

State of Minnesota
In Court of Appeals

In the Matter of the Determination of the
Need for an Environmental Impact
Statement for the Nolte Family Irrigation
Project in the Township of North Germany,
Wadena County, Minnesota.

BRIEF OF AMICI CURIAE
Willis Mattison and Peder Otterson

JAMIE LYNN KONOPACKY
(Pro Hac Vice- Wisc. Bar #1092665)
Environmental Working Group
111 Third Ave. So., Suite 240
Minneapolis, MN 55401
(612) 435-8280
jkonopacky@ewg.org

Attorney for Relators

JAMES P. PETERS (#0177623)
Law Offices of James P Peters PLLC
20020 S. Lakeshore Dr.
Glenwood, MN 56334
(320) 424-2326
jim@peterslawfirm.us

Attorney for Relators

MARSHAL H. TANICK (#108303)
TERESA J. AYLING (#0157478)
Meyer Njus Tanick, PA
330 Second Ave. So. Suite 350
Minneapolis, MN 55401
(612) 341-2181
mtanick@meyernjus.com
tayling@meyernjus.com

Attorney for Relators

PETER J. FARRELL (#0393071)
Attorney General State of Minnesota
445 Minnesota Street, Suite 900
St. Paul, MN 55101
(651) 757-1412
peter.farrell@ag.state.mn.us

*Attorney for Respondent
Department of Natural Resources*

KARUNA OJANEN (#027186X)
Ojanen Law Office
2665 Riverside Lane NE
(507) 993-5842
ojanenlaw@gmail.com

*Attorney for Amici Curiae
Willis Mattison and Peder Otterson*

*& Attorney for Amici Curiae Ryan
Pesch, Larry Heitkamp, Janaki
Fisher-Merrit and Zachary Paige*

JOSEPH MATERNOWSKI (#016463X)
JOSEPH REUTIMAN (#0396946)
Hessian & McKasy, P.A.
3700 RBC Plaze
60 South Sixth Street
Minneapolis, MN 55402
(612) 746-5770
jmaternowski@hessianmckasy.com
jreutiman@hessianmckasy.com

*Attorney for Amicus Curiae
Pollinator Stewardship Council*

FRANK BIBEAU (#0306460)
51124 County Road 118
Deer River, MN 56636
(218) 760-1258
frankbibeau@gmail.com

*Attorney for Amici Curiae Honor
the Earth and Pine Point Tribal
Community Members on the
White Earth Reservation*

PAUL BLACKBURN (#0391685)
Honor the Earth
P.O. Box 63
Callaway, MN 56521
(612) 599-5568
paul@honortheearth.org

*Attorney for Amici Curiae Honor
the Earth and Pine Point Tribal
Community Members on the
White Earth Reservation*

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INTEREST OF AMICUS CURIAE

Amicus Willis Mattison holds a Bachelor of Science degree in biology, chemistry and the broad sciences from Bemidji State University and a master's degree in biology with an emphasis in ecology from St. Mary's University. Mr. Mattison had a twenty-eight-year career with the Minnesota Pollution Control Agency (MPCA) and was Regional Director of the MPCA in Rochester and Detroit Lakes before retirement in 2001. While with the MPCA, Mr. Mattison reviewed and drafted agency comments and approvals of resource management plans such as watershed district, basin-wide water, local water, lake, solid waste, and wastewater facility management plans. Mr. Mattison critically assessed sources of pollution and the remediation measures for numerous land and water use activities including drainage and on-site sewer systems, urban stormwater runoff, and agricultural operations. His work on agricultural operations covered confined livestock feeding operations, as well as pasturing, cropping, and conservation practices, many of which involved MPCA permitting. When Mr. Mattison was the MPCA Regional Director, he drafted Environmental Assessment Worksheets (EAWs) and Environmental Impact Statements (EISs) and commented extensively on environmental review documents prepared by other state, local and federal agencies. Mr. Mattison oversaw and was directly involved in the MPCA's review and commentary on EAWs for three irrigated potato projects in the vulnerable soils of the Pineland Sands Aquifer that were initiated and directed by R.D. Offutt Company (Offutt): the Triple J Farms-Offutt project; the Lykken-Offutt project; and the Ulschmid-Offutt project.

As Regional Director, Mr. Mattison provided both procedural and scientific advice to individuals and the organizations about the scope of their rights under

Minnesota Environmental Protection Act (MEPA) and Minnesota Environmental Rights Act (MERA). Thus, Mr. Mattison has extensive training and experience in not only environmental review procedure but also Environmental Quality Board (EQB) rules, and application of MEPA and MERA.

Amicus Peder Otterson holds a bachelor's degree in Geology and a master's degree in Limnology and Hydrogeology. As a research scientist when he joined the Minnesota State Planning Agency in 1976, Mr. Otterson conducted detailed field surface and groundwater studies of pollutants that would affect streams from proposed copper-nickel mining. From 1978-2010, Mr. Otterson worked as a hydrologist for the Minnesota Department of Natural Resources (MDNR) starting as the Duluth Area Hydrologist overseeing the Division of Waters permits and land use programs within a four-county area of northeast Minnesota. Mr. Otterson subsequently assumed statewide responsibility for the development and management of the Shoreland Management Program in which he oversaw an extensive permitting system that mandated the use of special conditions and mitigation measures to protect water resources. Mr. Otterson in his role as a groundwater geologist for the MDNR coordinated the development of the 1998 Water Availability Assessment Report that provided a comprehensive review of the state of water resources relative to the quantities and trends of water supplies. Furthermore, Mr. Otterson has extensive experience coordinating MDNR Division of Waters Review and Comments on many federal and state EAWs and EISs.

In the 1980s and 1990s, when Amicus Peder Otterson was the Environmental Review Coordinator for the MDNR Division of Waters and Amicus Willis Mattison was the Regional Director within the MPCA there was a great deal of coordination both

within and among agencies in the review of and decision-making for proposed projects affecting Minnesota's natural resources. Amici Otterson and Mattison and other designated environmental review coordinators would meet at Environmental Review and other ad hoc committees to discuss EAWs and EISs from each Department's area of expertise and authority. Amici are retired senior agency officials, knowledgeable of the subject matter and issues before the court, having more than sixty years combined experience with the MPCA and MDNR. It is with their education, experience, history, and love of the natural resources of Minnesota that Amici Mattison and Otterson present this Brief to the Court.

Amici assert a public interest. The case at issue requires interpretation of MEPA. Petitioners have combined sixty years' experience interpreting MEPA specifically as it applies to the evaluation of irrigated potato projects in the vulnerable Pineland Sands region. Amici provide historical on-the-ground perspective as well as scientific expertise critical to a sound assessment of the case at hand. Amici believe that sound resolution of this case is critical not only to protecting local natural resources surrounding the Nolte project site, but also to stopping the long-running destruction of a region slowly succumbing to contamination and destruction from expanding irrigated agriculture, without legally required environmental review. This case has lasting and important implications, not just for natural resources and individuals in the immediate project area but will also serve as a strong precedent for evaluating other similarly destructive projects in the region and other vulnerable rural areas.

ARGUMENT

A. MDNR LEGALLY ERRED IN FAILING TO FOLLOW THE DIRECTLY APPLICABLE PRECEDENT OF THE TROUT UNLIMITED CASE

Amicus Mattison helped initiate the very first environmental review of a proposed irrigation project in the Pineland Sands, the Triple J project, which culminated in this Court's decision to order an EIS. *See Trout Unlimited v. Minn. Dept. of Ag.*, 528 N.W.2d 903 (Minn. App. 1995). While serving as Regional Director for the Detroit Lakes MPCA, Norbert and Bernadette Illg approached Mattison. The determined farming couple who lived near Dead Horse Hill Creek in eastern Becker County, had recently found out that their neighbor, operating as Triple J Farms had contracted with R.D. Offutt to begin an irrigated potato farming operation. As long-time farmers in the area, the Illgs knew their wells and those of their neighbors were shallow, sand point wells susceptible to contamination and depletion. The Illgs also knew that the creek near their home was fed by groundwater and similarly susceptible to contamination and drawdown. The Illgs were concerned that the proposed irrigation pumping and chemical application on the newly proposed irrigated potato operation near their home would contaminate and threaten their drinking water supply and the health and continued existence of Dead Horse Creek. Amicus Mattison shared the Illg's well-founded concerns. Accordingly, Mattison supported the drafting of a citizen's petition for an EAW. Unfortunately, ignoring the concerns expressed by MDNR, MPCA and Minnesota Department of Health (MDH), Minnesota Department of Agriculture (MDA) issued a negative declaration on the need for an EIS.

Citizens appealed MDA's erroneous determination that the proposed 97-acre Triple J irrigation project did not have the potential for significant environmental effects. On appeal this Court ruled that MDA's refusal to prepare an EIS for Triple J Farms was arbitrary and capricious and that the agency had made a "mockery of the EAW as a decision-making tool." *Trout Unlimited v. Minn. Dept. of Ag.*, 528 N.W.2d at 909 (1995). The Court further held that "[t]he very purpose of an EIS is to determine the potential for significant environmental effects before they occur" and in deferring environmental review to later permitting and monitoring decisions, the Commissioner had "abandoned his duty to require an EIS." *Id.*

As pointed out by Relators in their principal brief, in reaching its decision, the Court in *Trout* noted potentially significant effects identical to those at issue in this case including nitrate and pesticide groundwater contamination, offsite contamination migration, depletion impacts to the river due to leaky, connected aquifers, pesticide drift and drinking water public health impacts. *Id.* at 905-910. The Court further noted concerns with efficacy and enforcement of proposed mitigation measures. *Id.* at 906.

Minnesota Statute §116D.04, Subdivision 2a, requires that an agency order an EIS if a project has the potential for significant environmental effects. The proposed Nolte irrigation project in the Pineland Sands, poses nearly identical potentially significant environmental effects. In fact, the Nolte project is three times larger than the irrigation project in the Pineland Sands at issue in *Trout*. In this case, DNR has erred in the same manner that MDA erred in *Trout*. Namely, the agency has inexcusably deferred the gathering of critical and readily available information, required for an evaluation of potentially significant effects to the permitting process. AR 711 at 6. The record reflects

that scientific information gathered since *Trout*, including the state's own Byron Township study in the Pineland Sands, only confirms the certainty of potentially significant effects from the proposed Nolte project. AR 482; AR 486 at DNR08385-DNR08389; AR 497; AR 669; AR 698. And there is no excuse for the agency's willful disregard and failure to respond to studies and information confirming certain water contamination, pesticide drift and associated health effects likely to result from the Nolte project. AR 482; AR 486 at DNR08385-DNR08389; AR 497; AR 669; AR 698. Accordingly, Amici respectfully request that the Court follow its well-reasoned and applicable decision in *Trout* and order an EIS for the Nolte project and the larger RDO irrigated farming expansion of which it is a part.

B. MDNR LEGALLY ERRED AND MADE AN ARBITRARY AND CAPRICIOUS DECISION IN IGNORING PAST AGENCY PRECEDENT IN THE RECORD INDICATING THE NEED FOR AN EIS.

Minnesota Rule 4410.1700 Subpart 4 requires specific responses to substantive and timely comments submitted during the EAW comment period. Moreover, when an agency seeks to deviate from its prior decisions, it must set forth a reasoned analysis for the change. *In re Review of the 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils.*, 768 N.W. 2d 112, 119 (Minn. 2009) (citing *Sierra Club v. Clark*, 755 F.2d 608, 619 (8th Cir. 1985)). Failure to specifically respond to comments or set forth a reason for deviating from past agency precedent renders a decision arbitrary and capricious and legally erroneous.

During the EAW comment period, Relator EWG aptly raised poignant past agency precedent discussing similarly situated previously proposed irrigated potato projects in the Pineland Sands. AR 484 at 7, 8, 10, 11, 26, 36, 38-40, 45-

46, 47. Specifically, EWG commented that in 1995 and 2013, MDNR, MPCA and MDH identified the potential for significant environmental effects from two proposed irrigated potato projects in the Pineland Sands, the Triple J and Winnemucca irrigation projects. In no uncertain terms, the agencies noted the potential for unsafe nitrate groundwater contamination, stream depletion and chemical contamination among other potentially significant environmental effects from the similarly situated proposed irrigated potato projects.

From the historical agency record on the proposed Triple J irrigation project EWG provided the following directly relevant comments:

Groundwater contamination by nitrates seems a certainty, we can argue about what levels of nitrates but this is an unmitigable effect.

There is a high probability that nitrate concentrations leaching to groundwater under irrigated potatoes, even when BMPs are used, will exceed the drinking water standard of 10 mg/l.

... studies we are familiar with have not demonstrated that best management practices exist that would adequately protect shallow aquifers below irrigated potatoes grown in coarse soils. Further information on this issue is needed, as is data on the integrity of subsequent confining layers, so that the potential for impacts to deeper aquifers can be assessed. Our judgment is that, at least in the surficial aquifer, the nitrate recommended allowable limits would be violated as a result of this project. Despite the EAW's statements on the issue, it may not be possible to amend the conservation plan in such a way as to reduce erosion and the surface and ground water contamination potential to acceptable levels ... this project seems clearly to have the potential for significant environmental effects.

The draft EAW indicates that little surface and surficial aquifer interaction with the deep aquifer is expected. We believe that the potential for significant interaction is present. Without more information regarding the lateral extent and permeability of the till layers, we do not know what the impact of pumping irrigation wells will be on the water levels, temperature and trout viability in Dead Horse Creek. Further study is needed to determine the interaction between the surficial and buried aquifers under long term pumping conditions.

... the EAW indicates that a potential exists for the future use of chemigation and fertigation techniques as a component of agricultural water management. The EAW does not indicate the expected types or use-levels of nutrients and pesticides, whether herbicides, insecticides or fungicides. ... The coarse soils and heavy applications of fertilizers required for the proposed crop rotation could lead to elevated nitrate levels in the upper aquifers and may potentially lead to down-gradient migration of this and other chemicals. Such an occurrence would potentially threaten the local groundwater and surface water quality. ...

It is likely to be the applicant's contention that a Conservation Plan developed by the Soil and Water Conservation District will reduce these impacts to an acceptable level. There are a number of reasons why this contention is not valid. These include the substantive parts of the plan itself, but also the fact that there are no institutional structures in place to monitor the kind of detailed plan that is necessitated by the sensitivity of the site.

“... [a]ny plan involving such a sensitive area would have to be mandatory and would need frequent monitoring. Otherwise it is only a meaningless exercise.”

AR 484 at 7, 8, 10, 11, 26, 36, 38-40, 45-46.

After providing relevant agency comments from the Triple J record, EWG went on to provide additional, corroborating agency precedent identifying the potential for significant environmental effects from the Winnemucca irrigated potato project proposed in the Pineland Sands in 2013:

We have reviewed the EAW and do not believe the project's potential environmental impacts are adequately disclosed. Our comments indicate the potential for significant impact having to do with both potential water table drawdown effects on wetlands and surface waters, and the potential for nutrient contamination of the drinking water aquifer.

The EAW does not identify or discuss the use of pesticides or fungicides, or potential environmental effects resulting from pesticide or fungicide use, in potato production. In particular, the high likelihood of fungicide use for as long as this land is in potato production should be discussed at some level in several parts of this document in order for the EAW to be complete. The majority of all Minnesota potato farms use applications of fungicide and a high majority of these use chlorothalonil specifically. The application of

chlorothalonil, presumably via crop dusting, should be a consideration when discussing, at a minimum, items 11, 17, 20, 23, or 30. Chlorothalonil is classified by the Environmental Protection Agency (EPA) as "very highly toxic" or "highly toxic" to aquatic invertebrates. The EPA Reregistration Eligibility Decision (RED) fact sheet also states that "Chlorothalonil can contaminate surface water via spray drift or through runoff and erosion. Chlorothalonil can be dissolved in runoff and adsorbed to sediment in the runoff." As this proposed agricultural site has both wetlands and a stream that drains to the Crow Wing River, the potential for surface and groundwater contamination resulting from the use of pesticides and fungicides should be addressed in this environmental review.

AR 484 at 10, 47.

The record of decision reflects that MDNR wholly ignored and provided no response to directly relevant past agency precedent identified in EWG's EAW comments. AR 711. MDNR must explain why it no longer has concerns and has addressed the concerns of MDH and PCA regarding the following potentially significant effects from similarly situated proposed irrigated potato operations in the Pineland Sands identified in previous environmental review comments: nitrate contamination above the Safe Drinking Water Act limit, ineffectiveness of BMPs to prevent unsafe nitrate leaching beneath irrigated potatoes in sandy soils, leakage of nitrate and pesticides between shallow and deep aquifers and migration to surface water bodies, water drawdown in neighboring streams and wetlands, and ineffective conservation planning lacking mandatory requirements, monitoring and a reliable enforcement structure. In failing to explain its deviation from decades of agency precedent clearly identifying the potential for significant environmental effects from projects smaller than and similarly situated to the Nolte project, and wholly failing to respond to EWG's comments on the same, MDNR legally erred and made a decision that is arbitrary and capricious.

MDNR's decision constitutes reversible error and Amici respectfully request the Court reverse MDNR's negative declaration.

C. MDNR'S FAILURE TO RESPOND TO EAW COMMENTS ON THE EXACERBATING EFFECTS OF CLIMATE CHANGE CONSTITUTES FURTHER LEGAL ERROR

MDNR further failed to adequately respond to submitted comments regarding another critical consideration: climate change. Relator Minnesota Well Owners Organization represented by geologist expert Jeff Broberg discussed studies from the University of Minnesota showing that climate change will require increased fertilization of potatoes, which in turn will lead to greater nitrate leaching losses to the soil and groundwater.

“Future climate change will have adverse effects on potato tuber yield in Minnesota, however ... increased irrigation and [nitrogen] N fertilization to some extent can minimize the impact on productivity. The present [2015] potato tuber yield could be sustained for the years 2038–2047 at the current irrigation levels and N fertilizer levels ... however, this combination of N and irrigation would cause a 34–62% increase in leaching losses in the years 2048–2057. Even more into the future, by years 2058–2067, this yield cannot be sustained even with increased N and irrigation levels, yet leaching losses would increase by 41–67% ... The increased pollution and eventual inability to sustain yield are conspicuous limitations to these adaptation strategies.

Relators comments include testimony from a highly respected regional expert showing likely groundwater contamination double to quadruple the Safe Drinking Water Act limit beneath the Nolte project site. AR 486 at DNR08389. MDNR's failure to consider the potential for nitrate leaching, due to climate change, that is 30-60% greater than the already severe predicted leaching, renders their negative declaration more legally erroneous and arbitrary and capricious. AR 497 at 23-24. Climate change is a well-recognized and studied threat multiplier in

Minnesota and around the globe, and MDNR's failure to consider it in this case is wholly inexcusable both scientifically and legally.

CONCLUSION

Over the past thirty years, Amici have watched the incremental conversion of the Pineland Sands from native Jack Pine Forest to intensively irrigated crop land. In continuing to illegally permit irrigation projects demonstrated to cause severe and irreversible harm to the fragile Pineland Sands region and underlying vulnerable aquifers, without the required environmental review, agencies have shifted from serving the public to serving permittees. Contrary to the wise admonition of land steward Aldo Leopold, agencies entrusted with protecting our natural resources are treating the land as “a commodity belonging to us” rather than “a community to which we belong.” Based on more than sixty years of combined service with MDNR and PCA and decades of firsthand experience in evaluating the harms of irrigated agriculture in the Pineland Sands, Amici respectfully request that the Court reverse MDNR's legally erroneous, arbitrary and capricious and dangerous decision and order the preparation of EIS for the proposed Nolte project and the larger phased action of which it is a part.

Dated: 20 November 2020

By: /s/ Karuna Ojanen #027186x
Ojanen Law Office
2665 Riverside Land NE
Rochester, MN 55906
507.993.5842
ojanenlaw@gmail.com

CERTIFICATION OF BRIEF LENGTH AND CONTENT

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subds. 1 and 3 for a brief produced with proportional font. The length of this brief is 3,135 words. This brief was prepared using Microsoft Word, version 16.42.

I hereby certify that the content of the accompanying paper brief and addendum or addenda, if applicable is identical to the electronic version filed and served, except for any binding, colored cover, or colored back, and I understand that any corrections or alternations to a brief filed electronically must be separately served and filed in the form of an errata sheet.

Dated: 20 November 2020

By: /s/ Karuna Ojanen #027186x
Ojanen Law Office
2665 Riverside Land NE
Rochester, MN 55906
507.993.5842
ojanenlaw@gmail.com