the RGU, and, if necessary, to request preparation of an EIS. Minn. R. 4410.1600. The EAW process then requires the County to provide “specific responses to all substantive and timely comments on the EAW.” Minn. R. 4410.1700, subp. 4. By first denying the Petition and then addressing the environmental effects, the County was free to negotiate with the developer about the need for mitigation outside of the public eye.

This Court should limit the administrative record to what is required by Minnesota Statutes: the documents in the possession of the RGU at the time the decision on the Citizen Petition was made. To do otherwise is to allow the County to include post hoc rationalizations of its decision in the record, and to avoid its obligations under the Minnesota Environmental Protection Act.

IV. MOREOVER, EXPANDING THE ADMINISTRATIVE RECORD TO INCLUDE ALL EVIDENCE GATHERED BETWEEN THE DENIAL OF THE PETITION AND THE APPROVAL OF THE FINAL PLAT INDICATES THAT THE COURT OF APPEALS SHOULD REQUIRE THE PREPARATION OF AN EAW.

The expanded administrative record also demonstrates the need for the County to require preparation of an EAW. Substantial evidence indicates that the Project may have

the potential for significant environmental effects, despite the developer's attempts at mitigation. MPCA denied the permit. Because the wastewater treatment system permitted for the Project has a physical and permitted capacity of 110 units, Minnesota Rules require a mandatory EAW.

A. The Project May Have The Potential For Significant Environmental Effects.

In its Petition, Citizens raised concerns regarding the wastewater impacting public waters of the State. The Project was so improperly designed from an environmental standpoint that MPCA later denied the permit. A145-146. There is not much more that the Citizens could demonstrate.

In the Petition, the Citizens raised concerns about adequate water supplies, which the DNR and County wrestled with outside the EAW process. The administrative record, if expanded, indicates that the project may have the potential for significant environmental effects on the water supply in the area. The decision to not require the preparation of an EAW rests entirely on the "mitigation" of the impact to existing wells. The mitigation consists solely of promises made by the developer to the County. (Order, p. 19). Notably, these discussions did not include the impacted landowners, were not part of the public comment process and indicate a problem in the first instance. Indeed, the developer was unveiling new and different components of the water supply proposal as late as January, 2006. At the January 17, 2006, the developer revealed that in order to meet demand, the Project would have to pump at rates high enough to allow it to store excess water, or "have the ability to pump at higher rates." This will be accomplished by either the installation of a ground storage tank with a pump, or the installation of

“hydropneumatic tanks” described as “a little blue or red tank you have in your basement. . . [that] basically supplies pressure.” It is unclear if existing residents would have to install these pumps to meet their needs during peak hours. The reason for the confusion seems to be caused by the fact that the design of the water system is not completed, because, in the words of the Project engineer, “[y]ou don’t do that until you actually have approval for your project because it is expensive to do those designs.” In the absence of any plan, the County approved the Project, and required, as part of the Development Agreement, “that any well interference from adjacent properties be handled by the developer.” The environmental review process is designed to address these issues before the effects occur, not afterwards.

The Citizens also raised the impact of the Project on the township roads that were inadequate to service the new development. Despite extensive evidence in the administrative record that the road is insufficient to meet the needs of the Project, the County stated in its Findings that, “[t]he sufficiency of the existing road is not an environmental issue.” A143. As noted *supra*, this statement is inaccurate as the Worksheet clearly requires an analysis of the impact to surrounding roads. A164 The existing road is a 19-foot wide road with no shoulders that, according to testimony from County officials and the Watab Township Board, does not adequately meet *current* needs. This issue has yet to be addressed, and demonstrates that the Project may have the potential for significant environmental effects.

It is clear that despite claims that any significant environmental impacts were mitigated, there is still a great deal of uncertainty about what those impacts may be. There

was never any discussion about the installation of storage tanks, nor about installing pneumatic pumps that allow homes to pump at rates greater than normal. These types of questions should have been answered during the EAW process, and, more importantly, can still be answered during the EAW process. A consideration of the expanded record reveals that the Citizen Petition was adequate in the first instance.

B. The Project Triggers a Mandatory EAW. Minnesota Rules require the preparation of an EAW for a residential of 100 or more units with common wastewater systems. Minn. R. 4410.4300, Subp. 19. The rules also require the preparation of an EAW for the construction of a wastewater system with a flow capacity of 50,000 gallons per day. Minn. R. 4410.4300, Subp. 19. These mandatory categories apply “if the total number of units that may be developed on all contiguous land owned or under an option to purchase by the proposer” exceed the threshold. Minn. R. 4410.4300, Subp. 19. The Minnesota Pollution Control Agency (“MPCA”) has established that the treatment facility will have the capacity to serve 110 residential units, which exceed the mandatory threshold for an EAW. In the instant case, the developer has stated his intention that he will not build more than 61 units. This places the Project under the mandatory EAW threshold for residential development. It also creates an average wet weather flow 49,500 gallons, which places it just under the 50,000 gallon limit that would trigger a mandatory EAW for wastewater systems. A17. According to the Project Engineer, “the Lake Andrew development has an average daily water demand of approximately 46,500 gallon per day, which equates to a pumping rate of 32 gallons per minute . . .” A17-18. Respondent County has claimed that interference with existing wells, which both the

County and developer anticipate, will be mitigated by adding homes with impacted wells to the Project's system. By adding even two homes to the wastewater system, the Project may indeed reach the mandatory EAW threshold. An expansion to this project will trigger an EAW if construction begins within three years of issuance of this permit.

The District Court points to the holding of Berne Area Alliance for Quality Living v. Dodge County Bd. of Commrs., for the proposition that the threshold applies to the physical capacity of the project, not the legal capacity. (Order, p. 18). That statement is true, but it does not accurately reflect the facts of the instant case because this project has a waste plant with a permitted and actual capacity over the 100 level. The District Court bases its holding on the fact that the developer has made "[s]everal assurance" that it will not increase the physical capacity of the treatment facility beyond 61 units. (Order, p. 18). However, as discussed above, the developer's mitigation of environmental effects includes adding additional homes with impacted wells to the treatment facility. Obviously, this will increase the capacity beyond 61 units. Assurances are not legally binding, and the developer is legally able to build a facility that will serve 110 units.

CONCLUSION

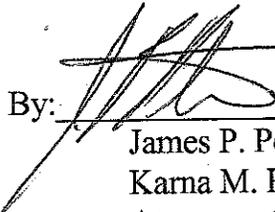
Pursuant to their rights under the Minnesota Environmental Protection Act, Appellants, in good faith, submitted a Citizen Petition for an EAW supported by material evidence. Minnesota law requires the Responsible Governmental Unit to require the preparation of an EAW when the Project may have the potential for significant environmental impacts. The facts in the administrative record show that the County improperly applied the higher standard for determining whether an EIS is required, when

denying the Citizen Petition and deferred in total to permitting. Respondent County impermissibly expanded the administrative record to include information gathered months after the final, legal determination on the need for an EAW was made.

For the foregoing reasons, Appellants respectfully request that this Court of Appeals reverse the decision of the District Court, and order Respondent County to require the preparation of an EAW according to Minnesota Statute and Rule.

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DATED: July 6, 2006

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).