

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Application
of the Lac qui Parle - Yellow
Bank Watershed District to
Excavate Four Floodways in the
Lac qui Parle River,
Lac qui Parle County

FINDINGS OF FACT,
CONCLUSIONS,
RECOMMENDATION
AND MEMORANDUM

This matter was heard before Allan W. Klein, Administrative Law Judge, on
December 15 and 16, 1993, in the Lac qui Parle Courthouse, Madison, Minnesota.

Appearing on behalf of the Applicant herein, the Lac qui Parle - Yellow
Bank Watershed District, was Kevin Stroup, of the firm of Nelson Oyen Torvick
221 North First Street, P.O. Box 656, Montevideo, Minnesota 56265.

Appearing on behalf of the staff of the Department of Natural Resources
Assistant Attorney General Matthew W. Seltzer, 520 Lafayette Road, Suite 200
St. Paul, Minnesota 55155-4199.

Appearing on behalf of the Intervenor CURE was Brian Bates, Attorney at
Law, 1985 Grand Avenue, No. B1, St. Paul, Minnesota 55105.

The hearing in this matter lasted for two days, and the record remained
open for briefs and other materials through March 22, 1994, when the last brief
was received. An additional exhibit was added to the record on April 20, 1994.

This Report is a recommendation, not a final decision. The Commissioner
of Natural Resources will make the final decision after a review of the record.
The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions
and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the
final decision of the Commissioner shall not be made until this Report has been
made available to the parties to the proceeding for at least ten days. An
opportunity must be afforded to each party adversely affected by this Report
to file exceptions and present argument to the Commissioner. Parties should

contact Commissioner Rodney W. Sando to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Should the Commissioner grant a permit to the Applicant to allow the construction of four floodways and two levees on a portion of the Lac qui Parle River in Providence and Maxwell Townships, Lac qui Parle County?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Background of the Project

1. Reducing flooding in this segment of the Lac qui Parle River has been a longstanding desire on the part of local landowners. A number of landowners were instrumental in the formation of the Lac qui Parle-Yellow Bank Watershed District in 1971. In 1972, the District issued its overall plan, which referred to the problems in this area and the District's desire to do something about them. Then, in 1977, the Minnesota River Basin Study Report was published by the Soil Conservation Service and the Southern Minnesota River Basin Commission. It recommended a joint study of general flooding problems to be undertaken by the Corps of Engineers and the Soil Conservation Service.

2. In 1985, the Upper Minnesota River Sub-Basins Study Interim Feasibility Report was issued by the Corps of Engineers and the Soil Conservation Service. This Report, popularly known as the "639 Report" (because it was issued pursuant to Public Law 87-639), contained proposals for a number of public works projects in the Lac qui Parle sub-basin and the Yellow Bank sub-basin. A number of projects were studied, and the Report suggested that other jurisdictions, such as the Corps of Engineers, might want to pursue them. The study found a 1.1:1 benefit/cost ratio for a large, \$3 million project of channel work in the Lac qui Parle River area.

3. On April 1, 1985, the Watershed District wrote to the Corps of Engineers, indicating that they had studied the preliminary findings of the Report, and desired to immediately pursue certain channel cleaning and flood establishment work in Section 1 of Providence Township, Sections 18 and 19 of Maxwell Township, Sections 21 and 28 of Oshkosh Township, and Sections 5 and 6 of Wergeland Township. Later, on July 7, 1987, the Watershed District requested the Corps to further restrict its work to Sections 18 and 19 of Maxwell Township and Section 24 of Providence Township.

4. From 1985 through 1988, the Corps was involved in studying the proposed project. The project at that time consisted of four channel cutoffs, a 2,000-foot "channel modification" effort, and two levees at the upstream end of the channel modification area. Based upon negative comments from a variety of state and federal agencies, the project was scaled down by elimination of the channel modification segment and changes in the levees.

5. In September of 1988, the Corps issued its "Section 205 Detailed Project Report" (Exhibit WB-2), popularly known as the "205 Report". The

Report describes the problems, the setting, the proposed project, a schedule for completion, and includes a recommendation from the Corps' district engineer that the project go forward pursuant to Section 205 of the 1948 Flood Control Act, as amended. Included in the Report is a Finding of No Significant Impact pursuant to the National Environmental Policy Act. This Finding is based upon an environmental assessment, which is part of the Report.

6. Following the issuance of the 205 Report, the Watershed Board set about obtaining the necessary federal, state and local permits and authorizations to proceed with the project. On September 10, 1991, the Watershed Board filed a permit application with the Department of Natural Resources. This application was assigned the docket number PA 92-4051. It is in the record as DNR Exhibit 4. It seeks authority to excavate four floodways on the south branch of the Lac qui Parle River in Sections 18 and 19 of Maxwell Township.

7. On October 1, 1992, the Watershed Board issued an Environmental Assessment Worksheet (DNR Exhibit 6) describing the four channel cutoffs and the levees proposed to be constructed. Following the receipt of adverse comments, that EAW was withdrawn.

8. On December 22, 1992, the Watershed District issued a revised Environmental Assessment Worksheet, DNR Ex. 9. Despite negative comments on the revised EAW, the Watershed District did, on June 16, 1993, determine that there was no need for an Environmental Impact Statement for the project. DNR Ex. 12.

9. On October 10, 1993, Commissioner Rodney W. Sando issued a Notice of Decision and Order for Hearing setting a public hearing in this matter for December 15 in Madison, Minnesota. The Notice was served upon the Watershed District, as well as upon a variety of federal, state and local agencies, including the Army Corps of Engineers, the Environmental Quality Board, the Lac qui Parle Soil Conservation District, the Lac qui Parle Auditor, and the Chairs of the Providence and Maxwell Township Boards. The Notice was published in the Western Guard on November 17 and again on November 24, 1993. The Notice was also published in the EQB Monitor of November 22, 1993.

10. A prehearing conference was held on December 8, 1993, involving attorneys for the applicant, the Department and the Intervenor.

11. The hearing did take place as scheduled, on December 15 and 16. It was preceded by a site visit on December 14, which involved the Administrative Law Judge and the three attorneys.

Proposed Project: Setting

12. The Lac qui Parle River begins at or near Lake Hendricks, which is on the Minnesota/South Dakota border in Lincoln County. The river flows in a generally northeasterly direction for roughly 65 miles, at which point it joins the Minnesota River northwest of Montevideo.

13. While the area around this project is very flat, upstream areas close to Lake Hendricks are substantially higher. The elevation at the start of the river is 2,000 feet, but the river drops to its final elevation of 931 feet

drop of 1070 feet, in just 65 miles. This drop should be compared with the drop between the Minnesota River and the Gulf of Mexico, which is 931 feet spread over a substantially larger distance. The relatively quick drop in elevation onto a flat plain creates flooding problems due to high sediment loads carried from the upper reaches which are then deposited on the plain. 88-89.

14. When the water reaches the flat plains, there are many cutoff oxbows and low wetland zones. Interconnecting crossover flow areas develop as sediment from the eroding steep areas deposit and fill the stream channels. Ex. WB-1, p. 7. Left to nature, oxbows do move on their own. A long-time resident of the area estimated that he has seen them move 40-plus feet in 50 years. P. 93. In Sections 18 and 19 of Maxwell Township, there are 23 oxbows.

15. Land use in the Lac qui Parle Sub-basin (683,400 acres) is principally crop land (76.7%), and pasture/range land (13.9%). Forest lands constitute only 0.7%, and public wildlife lands only 2.5%. Aerial photographs (Ex. WB-12A, B, E and I and DNR Ex. 23) show the dominance of crop lands and the absence of trees or vegetation. What trees there are are restricted to farmsteads and along the river corridor. The river corridor is the only connected pathway of trees in the project area. Natural vegetation is limited and wooded areas are confined primarily to narrow bands of vegetation along rivers and streams. Approximately 120 acres of woodlands are present in a narrow corridor along the six-mile stretch which constitutes the project area at issue here. In some parts, there are only one or two trees separating the agricultural land from the river itself. Id., at p. 10.

16. The proposed project is located four miles south of Dawson, which is roughly 17 miles west of Montevideo and 20 miles east of the South Dakota border.

17. The two primary problems driving this project are flooding and resultant erosion. A long-term resident estimated that the river used to flood, to one degree or another, roughly every three years, in the period before about 1969. But since then, the river floods every other year or more. The reason is additional tiling and upstream manipulations of the river. T. 117-18. The 205 Report predicts that the water quality problems resulting from agricultural runoff will worsen (even without this project) as sediments, nutrients and pesticides continually enter the watercourse. Ex. WB-2, p. 11. A preliminary report of the Minnesota River Citizens Advisory Committee (CURE Ex. 1) opined as follows:

Data recently collected through the Minnesota River Assessment Project (MRAP) makes a compelling case that the Minnesota River is in trouble and that its problems are largely caused by the cumulative impact of individual activities on the land. CURE Ex. 1 at p. 2.

18. After meandering through the project area, the river continues in generally northeasterly direction until it enters Lac qui Parle Lake, flows over a dam, and becomes part of the Minnesota River. T. 221.

Proposed Project: Description

19. There are four cutoffs proposed for a 6.3-mile reach of the river. The cutoffs would shorten the travel distance by three miles, resulting in a 3.4-mile reach if the project were built. They range in length from 350 to 1,000 feet. They effectively eliminate between 2,000 and 8,250 feet of river. They would isolate four "islands" of between 3 and 37 acres each. Ex. WB-2, p. 2.

20. The cutoffs would have steel sheet pilings at their entrances. These pilings would be placed such that water would only flow over them when the levels exceeded the one-year flood level. Lesser flows would stay in the original channel, and not enter the cutoffs. As flows increased above the one-year flood toward the five-year flood, more and more water would flow in the cutoff channels. Above the five-year flood, water would go over the banks of both channels, onto the land.

21. The channels are proposed to have a bottom width of 25 feet, and depth between 8 and 12 feet deep. They would have slopes at an angle of 1:3 (vertical to horizontal). The banks will be between 24 and 36 feet wide, so that the floodways will range between 73 feet and 97 feet in width. See calculations in CURE Brief, p. 15.

22. The other portion of the project would be two levees, placed on either side of a north-south county road, known as County Road 63, which separates Maxwell and Providence Townships. Another proposed levee, which would have been further upstream in Section 24 of Providence Township, has been dropped from consideration. The two remaining levees would be three feet high and roughly 2200 feet in total length. Ex. WB-2, pp. 20-22.

23. The total cost of the proposed project is estimated at \$373,000 for construction costs. These costs were updated to February of 1992.

24. The land needed for this project would be acquired by either condemnation or negotiation. The Watershed District has discontinued negotiations until this permit decision is settled. T. 369.

25. The land "isolated" by the first, third and fourth cutoffs would revert to its natural habitat after the project is completed. That land is currently in agricultural production. With regard to the second cutoff, a bridge would be built over it to allow for the transportation of farm equipment so that it could continue to be farmed. Thirty-four acres of land would be retired from crop production as a result of these cutoffs. Permanent easements would be obtained to prohibit agricultural uses of that land in the future. DNR Ex. 12.

Benefits: Agricultural Land Saved From Flooding

26. This project will only operate to protect lands from floods greater than the one-year flood, up to the five-year flood. It will not protect lands from the huge floods like 1993 or lesser floods which occur every 10, 20, or 50 years.

27. In the two-year flood, this project would protect 630 acres which would flood without the project. In the five-year flood, 850 acres would be

protected. These figures are based upon the 205 Report, which assumed a slightly different levee configuration than the final proposal. However, the figures give a reliable idea of the magnitude of the savings involved. The Report, using data from the mid-1980s, projected a cost benefit ratio of 1.4:1 using unsubsidized crop prices, and 1.7:1 using subsidized crop prices.

28. Fifteen farms would derive some benefit from the project. However, not all of the benefited landowners are in favor of it. T. 87 and 367.

29. Flooding is due to spring snow melt and summer storms. It causes decreased yields, delayed planting, increased production costs, idle crop land, road and bridge repairs, and fence repairs. The flooding is of generally long duration, due to the flat topography and the limited channel capacity available to remove the flow. The project area has the worst flooding on the entire south branch of Laq qui Parle River. T. 88.

Project Benefits: Nonagricultural Benefits

30. For eight of the past ten years, County Road 63 has had to close as a result of flooding. T. 125. The overtopping erodes soil on the road, and the county is then forced to restore the gravel and reshape the road. Culvert damage also occurs. Ex. WB-2, p. EA-5; T. 126-30.

31. Flooding also causes ditches to fill up with silt, and ditches near the road, for example, have to be cleaned out approximately once every five years. T. 127. In the huge flood of 1993 (which would not be controlled by this project), \$30,000 had to be spent cleaning out just one branch of the drainage ditch system to allow tiles to flow and drain the fields. T. 99.

32. Soil erosion results from two separate processes, both of which would be controlled, to some extent, by this project. First of all, there is sheet erosion which results from overland flooding. A few years ago, a flood in Section 18 gouged out an area 300 feet long, six feet deep, and 30 feet wide. T. 92. The other kind of erosion is erosion of stream banks as a result of oxbow deposition and new channel creation. T. 93.

33. Overland flooding takes not only soil, but also pesticides, herbicides, and fertilizer. All of this gets washed into the river. T. 47-48. Fish and wildlife habitat, such as that for pheasants and deer, is destroyed by overland flooding, and as floodwaters recede, fish can be trapped in small pools and die. T. 90. The proposed project would definitely lessen the amount of overland flooding, resulting in less sedimentation and chemical pollution in the river. Id.

34. The removal of the isolated areas in oxbows 1, 3 and 4 from intensive agriculture should result in a net gain in wildlife habitat from this project so long as there is no habitat lost due to ongoing maintenance activities. 303. The impact of ongoing maintenance on wildlife habitat will be felt, but it is impossible to assess in a quantitative sense.

Detriments: Downstream Flooding

35. The proposed project will reduce the storage capacity for the five-year flood from 859 acre feet to 465 acre feet, or a net reduction of 394 acre feet. However, the importance of that must be viewed in light of the total amount of water involved in the five-year event, which is 13,842 acre feet of inflow to the project reach. So the reduction in storage capacity is only 2.8% of the water coming in.

36. The proposed project will increase the velocity of the water as it passes through the study reach, and will lower the travel time. The travel time for the peak would reduce from 6.7 hours to 2.9 hours, or a net reduction of 3.8 hours. T. 30. The importance of that, however, depends upon whether or not it would cause the peak from this sub-basin to coincide with peaks from other sub-basins so as to worsen flooding downstream. The answer to that question is contained in the record. No person attempted the very substantial task of trying to coordinate various sub-basin peaks to determine whether or not the timing change resulting from this project would be an improvement, or a detriment, to downstream flooding. T. 252-53.

37. The project would not cause the water surface elevations upstream of the proposed project to vary by much. The upstream elevation for the five-year event would be 1073.2 without the project, and 1073.01 with the project. DE Ex. 10. Immediately downstream of the project, however, the elevation differences would be slightly more, but again, not much more. Using the five-year discharge, the volume at the end of the study reach would be 1247 cfs without the project, and 1249 cfs with the project, which is an increase of about .2 of one percent. Exhibit WB-4, Table 1. That has not been translated into elevations, however, so that it is impossible to tell how much additional land would be flooded at the higher flow. But no party suggests that it is substantial. Moreover, that calculation (along with the storage capacity, and travel time calculations above) assume that the channel modification is still part of the project. With the removal of the channel modification segment, the numbers become even less of a concern. T. 39 and 43.

38. The proposed project will not contribute, in any significant way, to downstream flooding unless it happens to coincide with peaks from other sub-basins. There has been no showing, one way or the other, whether this would occur.

39. The increase in velocity that does occur as a result of diverting water from the meandering oxbows into the straight and smooth cutoffs does create a concern due to increase erosive power. While the velocity in the natural channel would decrease (due to decreased volumes), the total velocity in the five-year event, for example, would increase. T. 205, 235-36.

40. In summary, downstream flooding will not be significantly exacerbated as a result of this project alone. But see, "Cumulative Impact", below.

Detriments: Fish Habitat

41. The Lac qui Parle River is unique in that it is the only tributary to the Minnesota River above the Lac qui Parle Reservoir that is available for fish spawning runs. Its primary value, from a fishery standpoint, is as a migratory route to upstream spawning areas. Ex. WB-2, p. 10. Pike, for

example, spawn in flooded areas. T. 326. The aquatic habitat on the river itself is only fair to poor. Water depths are only one to two feet, with average flows of only 15 cfs during the late summer. The substrate is primarily silt, and there is little instream cover. P. EA-4, Ex. WB-2. The river has at least 36 species of fish, and two species of mussels. T. 316. If this project is built, the frequency of "bankful flows", which are to the one-and-a-half year event, will be substantially reduced, if not totally

eliminated. These flows are important to the scouring of the channel and the maintenance of its capacity and fish habitat. T. 234-44.

42. If the project is built, waters in excess of the one-year event will be diverted into the cutoff channels. This diversion will not be equal throughout the water column. Instead, it will be the uppermost portion of the water column that gets diverted. This portion is relatively sediment-free. Since sediment is heavier than water, when the velocity of flow increases, the sediment begins to move, but it generally stays in the lower portion of the water column. When the top portion of the water column is diverted into the cutoff channel, there will be less water volume to push the sediment in the lower part along. At a lower velocity, the water can no longer move the sediment, and the sediment will deposit out. The greatest increase in sediment deposition will occur immediately downstream of each cutoff. It will also be carried on down further in the natural channel. This increase in deposition will result in a number of adverse impacts upon the fish habitat. T. 236-24

43. The first adverse impact of the increased sedimentation in the natural channel will be decreasing the pool depth, smothering of invertebrates and fish eggs, and covering spawning habitat. T. 241, 296 and 316-18.

44. Increased sedimentation dictates increased maintenance. Because of the importance of the natural channel for farm tile drainage, it is important that it be kept open. But maintenance is adverse to spawning habitat and the food chain. T. 241 and 318. Not only does maintenance literally remove spawning habitat and elements of the food chain, it also results in the resuspension of sediment which ultimately redeposits downstream, as well as reducing dissolved oxygen along the way. T. 318.

45. The Corps did not predict any long-term impacts on fish as a result of this project (T. 10), but its environmental assessment did not consider sedimentation impacts. T. 15. The Corps does not predict that there will be a need for frequent maintenance, but it has done no study of this. Its prediction is based solely on talks with engineers. Partial Statement (PS) 4, 6.

46. The Watershed District has agreed to perform whatever ongoing maintenance is required, both for the main channel and for the cutoffs. Ex. WB-3, item 17 and T. 370.

47. Another adverse impact from ongoing maintenance, as well as from the original construction itself, will be the loss of stream cover. This can lead to further erosion of the stream bank. Ex. WB-2 at EA-4 and T. 319.

Detriments: Wildlife Habitat

48. The relative scarcity of trees and other wildlife habitat in the area (see aerial photographs in Exhibit WB-12) does raise concern about the damage resulting from this proposed project. The four cutoffs are estimated to cause a loss of nine acres of woodlands, restricted to one bank. Exhibit WB-2, at EA-4. But that estimate includes the channel modification segment which has been dropped. A more recent estimate is that two and one-half acres of forested riparian habitat will be lost in construction of the channels

themselves. Some additional acreage (quantity unknown, but probably small) will be lost due to resulting maintenance work. Overshadowing the small number of acres involved, however, is the fragmentation of travel corridors for wildlife. The narrow band of trees along the river bank are an important habitat in the region. Exhibit WB-2, p. 9. Some wildlife, however, such as deer, will travel across fields, regardless of the habitat. T. 317.

49. When evaluating the impact on wildlife from the loss of trees and other natural cover, it must be remembered that there will be a net gain in acreage because of the "islands" that will be created by cutoffs 1, 3 and 4 which will be allowed to revert to natural state.

Detriments: Wetlands

50. There are seven small wetlands which will be affected by this project. They were not initially considered by the Corps in its Environment Assessment (Exhibit WB-2, p. EA-4), but after that assessment had been completed, the National Wetland Inventory Maps were issued, and the impacts the wetlands were evaluated by the Board of Water and Soil Resources, the Department, and others. T. 14, 57.

51. The proposed project will divert floodwaters from the main river channel when lands exceed the one-year event. This will reduce the frequency and volume of inundation to the seven wetlands. Additionally, if the flows the main channel were substantially reduced or eliminated as a result of siltation, the seven wetlands would lose their hydrologic connection to the river, and could dry up. CURE Ex. 5. That assumes, however, that the river is the significant source of recharge for the wetlands, rather than there being recharge by local inflows from other directions. Attempting to quantify the percentage of recharge which comes from the river, as opposed to from these other directions, is a very complex task which has not been accomplished in this record. However, each of the wetlands receives some river water, as well as some "local" water from other directions. Ex. WB-7.

52. For the five-year event (which is the most significant in terms of difference), changes in elevation of the wetlands will be as set forth below

	<u>Type</u>	<u>Before Project</u>	<u>After Project</u>	<u>Difference</u>
Wetland 1 & 2	1L	1065.7	1064.4	1.3 ft.
Wetland 3	3/7	1068.4	1067.3	1.1
Wetland 4	Riverine	1069.2	1068.6	.6
Wetland 5 & 6	2/7 & 3	1071.1	1069.9	1.2
Wetland 7	?	1072.3	1071.3	1.0

Source: Exhibits WB-3 (letter of 6/15/93 from Apelgrain to Beecher) and WB

53. The wetlands at issue are relatively shallow. Therefore, a change in elevation of a foot or 18 inches can make a substantial difference in the depth of the wetland. And in a relatively flat area, such as this, a change of a foot in elevation substantially changes the area of a wetland.

54. The Board of Water and Soil Resources, which is the oversight agency for the Wetland Conservation Act, has provided personnel and expertise to the Watershed District and to Area II (which has also been involved in promoting this project). Board personnel have concluded that they "couldn't see any apparent detriment to the wetlands or change to the wetlands because of the project"; the Board has not taken any formal position on the project. T. 60. In a letter dated March 8, 1993, the Board concluded that the project was consistent with the Wetland Conservation Act and Governor Carlson's Executive Order on no-net-loss of wetlands. Ex. WB-8. However, the explanation given for that determination was that the section 205 report determined there were wetlands within the project area which were subject to the Board's jurisdiction.

55. The wetlands at issue are also not within the jurisdiction of the Department with regard to permit issuance. However, the Department may still consider impacts to the wetlands in connection with a project application such as this one. T. 218-19.

56. The wetlands have been inspected a number of times by a variety of different agencies. One estimate was that the wetlands have been evaluated eight different times, most recently on October 29, 1993. Ex. WB-14. It may be noted, however, that the revised data showing the elevation differences (tabulated above) was not prepared until December 12, 1993, after the last visual inspection. Prior to that time, the Department was comfortable with the idea that impacts to the adjacent wetlands were only "minor" and that the individual wetlands each had drainage areas which were adequate to make up the loss in frequency of inundation. DNR Ex. 14, dated August 27, 1993. Having seen the revised water level data, the Department's hydrologist is now "more concerned" about the impact of reduced inundation. T. 209. He is not willing, however, to declare the impact significant at this time.

57. The Administrative Law Judge concludes that the impact of the proposed project on the wetlands is not significant. Each has a contributing watershed that feeds it separate and apart from the river. And the proposed project will only eliminate the recharges that occur with the two to five-year floods. The one-year flood, for example, should continue to recharge the wetlands as before, so long as sediment is kept from clogging up the main channel.

Alternatives to the Proposed Project

58. During the time that the Corps and the SCS were producing the 639 Report, there were 14 alternatives initially identified in a January 1980 Study 1 report. Seven of those alternatives were carried forward into the September 1985 interim feasibility study (Exhibit WB-1). Included in these was a no-action alternative, plus an alternative for roughly \$3 million of channel work

along the main stem of the Lac qui Parle River over a large area. This alternative was the genesis of the project at issue here. The 639 study separated flood damage production alternatives from erosion reduction alternatives. Erosion reduction alternatives included a no-action alternative plus various mixes of conservation measures on various lands. The flood damage reduction section of the 639 Report did discuss non-structural alternatives but it dismissed them in one paragraph, because

they did not satisfy the study objectives for reducing flood damage as well as being effective, acceptable, complete and efficient. Ex. WB-1, p. 66.

59. In the Environmental Assessment which was part of the September 1988 Report, alternatives were only looked at in a historical sense, with the exception of the no-action alternative. That alternative was discussed in one paragraph, which noted that if no action were taken, then some landowners might decide to reduce their economic losses by enrolling lands in programs designed to take marginal lands out of production. The Environmental Assessment did not note the concerns of the Minnesota Department of Natural Resources and the U.S. Fish & Wildlife Service regarding the appropriateness of the proposed project and noted that both agencies felt that a non-structural program, such as land treatment, erosion control, or the removal of some of the flooded lands from commodity crop production, would be more appropriate. The Environmental Assessment went on to reject those suggestions, however, as follows:

The Corps of Engineers does not have the authority to implement the type of non-structural alternatives recommended by the U.S. Fish & Wildlife Service and the Minnesota DNR. Land treatment, erosion control and flood easements were studied on a basin-wide basis during the Upper Minnesota River Sub-Basins Study. That study showed that while these measures were economically justified, they did not meet the objectives of reducing flood damages and still meet the goals of effectiveness, acceptability, completeness, and efficiency. In addition, non-structural alternatives are not supported by the local sponsor. Based upon the above information, non-structural alternatives were not evaluated in depth for this study.

Exhibit WWB-2, at p. EA-6.

60. There has not been any additional study of non-structural alternatives by the Corps since 1988. PS, p. 6.

61. During the hearing process, there were three general types of alternatives identified and discussed. These were upland retention, alternative farming uses, and land retirement.

62. Upland retention is a catch-all term for keeping the water upstream and releasing it more slowly, so that it does not cause flooding downstream. There was testimony, for example, of an upstream cutoff project, located in Yellow Medicine County. It was suggested that if this area were restored to its original configuration, it would reduce the amount of water coming downstream, and the speed with which it comes downstream, to the benefit of persons in the immediate project area. P. 168-69. However, there was no detail or cost/benefit type of presentation with regard to what would happen

the lands presently benefited by that cutoff project if it were reversed and the upstream area were put back in its pre-cutoff situation.

63. The Watershed District has been involved in upland retention projects, as has Area II. The Watershed District is the sponsor of the Canby Creek impoundment, which controls 26 square miles upstream of this project area. T. 408. The Watershed District is also the sponsor of the proposed

Lazarus Creek structure, which would also control 26 square miles of upland watershed. There are funding problems with that project, but it is still a viable one. T. 409. However, the Watershed District does not see it as a substitute or replacement for the proposed project. When the Watershed District applied to the Department for this permit, they identified upland retention as the alternative to this proposed project. In their application they noted that "building large dams upstream on the main stem would help, but [they are] not as cost effective". DNR Ex. 4. One large upstream retention project fell through due to an inadequate cost/benefit ratio. T. 412.

64. In concept, upland retention is a viable alternative to a project such as the one proposed here. However, there has been no showing of any particular area which could be used for such retention. Instead, there has just been general allusions to the idea that it might be possible. Before it can be said to be a prudent and feasible alternative, there must be examination of exactly where such retention would take place, whether it could be accomplished at that site, who would be harmed by it there, how would it be paid for, etc. This record does not contain enough of an analysis of any actual proposals for upland storage such that they could be labeled a feasible and prudent alternative.

65. Alternative farming methods was the second major type of alternative proposed during the hearing. Again, this is a catch-all term which essentially encompasses converting land use from row cropping to grazing land. It is perhaps best exemplified by the statement of a farmer who lives along the Minnesota River below Granite Falls. He stated as follows:

I farm river bottom land which sometimes floods in the spring, sometimes in the summer or fall, sometimes all three, and rarely, not at all. I believe that I have as much experience raising (or trying to raise) crops on intermittently flooded bottom land as anyone.

The idea of trying to raise corn and soybeans on this type of land seems archaic to me. Recent advances in livestock production technology, sometimes called management-intensive grazing, have been shown to be more profitable than conventional corn-soybean rotations, even on "good" land. I have recently started using intensive grazing on low land, and I will never go back to corn or soybeans. My reason is simply more profit. Recently developed strains of low alkaloid reed canary grass are nutritious, palatable, and high yielding. Once established, they are almost indestructible, and when interseeded with legumes, fertilizer requirements are low, which makes them environmentally benign.

66. The Minnesota Department of Agriculture has a program, known as the Energy and Sustainable Agriculture Program, which published a document entitled "Greenbook '92". It includes a description of intensive rotational grazing results obtained on four farms during a study that ran between 1990 and 1992. The study concluded that the four users were happy with the rotational grazing system, despite mixed economic results, for several

reasons, which included dramatically improved pasture and livestock productivity, ease of use, and other benefits. DNR Ex. 31.

67. Willis Beecher, Chairman of the Watershed District, indicated that he had friends who use this technique. He believed it would not be a viable alternative to the proposed project unless the flooding could be stopped, because flooded grass causes cattle to get sick. T. 414. This was rebutted, however, by the Granite Falls farmer (who is also a veterinarian), who indicated that cows grazing on mud-laden grass do not get sick. He allows his cattle to graze on such ground routinely, and has had no problems. CURE Ex.

68. The benefits from intensive grazing include making a profit from the land, keeping the land in grass so as to reduce sheet erosion (even in big floods, which would not be affected by the proposed project), and a reduction in pollution from chemical and fertilizer runoff. T. 297.

69. The Watershed Board met with CURE on two different occasions, at which times CURE offered to work with the Watershed Board to pursue non-structural alternatives to the proposed project. The Watershed Board members, however, responded that they did not see it as a viable alternative, and that they were not interested. T. 385.

70. The Administrative Law Judge concludes that intensive grazing is a feasible and prudent alternative to the proposed project.

71. Retiring some of the flooded lands from crop agriculture under programs such as CRP and RIM was a third major alternative discussed at the hearing.

72. The Conservation Reserve Program (CRP) is a federal program established pursuant to 16 U.S.C. § 3831. A number of farmers in the affected area have enrolled some or all of their flooded acres in the program. T. 92 and 410. Areas subject to scour erosion can be enrolled and also filter strips along the river are eligible. There are a number of other variables regarding eligibility. Most of the bids in Lac qui Parle County have been accepted at the \$65-70 range (\$60-70 per acre per year). Ex. 29. However, it is not currently possible to enroll lands in CRP. As of December 10, 1993, the SCJ was uncertain as to whether there would be another opportunity to enroll lands in the future, or not. DNR Ex. 29 and T. 409. At the current time, CRP is a viable alternative.

73. The Reinvest in Minnesota Reserve Program (RIM) is established under Minn. Stat. § 103F.515. Under the program, the Board of Water and Soil Resources takes permanent conservation easements on eligible land. Generally, land in the 100-year flood plain is eligible for RIM if it meets other qualifying criteria. DNR Ex. 30. The Board has made land in the 100-year flood plain a priority for enrollment in the RIM riparian program. T. 358.

Payment rates per acre as of August 1993 were \$704 for crop acres and \$469 for non-crop acres in Maxwell Township, and \$663 for crop acres and \$442 for non-crop acres in Providence Township. DNR Ex. 30.

74. A detriment to the RIM program is the fact that although the RIM easement is permanent, the land owner continues to pay taxes on the land and conceivably, taxes could increase to the point where a farmer would be placed

in a bad economic position. T. 409. Presumably, however, any such increase would be offset by investment returns if the farmer invested the lump sum payment.

75. The Permanent Wetlands Preserve Program, a state program pursuant to Minn. Stat. § 103G.516, is another permanent easement program whereby land capable of being restored to a wetland area is subject to an easement. In addition, the easement can include up to four acres of adjacent upland for each acre of eligible wetland. The rates are similar to the rates quoted above for the RIM program. However, the amount of acreage which would qualify under the program is severely limited because there are not enough drained wetlands that could be restored. DNR Ex. 29 and 30. While the program would cover some acreage, it would not be a meaningful amount, unless the acreage could be combined with acreage eligible for other programs, such as RIM.

76. In summary, of the programs proposed, only the RIM program constitutes a viable alternative to the proposed project.

77. The Administrative Law Judge finds that the Watershed District did not seriously consider non-structural alternatives. They viewed all of them as being equal to a "no-action alternative", which they found unacceptable because they viewed it as just continuing the status quo. T. 143-44.

78. On August 24, 1993, the White House directed the Corps of Engineers to examine non-structural alternatives, such as restoration of wetlands and designation of overflow areas. T. 361-62. A similar strategy has been recommended by the National Research Council and the Interagency Task Force on Floodplain Management. Id.

79. CURE has proposed a package of alternatives including some continuous row cropping coupled with best management practices, crop land retirement programs, pasture with rotational grazing, and upland wetland restoration. This package, however, has not been acceptable to the Board. T. 383. CURE does not believe that a "do nothing" version of the no-action alternative is appropriate.

80. When considering alternatives, it must be remembered that the proposed project only protects land up to the five-year flood. It does not protect for greater floods. Alternatives, on the other hand, would be "working" for the landowner even at times of greater floods. Alternatives such as alternative farming practices or land retirement eliminate (or at least seriously reduce) the economic losses from flooding.

Cumulative Impacts

81. The Minnesota River and its tributaries in this part of the state have been adversely impacted over time by thousands of small projects such as this one. Journals of early European explorers described a river and valley which were beautiful and inspiring. The river upstream of Mankato was described in many areas as exceedingly clear, with white sand bottoms in many places. Today, however, pollution in the river and its tributaries has significantly diminished the value of the waters for recreation, fish and wildlife habitat and scenic beauty. In many areas of the river basin, pollution has degraded water quality below what is needed to support healthy

fish and invertebrate populations. In some tributaries of the river, water quality has been so degraded that very little aquatic life can survive. CUI Ex. 1, pp. 2 and 8. Some of the problem is due to urban development and attendant problems with sewage and storm water runoff. Some of the problem also caused by agricultural runoff and drainage practices. Until recently, many of these practices were not only condoned, but actually encouraged, by government. However, governmental attitudes have changed. See, for example DNR Exhibits 11 and 13, as well as T. 361-62.

82. Cumulative effects of similar projects must be considered in evaluating this project. The net effect of this project is loss of storage aggravation of downstream flooding. Cumulative increases in downstream flooding are undoubtedly significant.

83. It is difficult to measure the negative downstream impacts of this project individually. However, it is clearly designed to move water off the land faster. It is analogous to the minimal impacts of the drainage of a wetland basin on flooding or sediment delivery problems. Unfortunately, the cumulative impacts of such small actions can and have been significant in altering the character of the Minnesota River.

84. Problems with the Minnesota River are due to an accumulation of many actions which have occurred in very small increments. T. 401. The Administrative Law Judge adopts the statement of a resident near Lac qui Parle Lake, downstream of the proposed project, who believes that over time there have been countless small projects like this which have caused the problems that are present today. T. 372.

Other Matters

85. Most of the land which would be protected by this project is within the designated flood plain. DNR Ex. 14. The Lac qui Parle County Planning Commission and the Lac qui Parle County Board both approved a conditional use permit for the levees which are a part of this project. Ex. WB-11. It was the opinion of the Board that the project was consistent with the Lac qui Parle County flood zone ordinance. T. 84.

86. The MPCA has suggested that the proposed project requires a storm water runoff permit. Ex. 11 and 13. The Watershed District disagrees. DNR Ex. 12. No party presented much evidence on this issue, and the MPCA did not offer a witness. T. 287-88. There is insufficient evidence to determine the correct resolution of this matter.

87. Not all of the landowners who would be benefited by this proposed project are in favor of it. Lloyd Dahl, who farms in Section 18 of Maxwell Township, has expressed his opposition to the project. He asserts that "a

of the construction work will take place on his land. He believes it does not make sense to spend a lot of money until there is some place for the excess water to go. He believes that every time someone makes a dike or drains into the river above his farm, downstream lands end up getting more water and it comes down faster. T. 366-67.

88. The overall plan of the Watershed District has not been updated since 1972. Minn. Stat. § 103D.405 requires a plan to be revised "at least

once every ten years" after the original plan is approved. The revised plan must be transmitted, reviewed, recommended and approved by the Board of Water and Soil Resources and the Director of the Department's Division of Waters. These procedures allow for changes in state policy to be reflected in the local plan. Some Department staff believe the 1972 plan does not reflect current water management objectives and policies. However, the Board of Water and Soil Resources has opined that the project is consistent with the Watershed District's objective to control or alleviate damage by floodwaters. Exhibit WB-8. The Board has not opined that the project is consistent with current state policy and objectives. The local plan has not been introduced into the record, and therefore, there is insufficient evidence to decide questions related to it.

89. The Lac qui Parle County Water Plan is not in the record. Some Department staff allege that this proposed project is inconsistent with the Plan. T. 166 and DNR Ex. 14. However, without the Plan, there is insufficient evidence to resolve this.

APPLICABLE STATUTES AND RULES

1. [A] political subdivision of the state, a public or private corporation, or a person must have a public waters work permit to . . . change or diminish the course, current, or cross section of public waters, entirely or partially within the state, by any means, including filling, excavating, or placing of materials in or on the beds of public waters. Minn. Stat. § 103G.245, subd. 1.

2. A public waters work permit may not be issued under this section if the project does not conform to state, regional, and local water and related land resources management plans. Minn. Stat. § 103G.245, subd. 6.

3. A public waters work permit may be issued only if the project will not involve a minimum encroachment, change, or damage to the environment, particularly the ecology of the waterway. Minn. Stat. § 103G.245, subd. 7(a).

4. If the commissioner concludes that the plans of the applicant are reasonable, practical, and will adequately protect public safety and promote the public welfare, the commissioner shall grant the permit. Minn. Stat. § 103G.315, subd. 3.

5. Otherwise the commissioner shall reject the application or may require modification of the plan as the commissioner finds proper to protect the public interest. Minn. Stat. § 103G.315, subd. 5.

6. In permit applications, the applicant has the burden of proving that the proposed project is reasonable, practical, and will adequately protect

public safety and promote the public welfare. Minn. Stat. § 103G.315, subd. 6(a).

7. A public waters work permit for a project affecting floodwaters may be granted only if (1) the area covered by the public waters work permit is governed by a flood plain management ordinance approved by the commissioner and (2) the conduct authorized by the public waters work permit is consistent with the flood plain management ordinance, if the commissioner has determined

that enough information is available for the adoption of a flood plain ordinance. Minn. Stat. § 103G.245, subd. 9(a).

8. A public waters work permit involving the control of floodwaters by structural means, such as dams, dikes, levees, and channel improvements, may be granted only after the commissioner has considered all other flood damage reduction alternatives. Minn. Stat. § 103G.245, subd. 9(b).

9. No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements for the protection of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct. Minn. Stat. § 116D.04, subd. 6.

10. It is the goal of the department to limit the excavation of materials from the beds of protected waters in order to:

- A. preserve the natural character of protected waters and their shorelands, in order to minimize encroachment, change, or damage to the environment, particularly the ecosystem of the waters;
- B. regulate the nature, degree, and purpose of excavations so that excavations will be compatible with the capability of the waters to assimilate the excavation; and
- C. control the deposition of materials excavated from protected waters and protect and preserve the waters and adjacent lands from sedimentation and other adverse physical and biological effects.

Minn. Rule pt. 6115.0200, subp. 1.

11. Excavation as used in this rule includes any activity which results in the displacement or removal of bottom materials or the widening, deepening, straightening, realigning, or extending of protected waters. Minn. Rule pt. 6115.0200, subp. 2.

12. Excavation shall not be permitted where the proposed excavation will be detrimental to significant fish and wildlife habitat, or protected vegetation and there are no feasible, practical, or ecologically acceptable means to mitigate the effects. Minn. Rule pt. 6115.0200, subp. 3C.

13. Excavation shall not be permitted where the excavation would not provide an effective solution to a problem because of recurrent sedimentation and there are feasible and practical alternative solutions which do not require excavation. Minn. Rule pt. 6115.0200, subp. 3F.

14. The proposed project must represent the "minimal impact" solution to a specific need with respect to all other reasonable alternatives. Minn. Rule pt. 6115.0200, subp. 5C.

15. The biological character of the waters and surrounding shorelines shall be affected to the minimum degree feasible and practical. Minn. Rule 6115.0200, subp. 5F.

16. The . . . drainage characteristics of the water shall be protected to ensure that the interests of the public and of private riparian landowners are not adversely affected by the proposed excavation. Minn. Rule pt. 6115.0200, subp. 5H.

17. The proposed excavation shall be consistent with applicable flood plain . . . standards and ordinances for the waters involved. Minn. Rule pt. 6115.0200, subp. 5I.

18. The proposed excavation shall be consistent with plans and management programs of local and regional governments provided that such plans are consistent with state plans and programs. Minn. Rule pt. 6115.0200, subp. 5I.

19. The preferred alternative to widening, deepening, or straightening a watercourse for control of floodwaters is the construction of water impoundment structures in upstream areas. Where impoundments are infeasible, impractical, or would result in adverse effects on health and safety or greater adverse environmental effects, the preferred alternative is the construction of flood bypass channels to convey high velocity flood flows. Excavations in protected watercourses for flood management purposes shall be allowed only where an upstream impoundment or a flood bypass channel is infeasible or impractical and excavation is the least damaging environmentally. Excavations for widening, deepening, or straightening portions of watercourses shall be based upon flood management plans which provide details on the relationship of the proposed excavation to management including maximum use of nonstructural measures which are feasible and practical. . . . Minn. Rule pt. 6115.0201, subp. 7I.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Commissioner and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. ch. 103G. All relevant substantive and procedural requirements of law and rule have been fulfilled. In particular, the Department satisfied the requirements of Minn. Stat. § 103G.311 regarding the giving of appropriate notice for the hearing.

2. The Lac qui Parle River constitutes a "public water" because it is a watercourse with a total drainage area greater than two square miles.

3. The project will not involve a minimum encroachment, change, or damage to the environment, particularly the ecology of the waterway within the meaning of Minn. Stat. § 103G.245, subd. 7(a).

4. The plans of the applicant are not "reasonable, practical, and . . . [promoting of] the public welfare" within the meaning of Minn. Stat. § 103G.315, subd. 3. The applicant has failed to meet its burden as required by subdivision 6(a) of that statute.

5. There are flood damage reduction alternatives to this project within meaning of Minn. Stat. § 103G.245. subd. 9(b). These include alternative farming techniques and enrollment of land in the RIM program.

6. The proposed action is likely to cause pollution, impairment, or destruction of water, land or other natural resources within the meaning of Minn. Stat. § 116D.04, subd. 6.

7. There is a feasible and prudent alternative consistent with reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its natural resources within the meaning of Minn. Stat. § 116D.04, subd. 6.

8. The proposed project will be detrimental to significant fish habitat and there is no feasible, practical or ecologically acceptable means to mitigate the effect within the meaning of Minn. Rule pt. 6115.0200, subp. 3C. There will be recurrent sedimentation, and there are feasible and practical alternative solutions which do not require excavation within the meaning of Minn. Rule pt. 6115.0200, subp. 3F.

9. The proposed project is not the "minimal impact" solution with respect to other reasonable alternatives, within the meaning of Minn. Rule pt. 6115.0200, subp. 5C.

10. The proposed plans would represent a minimum impact on the biological character of the waters and surrounding shorelines if the project were to go forward within the meaning of Minn. Rule pt. 6115.0200, subp. 5F.

11. The proposed project will require significant maintenance on the natural channel in order to preserve the drainage abilities of that channel. To the extent that the maintenance does, in fact, occur, then it can be said that the drainage characteristics of the main channel will be protected within the meaning of Minn. Rule pt. 6115.0200, subp. 5H. Without such maintenance, however, the drainage characteristics will not be protected. On balance, the likelihood is that the rule will be complied with.

12. It has not been shown that upstream impoundments are feasible, practical, or would result in less adverse effects within the meaning of Minn. Rule pt. 6115.0201, subp. 7I.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

That the Application of the Lac qui Parle - Yellow Bank Watershed District to excavate four floodways in the Lac qui Parle River be DENIED.

Dated this 22nd day of April, 1994.

s/ Allan W. Klein
ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to send its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape Recorded, Partial Summary and Transcripts Prepared.

MEMORANDUM

I.

There are two separate sets of standards which govern the Commissioner decision on this permit application. The first set is contained in the State water laws and the Department's rules. These are Ch. 103G and Pt. 6115. The second set is contained in the Minnesota Environmental Rights Act and the Minnesota Environmental Policy Act, Ch. 116B and 116D, and the cases decided under them. Before the Commissioner can grant a permit, the project must pass muster under both sets of standards. In this case, the proposal does not pass either test.

The first major case interpreting the Minnesota Environmental Rights Act was County of Freeborn, by Tuveson v. Bryson, 210 N.W.2d 290 (Minn. 1973) and 243 N.W.2d 316 (Minn. 1976). In that case, a county was proposing to construct a highway across a marsh. The highway would have eliminated between .7 acres and 1.4 acres of the marsh. But there was an alternative, which would route the highway around the marsh. The court ordered that the alternative be used. In language which is applicable to the Lac qui Parle case as well, the court noted:

Times change. Until the [Environmental Rights] Act was passed, the holder of the power of eminent domain had in its hands almost a legislative fiat to construct a highway wherever it wished. In the 1920's and 1930's, the state encouraged highway construction to facilitate industrial expansion and transportation of farm products to market. However, a consequence of such construction has been the elimination or impairment of natural resources. Whether for highways or for numerous other reasons, including agriculture, it is a well-known fact that marshes have been drained almost indiscriminately over the past 50 years, greatly reducing their numbers. The remaining resources will not be destroyed so

indiscriminately because the law has been drastically changed by the Act. (243 N.W.2d 316, 321.)

In order to invoke the protections of the Environmental Rights Act, it must first be shown that that protectable natural resources will be "polluted, impaired, or destroyed". Both the fish habitat and the wildlife habitat fall into this category because their impairment or destruction will constitute a "material adverse effect on the environment."

In some cases, it has been easy to show a material adverse effect on the environment. See, for example, County of Freeborn, supra, In re City of White Bear Lake, 247 N.W.2d 901 (Minn. 1976) and Urban Council on Mobility v. Minnesota Department of Natural Resources, 289 N.W.2d 729 (1980). In those cases, the impact of building a road or highway across a wetland or a lake was obviously negative and material. In other cases, however, it has not been so easy to demonstrate environmental impairment. For example, in State, by Skeie v. Minnkota Power Co-op, Inc., 281 N.W.2d 372 (1979), the Supreme Court affirmed a trial court holding that Skeie had failed to demonstrate a material adverse effect when he only demonstrated that the use of his cultivated fields would be made more difficult because of the presence of a proposed power line. He did not show that the power line would make the soil sterile, or cause it to erode, or ruin its cropping potential in a significant and irreversible way. Skeie did show some permanent, but minor, impacts, but the court dismissed them because the law requires that the adverse impacts be "material".

The impact on fish habitat in the Lac qui Parle River must be viewed as material. The findings under this category are self-explanatory, and will not be repeated here. The long and the short of the matter is that this particular resource has a unique role to play, and the proposed project and resulting maintenance will materially impair or destroy it. The impact on the wildlife habitat is less severe, but still material.

Having found impairment or destruction, the act then asks whether or not there is some feasible and prudent alternative to the proposed project that will not cause impairment or destruction of natural resources. The answer to that question is that there are alternatives, both in terms of farming practices and land retirement, which meet the statutory tests. They may not be as profitable to the landowner in every year, but economic considerations alone cannot justify the proposed project.

Finally, even without the Environmental Rights Act, this proposed project does not meet the Department's own statutes and rules which favor nonstructural solutions to flooding problems. There are such alternatives available in this case, and they should be used in lieu of the project.

II.

The recommendation to deny the application rests on this project's individual impacts, and not upon the cumulative impacts noted in the Findings. This is because the Department's rules are orientated toward a review of a project in isolation from other projects. While that is satisfactory in many cases, there are some, such as this one, where the cumulative effects of many small projects ought to be considered before proceeding.

The Administrative Law Judge does not have any easy answers for designing a regulatory system that would accomplish this goal, other than to point it out and suggest the Department consider it in their next revision of the rules. However, the Commissioner may be in a better position than the Administrative Law Judge to use the evidence on cumulative impacts by virtue of the authority for an agency to apply expertise, technical competence, and specialized knowledge when evaluating evidence in the record. This authority, in Minn. Stat. § 14.60, subd. 4, gives an agency the right to use its knowledge in weighing the evidence and applying the law to the facts.

A.W.K.