

3. The extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority; and
4. The extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the proposer, including other EISs.

Minn. R. 4410.1700, subp. 7 (2005). The environmental review rules do not define the term “cumulative potential effects of related or anticipated future projects.”

The term “cumulative impact,” on the other hand, is defined. Minn. R. 4410.0200, subp. 11 provides that:

“Cumulative impact” means the impact on the environment that results from incremental effects of the project in addition to other past, present, and reasonably foreseeable future projects regardless of what person undertakes the other projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.

In practice, RGUs have tended to apply the definition of “cumulative impacts” when performing a “cumulative potential effects” inquiry. This practice has been consistent with EQB guidance on the issue. EQB’s *Guide to Minnesota Environmental Review Rules* treats the terms “cumulative effects” and “cumulative impacts” as if they are interchangeable.

The Minnesota Supreme Court, however, recently ruled that RGU’s legally cannot apply the definition of “cumulative impacts” when performing a “cumulative effects” analysis under the environmental review rules. *CARD*, 713 N.W.2d at 829-32.

***CARD* Decision**

The *CARD* case involved a challenge to Kandiyohi County’s decision not to order an EIS for two proposed gravel pits. The district court granted the plaintiff’s motion for summary judgment and overturned the county’s negative declaration. The county appealed and the

Minnesota Court of Appeals reversed and reinstated the county's negative declaration. The Minnesota Court of Appeals accepted the county's reasoning that because no significant environmental effects had been identified for any single gravel pit in the area, there could not be a potential for significant cumulative effects from the pits when viewed collectively.

The plaintiff's appealed the court of appeals' decision to the Minnesota Supreme Court. EQB filed a friend of court brief in the supreme court case. The Minnesota Supreme Court reversed the court of appeals and remanded the matter back to the county for additional findings on the issue of cumulative effects.

In the litigation before the Minnesota Supreme Court, the plaintiffs and EQB argued that an RGU can and should apply the definition of "cumulative impact" when evaluating the cumulative potential effects of a project per Minn. R. 4410.1700, subp. 7. Both the plaintiffs and EQB pointed out that EQB's guidance documents treat the terms "cumulative effects" and "cumulative potential effects" as interchangeable.

The *CARD* court rejected that argument. The court noted that the term "cumulative impact" applies when an RGU is deciding whether to prepare a GEIS. See Minn. R. 4410.3800, subp. 5. The court noted that the scope and function of a GEIS is very different from the scope and function of a project-specific review. As a result, the court concluded that it would not be proper to apply the definition of "cumulative impact" to the "cumulative potential effects" criterion when deciding whether to order a project-specific EIS. *CARD*, 713 N.W.2d at 829-32.

The court then described how an RGU should apply the "cumulative potential effects of related or anticipated future projects" criterion for determining whether to order a project-specific EIS under Minn. R. 4410.1700, subp. 7.

First, the court stated that “for a project-specific EIS determination, the RGU considers ‘anticipated future projects’ -- an inquiry that . . . involves specific projects actually planned or for which a basis of expectation has been laid.” *CARD*, 713 N.W.2d at 830.

Second, the court stated that “[A] cumulative potential effects analysis is limited geographically to projects in the surrounding area that might reasonably be expected to affect the same natural resources--for instance, a nearby lake,-- as the proposed project.” *Id.*

Finally, the court rejected the assertion that in order for a group of projects to have a significant environmental impact, they must each individually have a significant impact. The court held that this assertion was “contrary to a key underlying premise of a cumulative potential effects review -- that an individually insignificant project may have a significant environmental effect when considered in conjunction with other projects.” *Id.* at 836.

Other Cases Involving Cumulative Effects

In *Trout Unlimited, Inc. v. Minn. Dep’t of Ag.*, 528 N.W.2d 903 (Minn. Ct. App. 1995), opponents of an irrigation project challenged the Commissioner of Agriculture’s decision not to require an EIS for the project. The Becker County District Court held that the Commissioner had acted within his discretion in declining to order the EIS, but the Minnesota Court of Appeals reversed.

Among other things, the court of appeals held that the Commissioner had failed to properly evaluate the cumulative potential effects associated with the project. *Id.* at 908. The court focused on whether the irrigation project would stimulate expansion of cropland in the area. *Id.* The Commissioner had stated that decisions to expand cropland are highly individualized and dependent upon several factors. *Id.* As a result, the Commissioner concluded

that one could not infer that the irrigation project under review was likely to stimulate additional expansion of cropland. *Id.*

The court of appeals rejected this reasoning for several reasons. *Id.* First, the court noted that the EAW itself indicated that future stages of irrigation projects in the area were “planned or likely.” *Id.* Second, the court noted that a memorandum from MPCA stated that a nearby landowner had three or four parcels of land that he hoped to convert depending on the outcome of the irrigation project at issue. *Id.* Finally, the court noted that both the DNR and the Department of Health had suggested that it would not be possible to determine the potential for significant environmental effects from the irrigation project without determining the extent of future plans for farming in the area. *Id.* Based on this record, the Court of Appeals held that the Department of Agriculture’s failure to evaluate the cumulative effects of future irrigation projects was arbitrary and capricious. *Id.*

In *White v. Minn. Dep’t of Nat. Res.*, 567 N.W.2d 724 (Minn. Ct. App. 1997), opponents of a trail expansion challenged DNR’s decision not to require an EIS for the project. The Cook County District Court granted DNR summary judgment upholding the decision not to require an EIS and the Minnesota Court of Appeals affirmed.

The plaintiffs claimed that DNR had failed to address the cumulative effects of the trail expansion and the effects from an existing trail. *Id.* at 731. The court of appeals concluded that DNR had, in fact, addressed this issue. The court stated that “[a]lthough not very detailed, the analysis indicates that the DNR concluded the proposed trail would not significantly add to the environmental impact of the existing trail.”

As a result, the court rejected the plaintiffs' argument that DNR had ignored the issue of cumulative effects from the trail expansion and the existing trail. *Id.* (The court of appeals, however, went out of its way to note that the *White* plaintiffs had not contended that the analysis or DNR's conclusion on this issue was unsupported by the evidence in the record as the plaintiffs in *Trout Unlimited* had. This suggests that the court may have ruled in the plaintiffs' favor if the plaintiffs had made such an argument.)

Relying on *Trout Unlimited*, the plaintiffs in *White* also claimed that DNR's evaluation of the cumulative effects of the trail expansion was inadequate because DNR did not consider the effect of future spur trails. *Id.* at 713-32. The court of appeals rejected the plaintiffs' argument on this point. The court noted that although DNR had acknowledged that local residents had proposed two additional spur trails, no specific request for DNR approval of any spur trails had been submitted. *Id.* In the absence of any specific plans for spur trails, the court held that any consideration of the effects from spur trail would be purely speculative. *Id.*

The court also distinguished *White* from *Trout Unlimited*. The court noted that unlike in *Trout Unlimited*, there was nothing in the record in *White* to suggest that the effects of the trail project under review could not be properly evaluated without first determining the effects of future spur trails. *Id.* Based on these factors, the court rejected plaintiffs' argument that DNR's analysis of cumulative effects had been inadequate. *Id.*

In *Pope County Mothers & Others v. MPCA*, 594 N.W.2d 233 (Minn. Ct. App. 1999), opponents of a multi-site feedlot operation challenged MPCA's decision not to require an EIS for the project. The Pope County District Court found that MPCA's decision not to prepare an EIS was arbitrary and capricious. The Minnesota Court of Appeals affirmed.

The court of appeals held that MPCA failed to properly consider the cumulative environmental effects of the multiple hog finishing sites that the project included. *Id.* at 237. Interestingly, in addressing the cumulative effects issue, the court of appeals applied the definition of cumulative impacts set forth at Minn. R. 4410.0200, subp. 11. *Id.* at 237. It does not appear from the decision that either of the parties argued that it was improper to apply the definition of “cumulative impacts” to a “cumulative effects” analysis as the litigants did in *CARD*. The *Pope County* court went on to note that with the finishing sites, the total number of animal units in the project area increased by 3150 to a total of 4134. *Id.* Under these circumstances, the court held that the MPCA did not engage in reasoned decision and that an EIS was necessary.

In *O’Neill v. MPCA*, No. C7-01-2049, 2002 WL 1423302 (Minn. Ct. App. 2002), opponents of a feedlot expansion project petitioned MPCA to require an EAW for the project. MPCA denied the EAW petition. The project opponents challenged MPCA’s denial of their petition. The Renville County District Court granted MPCA summary judgment upholding the denial of the EAW petition. The Minnesota Court of Appeals partially affirmed and partially reversed. The court affirmed MPCA’s denial of the EAW petition as to alleged effects to soil and water, but denied as to alleged effects to air quality.

The project opponents argued that the feedlot expansion project would have a cumulative adverse impact on air quality and that the project might harm a disabled child who lived near the project site.

In response to these concerns, MPCA noted that there had already been a great deal of litigation over the conditional use permit for this project and that that litigation had focused on

the potential air quality effects from the project. In that litigation, both the Minnesota Court of Appeals and the Minnesota Supreme Court held that Renville County did not have sufficient evidence that the feedlot project would adversely effect air quality to justify denying the facility's permit. *In re Livingood*, 1998 WL 531579 (Minn. Ct. App. 1998); *In re Livingood*, 594 N.W.2d 889 (Minn. 1999).

MPCA also noted that the project proposer had agreed to use a specific mitigation technology to reduce or eliminate the emissions from the feedlot site. MPCA's record included evidence that this technology had proven highly effective in the past. Nevertheless, the court held that the MPCA's analysis of the cumulative air emissions was inadequate and ordered preparation of an EAW on that issue.

In *Filmore County Residents Concerned for Health v. MPCA & Reiland Farms*, No. CX-00-306 (3d Jud. Dist. Dec. 22, 2000), opponents of a dairy feedlot challenged MPCA's decision not to require an EIS for the project. The Fillmore County District Court granted summary judgment in favor of the Plaintiffs requiring an EIS for the project.

Among other things, the district court found that MPCA had not adequately evaluated the cumulative potential effects from the dairy feedlot. Specifically, the court held that MPCA had improperly failed to evaluate the effects of a potential future expansion of the dairy at issue. *Reiland Farms*, pp. 17-19.

MPCA argued that it would have been speculative to evaluate the effects of a potential future expansion of the dairy at issue because the dairy had not applied for any permits for such an expansion.

The court rejected MPCA's argument because the court concluded that there was a strong possibility that the dairy would expand within a limited period of time. *Id.* The court based this conclusion on three facts. First, the dairy indicated on the EAW that future stages of development were planned or likely. Second, the project site map that accompanied the EAW showed a location for a possible future freestall barn. Third, the manure basin that the dairy planned to build was going to be over-sized so that it could accommodate more manure than the dairy was expected to produce.

Based on its conclusion that the *Reiland Farms* project was likely to expand in the future, the court held that MPCA had failed to properly evaluate the cumulative effects of the current project with the expansion. As a result, the district court ordered MPCA to prepare an EIS for the project.

In *MCEA v. City of St. Paul Park*, 711 N.W.2d 526 (Minn. Ct. App. 2006), MCEA opposed a proposed development on the Mississippi River. The City of St. Paul Park prepared an AUAR for the project and limited its review of cumulative effects to effects within the AUAR area. Among other things, MCEA claimed that it was improper for the RGU to limit its evaluation of cumulative effects to effects within the geographic boundary of the AUAR area. In a two to one decision, the Minnesota Court of Appeals rejected MCEA's argument and held that in an AUAR, the RGU is only required to cumulative effects within the project area. *Id.*

Conclusion

As the cases discussed above demonstrate, the question of how RGUs should evaluate the issue cumulative effects when conducting or deciding on the need for environmental review has been the subject of a fair amount of litigation. The courts have not always been able to agree on

the proper approach under EQB's current rules. As a result, EQB staff have proposed to revisit this issue in the Phase II environmental review rulemaking.