

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.

---

**RELATORS' PRINCIPAL BRIEF AND ADDENDUM**

---

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](mailto: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](mailto:jim@peterslawfirm.us)

*Attorney for Relators*

MARSHALL H. TANICK (#108303)  
TERESA J. AYLING (#0157478)  
Meyer NjusTanick, PA  
330 Second Ave. So. Suite 350  
Minneapolis, MN 55401  
(612) 341-2181  
[mtanick@meyernjus.com](mailto:mtanick@meyernjus.com)  
[tayling@meyernjus.com](mailto:tayling@meyernjus.com)

*Attorney for Relators*

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

*Attorney for Respondent  
Department of Natural Resources*

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

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

KARUNA OJANEN (#027186X)  
Ojanen Law Office  
2665 Riverside Lane NE  
Rochester, MN 55906  
(507) 993-5842  
[ojanenlaw@gmail.com](mailto: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*

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

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

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

*Attorney for Amicus Curiae  
Pollinator Stewardship Council*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
STATEMENT OF LEGAL ISSUES.....	iv
STATEMENT OF THE CASE .....	1
STATEMENT OF FACTS .....	3
A. Parties .....	3
B. The Project: .....	4
1. RDO's Irrigated Potato Operation in the Pineland Sands: Environmental and Economic Effects .....	5
2. RDO's Environmental Review Evasion .....	9
3. RDO's Deal with Project Proposer Tim Nolte to Continue Implementation of RDO's 2015 Phased Expansion Action.....	9
4. DNR's Abbreviated Investigation of Project Proposer-RDO Relationship .....	10
5. Current RDO-Project Proposer Relationship .....	10
6. DNR's Rolling Approval of Additional Related Segments of RDO's 2015 Phased Expansion Action .....	11
C. The 303-acre Nolte Project Site.....	13
1. Surrounding Water Resources and Residential Wells.....	13
2. Neighbors Impacted by the Project .....	15
D. The Environmental Review Process .....	16
1. EQB Receives Citizen's Petition, Assigns to DNR, DNR Orders EAW .....	16
2. DNR's Partial Data Collection from Nolte .....	17
i. Nolte's First Data Submittal.....	17
ii. Nolte's Second Data Submittal .....	19
iii. Nolte's Third Data Submittal .....	20
3. DNR's Interagency Meetings on Cumulative Effects.....	21
4. DNR's Partial Aquifer Pump Test.....	21
5. DNR's First Draft EAW for Interagency Review .....	22
6. DNR's Final Draft EAW for Interagency Review .....	23
7. The EAW .....	24
8. Comments on EAW .....	26

9. DNR’s ROD Drafting.....	31
10. ROD Content .....	33
11. Finding of Fact Sheets for Project Permit Applications .....	35
<b>STANDARD OF REVIEW</b> .....	36
<b>ARGUMENT</b> .....	37
I. DNR’S SEPARATION OF THE PROJECT FROM RDO’S 7,000-ACRE PHASED EXPANSION ACTION VIOLATES MEPA. ....	37
A. Substantial evidence does not support DNR’s decision to separate the Project from RDO’s 7,000-acre expansion action. ....	38
B. DNR arbitrarily and capriciously separated the project from RDO’s 7,000-acre expansion action. ....	41
C. DNR erred as a matter of law when it separated the Project from RDO’s 7,000- acre expansion action and failed to respond to the substantial evidence in the record establishing a phased action. ....	44
II. DNR’S NEGATIVE DECLARATION BASED ON ITS DETERMINATION THAT THE PROPOSED PROJECT DOES NOT HAVE THE POTENTIAL FOR SIGNIFICANT ENVIRONMENTAL EFFECTS VIOLATES MEPA. ....	45
A. DNR erred as a matter of law in failing to consider Dr. Kraft’s expert report establishing the potential for significant local water quality effects. ....	46
B. DNR’s decision that the Project does not have the potential for significant local water quality effects is arbitrary and capricious. ....	47
C. DNR arbitrarily and capriciously dismissed Relators’ comments regarding ineffective mitigation. ....	50
D. Substantial evidence in the record does not support DNR’s proposed mitigation measures. ....	52
E. DNR erred as a matter of law in finding that project does not have the potential for significant water quantity effects. ....	53

F. DNR’s determination that the project does not have the potential for significant pesticide drift effects to nearby residences or pesticide effects to pollinators is an error of law and arbitrary and capricious. ....	56
<b>CONCLUSION</b> .....	59
<b>CERTIFICATE OF COMPLIANCE AND CONTENT</b> .....	61

## TABLE OF AUTHORITIES

	<b>Page</b>
<b>MINNESOTA CASES</b>	
<i>Berne Area Alliance for Quality Living v. Dodge Cnty. Bd. Of Comm’rs</i> , 694 N.W.2d 577, 582-83 (Minn. Ct. App. 2005) .....	43, 44
<i>Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. Of Comm’rs</i> , 713 N.W.2d 817, 832 (Minn. 2006) .....	36, 50
<i>In re Envtl. Assessment Worksheet for the 33rd Sale of State Metallic Leases in Aitkin</i> , 838 N.W.2d 212, 216 (Minn. Ct. App. 2013).....	36
<i>In re Minn. Power’s Petition for Approval of the Energy Forward Res. Package</i> , 938 N.W. 2d 843, 849 (Minn. Ct. App. 2019).....	37
<i>Minn. Ctr. For Envtl. Advocacy v. Minn. Pollution Control Agency</i> , 644 N.W.2d 457, 468 (2002).....	51
<i>Minnesotans for Responsible Rec. v. Dep’t of Natural Res.</i> , 651 NW 2d 533, 540 (Minn. Ct. App. 2002) .....	37, 44
<i>Pope County Mothers v. Minn. Pollution Control Agency</i> , 594 N.W. 2d 233, 237 (Minn. Ct. App. 1999) .....	53
<i>Reserve Mining Co. v. Herbst</i> , 256 N.W.2d 808, 825 (Minn. 1977) . ....	36, 52
<i>Trout Unlimited v Minn. Dept. of Ag.</i> , 528 N.W.2d 903, 909 (Minn. Ct. App. 1995) .....	47, 48, 53
<b>MINNESOTA STATUTES</b>	
Minn. Stat. § 103G.271 Subd. 3. (2017) .....	56

Minn. Stat. 116D.04, Subd. 10 (2019) . . . . .	1, 2, 45, 56
--	--------------

## OTHER AUTHORITY

<i>In re Minn. Pipe Line Co.</i> , 2008 Minn. App. Unpubl. LEXIS 675 at *32-33 (Minn. Ct. App. June 10, 2008) . . . . .	42
Minn. R. 4410.0200, Subd. 65 . . . . .	37, 38, 44
Minn. R. 4410.0220, Subd. 33 . . . . .	37
Minn. R. 4410.1000, Subp. 4 (2018) . . . . .	2, 38
Minn.R. 4410.1700, Subp. 1, 4 (2018) . . . . .	2, 38, 45, 46, 53

## STATEMENT OF ISSUES

### STANDARD OF REVIEW

*Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. Of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006)

- I. Was DNR's separation of the Nolte Family Irrigation Project (Project) from R.D. Offutt Company's (RDO) phased expansion action arbitrary and capricious, not based on substantial evidence or an error of law?

DNR concluded in the Negative Declaration that the Project was isolated and failed to consider RDO's phased action, as requested by Relators, in ordering and preparing the EAW.

This issue was raised in Relators' Statement of the Case.

Minn. Stat. § 116D.04, Subd. 10 (2019).  
Minn. R. 4410.1700, Subp. 4 (2018).  
Minn. R. 4410.0200, Subp. 33, 60, 65, 68 (2020).  
*In re Minn. Power's Petition for Approval of the Energy Forward Res. Package*, 938 N.W. 2d 843, 849 (Minn. Ct. App. 2019).  
*Minnesotans for Responsible Rec. v. Dep't of Natural Res.*, 651 NW 2d 533, 540 (Minn. Ct. App. 2002).  
*Berne Area Alliance for Quality Living v. Dodge Cnty. Bd. Of Comm'rs*, 694 N.W.2d 577, 582-83 (Minn. Ct. App. 2005).

**II.** Was DNR's Negative Declaration based on a finding that the Project does not have the potential for significant environmental effects arbitrary and capricious, not based on substantial evidence or an error of law?

DNR issued a Negative Declaration and refused to conduct an EIS.

This issue was raised in Relators' Statement of the Case.

Minn. Stat. § 116D.04, Subd. 10 (2009).

Minn. R. 4410.1700 (2018).

*Trout Unlimited v Minn. Dept. of Ag.*, 528 N.W.2d 903, 909 (Minn. App. 1995).

*Minn. Ctr. For Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 468 (2002).

*Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977).

*Pope County Mothers v. Minn. Pollution Control Agency*, 594 N.W. 2d 233, 237 (Minn. App. 1999).

*Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. Of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006)

## STATEMENT OF THE CASE

In accordance with Minn. Stat. 116D.04, Subd. 10, of the Minnesota Environmental Policy Act (MEPA), Relators seek reversal of the Department of Natural Resources' (DNR) June 18, 2020, Negative Declaration on the need for an Environmental Impact Statement (EIS) for the proposed 303-acre Nolte Family Irrigation project (Project).

The proposed Project is part of a 7,000-acre RDO phased expansion action and represents the next frontier of irrigated agriculture in a highly vulnerable region with severe, widespread nitrate contamination of private wells and extreme nitrate contamination of groundwater-fed river systems. Despite well-documented nitrate contamination from irrigated agriculture to the north and south, the Project proposer would apply massive quantities of nitrate fertilizer to leaky soils overlaying shallow groundwater. In addition, the Project will likely use frequent crop dusting or chemigation pesticide application methods, prone to chemical drift, on fields immediately abutting private residences, an organic farm and public waterbodies.

Concerned with potential significant environmental effects from the Project and the larger RDO operation from which it spawned, Relators submitted a citizen's petition for an Environmental Assessment Worksheet (EAW), which the Environmental Quality Board (EQB) assigned to DNR. During the EAW comment period Relators commented on the following potentially significant environment effects, *inter alia*:

- Water quantity and quality impacts to surrounding wetlands and the Redeye River
- Water quantity and quality impacts to surrounding residential wells and health effects



- Pesticide drift impacts to residences and health effects
- Pesticide drift impacts to water resources and pollinators

Relators commented further that MEPA mandates review of the Project as a phased action.

On June 18, 2020, DNR issued its Negative Declaration. Relators bring this appeal under Minn. Stat. 116D.04, Subd. 10 (2019).

MEPA requires phased actions to be considered in total when preparing an EAW. Minn. R. 4410.1000, Subp. 4 (2018). In this case, DNR failed to evaluate the Project as a phased action and made a decision to separate the Project from RDO's 7,000-acre phased expansion action, which was unsupported by substantial evidence, arbitrary and capricious and an error of law.

MEPA also requires reviewing bodies to respond specifically to substantive EAW comments and order an EIS if a project has the potential for significant environmental effects. Minn. Stat. 116D.04, Subd. 2a (2018); *see also* Minn.R. 4410.1700, Subp. 1, 4 (2018). Here, DNR erred as a matter of law in wholly failing to respond to the expert report of Dr. George Kraft, submitted as part of Relator EWG's comment, which showed likely nitrate groundwater contamination *double to quadruple* the Safe Drinking Water Act limit beneath the Project site. DNR further arbitrarily and capriciously dismissed, dismissed without substantial evidence or erred as a matter of law in dismissing Relators' comments regarding potentially significant local water quality and quantity and pesticide drift effects.

Relators request the Court of Appeals reverse the Negative Declaration and order DNR to complete an EIS for the entire 7,000-acre phased action. In the alternative, Relators request the Court order DNR to complete an EAW for the 7,000-acre phased action or an EIS for the 303-acre Project. Relators further request that the Court order DNR to rescind irrigation permits that the agency issued before completing required environmental review.

## **FACTUAL BACKGROUND**

The factual background on this appeal is set forth in the administrative record.<sup>1</sup>

### **A. Parties**

#### **1. Relators**

- i. Toxic Taters.** Toxic Taters represents community members in the Pineland Sands region who are directly impacted by expanding irrigated agriculture. It is a multi-generational rural community organization of Native and non-Native members fighting for environmental and social justice now and for future generations.
- ii. Minnesota Well Owners Organization (MNWOO).** MNWOO provides education, technical, legal and advocacy services to private well owners in Minnesota. MNWOO's members include residents of the Pineland Sands region.

---

<sup>1</sup>Relators maintain that the length of the record—approximately 12,000 pages—reflects poor record management rather than a well-reasoned assessment. After initially producing its administrative record, at the insistence of Relators, DNR twice supplemented the record with more than 1,600 additional pages of documents that the agency “accidentally omitted.” The record also includes thousands of redundant pages.

- iii. **The Northern Water Alliance (NWA).** The Northern Water Alliance is an alliance of organizations and individuals focused on protecting northern Minnesota's water resources. NWA members include residents and neighbors affected by expanding irrigated farming operations in the Pineland Sands.
- iv. **The Environmental Working Group (EWG).** EWG is a national public health and environmental organization committed to helping people lead healthier lives in a healthier environment. EWG's supporters live, work and recreate throughout Minnesota, including in the Pineland Sands region.
- v. **Organic Farmer, Kathy Connell.** Kathy Connell used organic practices to grow food for local markets on a 6.5-acre farm directly adjacent to the proposed Project for over thirty years (see Figure 7). Ms. Connell has also provided organic seeds to other farmers and offered classes. The organic farm, which is located at 18298 270<sup>th</sup> Street in Sebeka, MN 56477 is identified and searchable in Minnesota's specialty crop registry, <https://mn.driftwatch.org/map>.

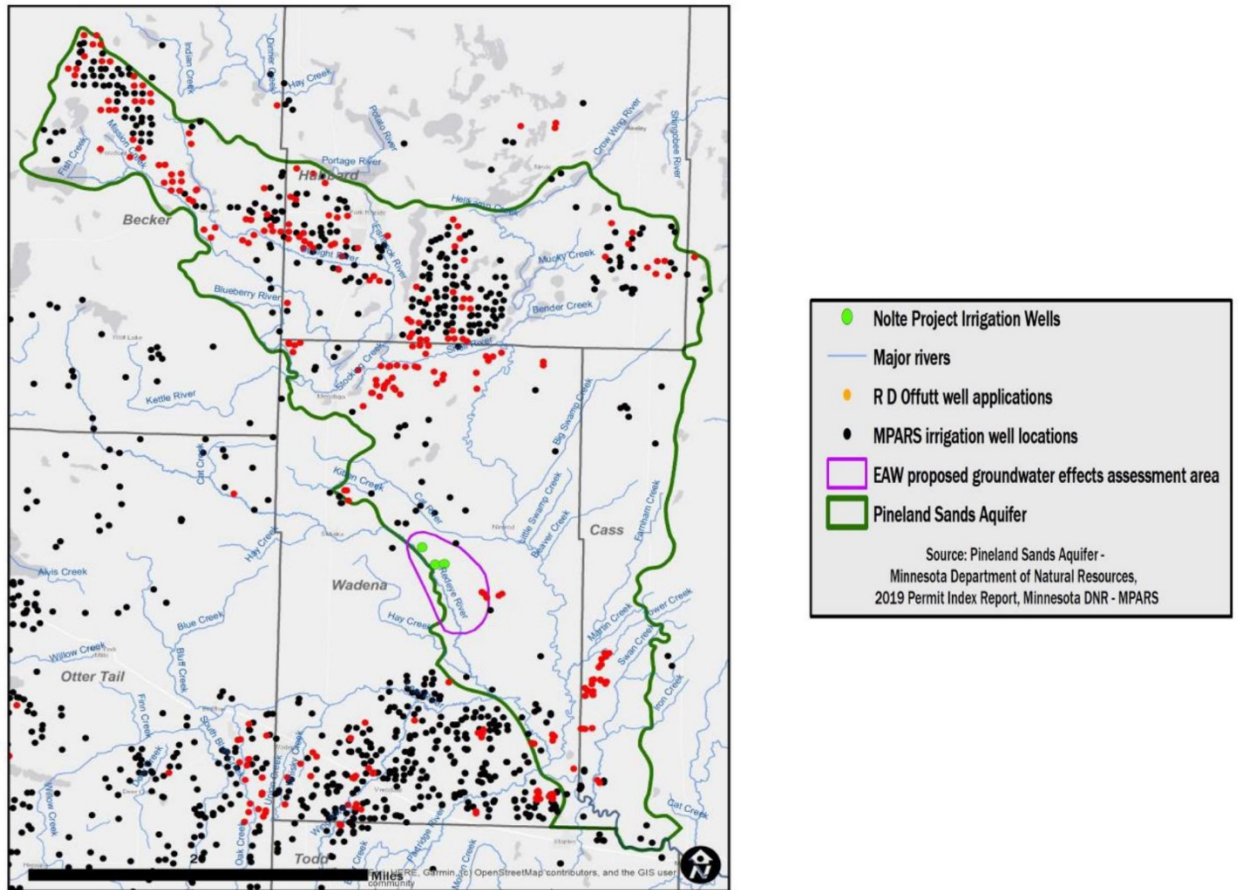
- 2. **Respondent. Minnesota Department of Natural Resources (DNR).** DNR is an agency of the state created under Minn. Stat. 84 *et. seq.*, with a mission to conserve and manage the state's natural resources.

## **B. The Project**

# **1. RDO's Irrigated Potato Operations in the Pineland Sands: Environmental and Economic Effects**

RDO is the largest potato company in the world. AR 484 at 2. For nearly 50 years, the company has been expanding irrigated potato farming in the Pineland Sands region. AR 484 at 2, n. 5. In the nineties, RDO spent \$25 million to double production capacity at its Park Rapids potato processing facility. AR 484 at 2, 9. As of 2016, DNR acknowledged that RDO had 168 irrigation permits formally registered to the company and at least an additional 40 irrigation permits known to be connected to the company through leases and other agreements. AR 484 at 3, n. 8, 25. In 2018, DNR noted that RDO's permits cover "almost half of the total groundwater appropriation volume from the Pineland Sands aquifer." AR 62 at DNR00996.

[This part intentionally blank.]

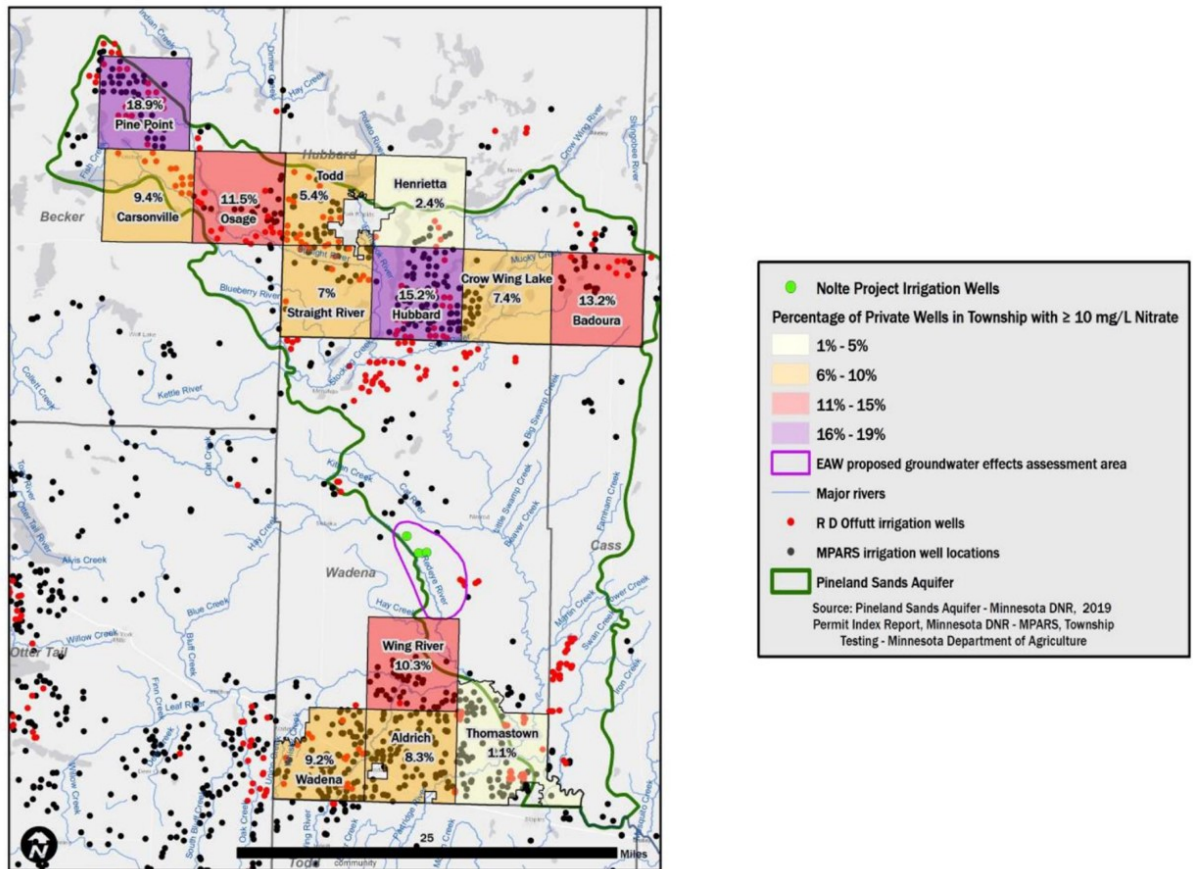


**Figure 1:** EWG Map Showing Currently Known Extent of RDO Irrigation Wells in the Pineland Sands and Directly Adjacent Area. AR 484 at 25.

RDO's expansion has left devastated private wells, forests and rivers in its wake.

AR 484 at 12, 28; AR 349 at DNR06253, DNR06256, DNR06259, DNR06268.

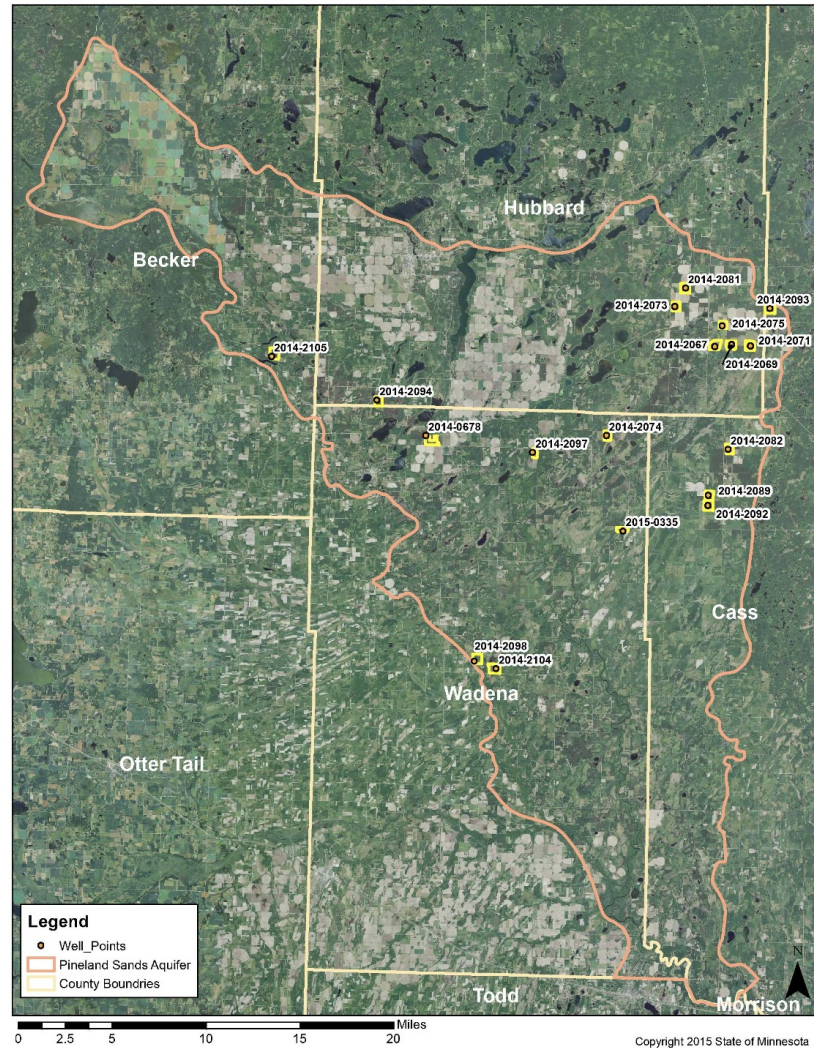
[This part intentionally blank.]



**Figure 2:** EWG Map of Pineland Sands and Adjacent Area Showing Known RDO Irrigation Wells in Townships with Private Drinking Water Wells That Exceed the Safe Drinking Water Act Limit of 10 mg/L Nitrate. AR 484 at 28.

[This part intentionally blank.]





**Figure 3:**DNR Map Showing Cumulative Deforestation Effects Associated with Irrigation Wells Shown in Figure 1 and showing RDO’s Downsized (18-permit) Irrigation Application Package From 2015. AR 257.

The groundwater-fed Straight River is now contaminated with nitrate at levels 100 times higher than streams in areas with intact forest cover. AR 349 at 7. Additionally, communities have incurred substantial economic hardship in addressing nitrate contamination associated with increased irrigated farming in the Pineland Sands. AR 484 at 3-4 n. 10-11.

## **2. RDO's Environmental Review Evasion**

RDO leases or swaps farmland to avoid environmental review. AR 484 at 2, n. 7. DNR has advised and aided the company in doing so. AR 375, Attachment E, 3-4. RDO has a well-documented track record:

- In the early 90s, RDO lied to the Minnesota Environmental Quality Board when it tried to conduct environmental review of the Park Rapids potato processing plant and associated irrigated potato farming expansions. AR 484 2-3, n. 8; 6-17.
- In 1995, to avoid environmental review, RDO cancelled one of its first leased 97-acre irrigation projects after the Minnesota Court of Appeals ordered an EIS. *Id.*
- In 2012, RDO struck a deal with DNR to participate in the Byron Township Nitrate Study and evaded environmental review for seven irrigation permits to irrigate 1,459 acres on its Winnemucca Farm site. *Id.*
- In 2015, RDO temporarily struck a second deal with DNR, phased its permit applications and sidestepped environmental review of 21 irrigation permit and 33 preliminary well assessment applications to convert 7,000 acres of pine forest to irrigated farmland. *Id.*
- In 2018, RDO submitted a request for three new irrigation permits and four permit expansions but pulled all three new permit applications after receiving notice that DNR intended to conduct environmental review. *Id.*

## **3. RDO's Deal With Project Proposer Tim Nolte to Continue Implementation of RDO's 2015 Phased Expansion Action**

In negotiations with DNR in 2015, RDO agreed to *temporarily* scale back its permit applications from 54 to 2 and *temporarily* support a regional study. AR 484 at 13-15. In exchange, DNR did not require environmental review. AR 484 at 13-15; AR 82.

After RDO struck its deal with DNR, on May 1, 2017, the company entered into a “contract for deed” arrangement with Tim Nolte, listed as proposer on the Project’s EAW. AR 203 at ¶ 21 (e); AR 484 at 3, n. 9. RDO agreed to “sell” the Project site, including the previously cleared land and drilled irrigation wells, to Nolte for \$1.13 million on condition that Nolte resubmit three of RDO’s 2015 applications and lease the land back



to RDO for potato farming. AR 203 at ¶ 21 (e); AR 484 at 3, n. 9. In 2017, as directed by RDO, and while RDO still legally owned the property, Nolte resubmitted RDO's 2015 applications. AR 203; 206; 210; 212; 798; 804; 811.

#### **4. DNR's Abbreviated Investigation of Project Proposer-RDO Relationship**

Prior to and during environmental review, DNR briefly investigated Nolte's legal property interest. In December 2018, DNR drafted a letter to Mr. Nolte noting significant problems regarding property ownership including property tax payments, recording issues, and a lacking recordable interest in property. AR 206. Similarly, on May 23, 2019, DNR's general counsel, Sherry Enzler, responded to an email from RDO's outside counsel on which RDO's in-house counsel had been copied. Enzler reiterated property ownership concerns and stated that DNR awaited a site-specific nitrate management plan. She also stated that as late as April 11, 2019, Nolte had told DNR officials that he planned to lease the Project site to RDO for irrigated potato production. AR 204; 210.

#### **5. Current RDO-Project Proposer Relationship**

Amid scrutiny, RDO and Nolte removed the potato lease provision in their "contract for deed" and Nolte told DNR he would buy the property "outright". AR 208; AR 484 at 3, n. 9; AR 209.

In contrast to his repeated previous statements to DNR, Nolte currently maintains that he has no agreement to sell potatoes or rent land to RDO for potato production. AR 711 at 18; AR 210 at 2; AR 629 at DNRAMEND20224, cmt 87a. However, the deed Nolte provided DNR as proof of outright ownership is stamped "Returned to R.D. Offutt

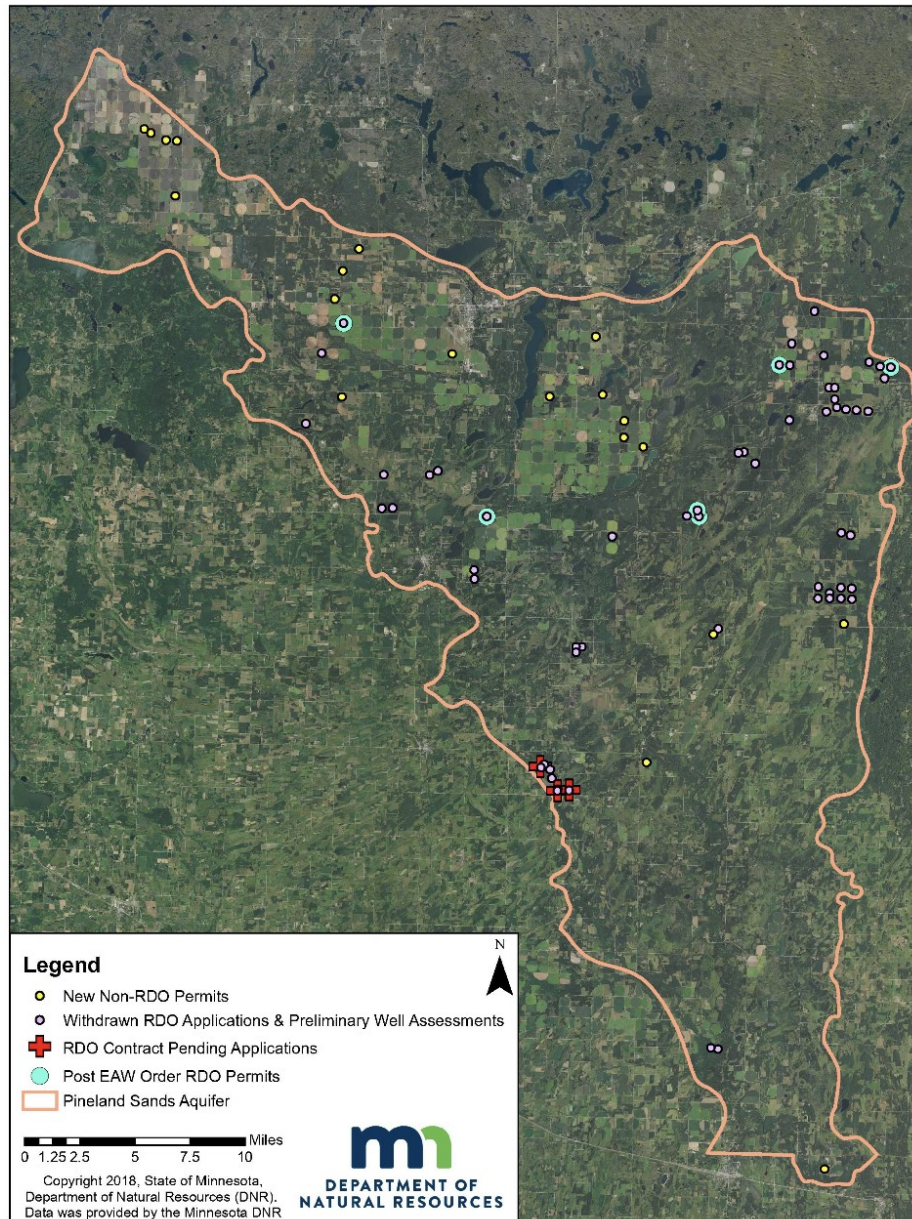
Farms” and Nolte also stated, in response to agency inquiry regarding his relationship with RDO, that what he does on his farm is “none of anyone’s business.” AR 666.

The record also reflects significant economic pressure to work with RDO. According to DNR, potatoes are valued at \$4,000 per acre, making them 8 times more profitable than corn (\$524 per acre), 14 times more profitable than wheat (\$292 per acre) and 9 times more profitable than soybeans (\$428 per acre). AR 432 at DNR08074.

#### **6. DNR’s Rolling Approval of Additional Related Segments of RDO’s 2015 Phased Expansion Action**

Since its initial approvals in 2015, DNR has issued RDO five additional permits and allowed one permit amendment. AR 64. Moreover, since 2014, DNR has approved 108 RDO permit actions in total. AR 90.

[This part intentionally blank.]



**Figure 4:** DNR Map From 2018 Showing RDO 2015 Irrigation Application Package (54 Applications Encompassing 7,000 Acres of Deforestation) and New Permits Approved Without Environmental Review Since DNR Rescinded its 2015 EAW Order for RDO's Proposed Expansion. AR 250.

DNR noted in 2018:

After the initial discretionary EAW orders in 2015, RDO reduced the size of its proposed conversion and water appropriation to avoid being subject to an EAW. Since those orders were vacated, RDO's conversions and requests for water appropriations have continued in much smaller numbers

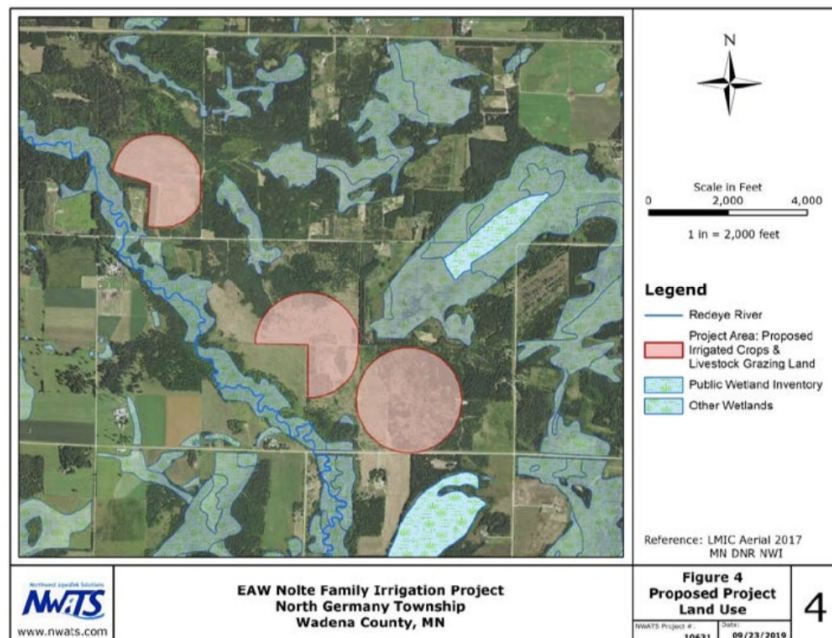
and over a larger time span. The environmental concerns that led to the initial EAW orders have not been addressed. While the number and pace of conversions and new water appropriations have been reduced, extended over a longer period of time, these changes could eventually result in the same environmental effects as the initial 2015 RDO project would have produced. AR 62.

Several DNR memos from 2018 also indicate DNR's desire to not focus environmental review on RDO. AR 103; 105-109.

## C. The 303-acre Nolte Project Site

### 1. Surrounding Water Resources and Residential Wells

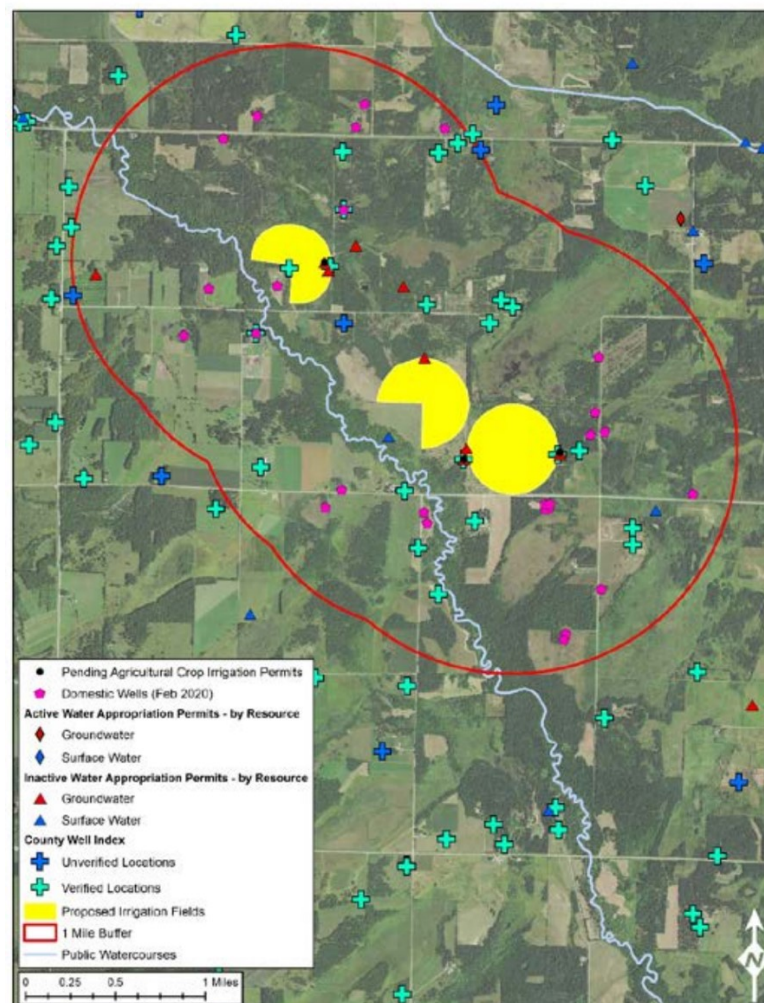
The Project includes 3 of RDO's 54 previously submitted irrigation applications and entails conversion of 303 acres of formerly forested land to irrigated crop production. AR 374 at 3; AR 489. The Redeye River public watercourse and hundreds of acres of wetlands encircle the Project site (See Figure 5). AR 374.



**Figure 5:** Map Showing 225 Acres of Wetlands, Including Public Water Wetlands and Wetland Conservation Act Wetlands, and Redeye River Public Watercourse Adjacent to and Within a Quarter Mile of Project Site Irrigation Areas. AR 374 at 7.



The three Project irrigation wells will be permitted to pump up to approximately 100 million gallons per year from two leaky aquifers. AR 753 at 3. In some places, the leaky aquifers are directly connected to the shallow drinking water aquifer. AR 753 at 1. The shallow drinking water aquifer in turn feeds the Redeye River and area wetlands and provides water for local residential wells. AR 753 at 7.



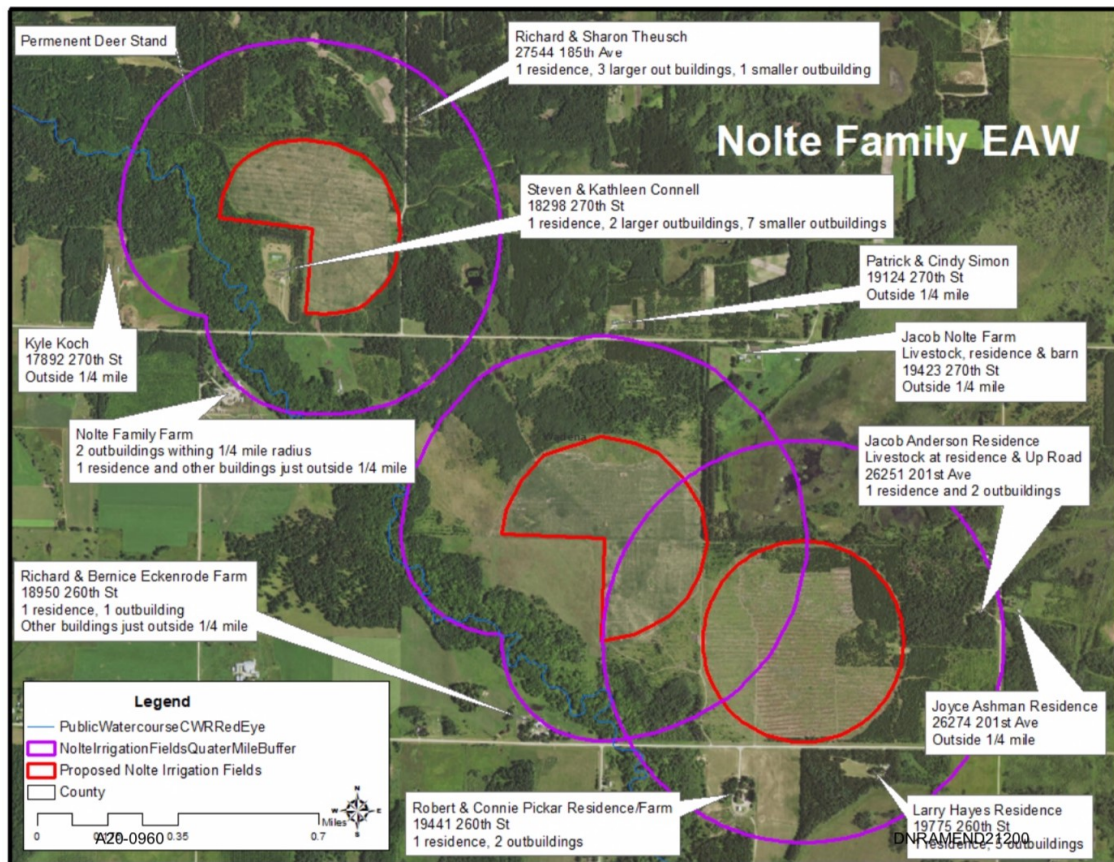
**Figure 6:** Map Showing High Density of Residential Wells Within One Mile of Project Irrigation Sites. The 23 Wells Not in the Minnesota Well Index Require Additional Evaluation of Well Location, Depth and Age to Assess Risk from the Project. AR 374 at 22.

The Project will likely use crop dusting and chemigation methods as well as soil fumigation, prone to pesticide drift, to apply pesticides (herbicides, insecticides, fungicides) next to homes and surface water resources. AR 131 at 19, 23, 27-29; AR 374 at 7, 22; AR 375 at Attachment D; AR 482 at DNR08322-DNR08324; AR 484 at 47.

The Project will also apply hundreds of pounds of commercial nitrate fertilizer per acre to highly permeable soils overlying extremely shallow groundwater used for drinking water. AR 484 at 1, n. 2; AR 497 at 13, 15-18; AR 498; AR 510. Sandy, porous soils cover 99.7% of the Project site and groundwater sits just 2-3 feet below the surface. AR 374 at 16; AR 497 at 13. Nolte will also apply 1.4 million pounds of cattle manure annually, adding an additional 14,440 pounds of nitrogen. AR 374 at 19; AR 486 at DNR08388.

## **2. Neighbors Impacted by the Project**

A neighboring organic farming operation and homestead (noted in Figure 7 below as “Steven and Kathleen Connell”) lies directly within the Project’s northern irrigation crop circle. The farm has provided vegetables for local markets for years. AR 787 at DNRAMEND20014 (citing Josephine Marcotty, *Minnesota Struggles to Slow Deforestation, Protect Water*, Star Tribune (Feb. 1, 2015)).



**Figure 7:** Map Showing Directly Adjacent Organic Farm and Other Residential Homesteads Within or Just Outside a Quarter Mile Area Surrounding the Project Irrigation Sites. AR 657.

## D. The Environmental Review Process

### 1. EQB Receives Citizen's Petition, Assigns to DNR, DNR Orders EAW

On June 24, 2019, DNR received Relators' citizen's petition requesting an EAW for Nolte and RDO's continued potato field expansion, land conversion and chemical application. AR 789 at ¶ 25. DNR approved and ordered an EAW on August 29, 2019. AR 789.

In its EAW order, DNR separated the Project from RDO. AR 789 at 12 ¶ 1-3. Instead of analyzing the Project's connection to RDO's proposed 2015 expansion action,

the agency based its decision on a previous decision to deny environmental review of 4 RDO permit amendment requests in 2018. AR 789 at 12 ¶ 1-3.

After ordering the EAW, DNR also decided to further limit the geographical and historical scope of EAW review and limit discussion of RDO's 2015 proposed expansion action to an attachment. AR 218; AR 375, Attachment E at 3-5. In doing so, DNR eliminated consideration of 98% of the Pineland Sands Area. AR 484.

## **2. DNR's Partial Data Collection from Nolte**

### **i. Nolte's First Data Submittal**

On October 31, 2019, Nolte submitted a draft EAW document to the DNR. The draft: 1) omitted his plan to grow potatoes; 2) included an inapplicable aquifer test to support a claim of "minimal to nonexistent" domestic well interference impacts; 3) claimed zero anticipated depletion or pollution impacts to wetlands and the Redeye River; 4) ignored neighboring residences and associated threats to drinking water and air quality; and 5) referenced conservation practices/mitigation measures used on Nolte's existing dryland haying and grazing operation. AR 1 at 12, 15-17, 24-25; AR 4 at DNR00058, DNR00060-DNR00062.

On December 2, 2019, DNR sent a letter to Nolte's consultants indicating that the data submittal was incomplete. AR 18; AR 19. DNR and a few PCA experts noted missing information including:

General missing information:

- Failure to identify the Redeye River as a public watercourse
- Failure to discuss relevant watershed reports
- Failure to identify a full crop rotation, including potatoes



Potential groundwater and surface water quality impacts:

- Failure to identify water quality impacts from pesticide and nitrogen use
- Lack of information on nitrate fertilizer retention in permeable soils
- Lack of information on nitrate leaching to groundwater
- Regarding manure, failure to identify number of cattle, timing of application, method of application, nitrogen content
- Lack of information on pesticide use, including neonicotinoids, chemigation and potential contamination of groundwater

Potential habitat and species impacts:

- Lack of information on potential for pesticide overspray, drift and volatilization and associated impacts to imperiled jack pines and pollinators

Potential air pollution impacts:

- Lack of information on potential for soil and chemical drift onto residences
- Missing information on distance to sensitive receptors

Potential residential well impacts:

- Missing domestic well information
- Lack of information on potential pollution and depletion risks

Irrelevant mitigation measures/ BMPs:

- Submittal of irrelevant BMP information for the proposer's haying and grazing operation in lieu of site-specific BMPs for proposed irrigation operation

AR 19.

In addition to the above comments, DNR hydrogeologist, Michelle Walker, also submitted eight comments on the need for a site-specific aquifer pump test to:

- Evaluate risk from pumping each proposed irrigation well separately and concurrently

- Determine leakage between the shallow, drinking water aquifer and deep aquifers to be pumped for irrigation
- Determine drawdown impacts on the shallow, drinking water aquifer from pumping deep aquifers
- Determine depletion impacts to the Redeye River and wetlands from pumping deep aquifers

AR 19.

Ms. Walker repeatedly recommended in her comments that an aquifer pump test be completed as part of an EAW. Ms. Walker eventually deferred to the DNR's environmental review staff on testing. AR 793. Ultimately, DNR officials Jill Townley and Ellen Considine indicated to Nolte that an aquifer test would not be required as part of the EAW process. AR 21-22.

## **ii. Nolte's Second Data Submittal**

On December 21, 2019, Nolte consultants submitted partial responses to DNR's requests for more Project information. AR 24. They indicated, *inter alia*:

- The fifth-year crop on the Project site would be potatoes or edible beans (C11)
- Nolte has 8 bee sites on his existing dryland haying and grazing operation (C50)
- Nolte has a manure management plan covering his existing dryland haying and grazing operation (C15)
- Nolte plans to graze varying numbers of his 600-cow herd at the new irrigated Project site (C23, C31)
- Nolte's new irrigated Project site would protect water quality because Nolte has a MDA water quality certification (C39)
- Nolte expects to use BMPs and soil health practices to help protect water quality (C40)
- Nolte expects to apply the minimum recommended pesticides (C40)
- Nolte has a well-known conservation ethic (C39)
- Nolte plans to use Poncho 250 neonicotinoid insecticide-treated corn seed (C40)

AR 24.

Nolte consultants also bypassed certain questions or provided useless information. With the exception of Poncho 250 neonicotinoid treated corn seed, they did not identify pesticide type, quantity, rate or application method. AR 24. They included an erroneous RDO aquifer test. AR 26. They provided a 1-page irrigation conservation plan but failed to provide copies of site-specific manure or nitrogen management plans. AR 28. The consultants also provided Nolte's MDA water quality certification agreement, which erroneously identifies the wrong crops and operation. AR 4 at DNR00060.

DNR's internal record of responses to Nolte's second data submittal is brief and lacks follow-up regarding incomplete responses. AR 30. Despite several unanswered questions, on January 21, 2020, DNR sent Nolte a drastically reduced second request for additional information. AR 33. The agency requested, *inter alia*:

- More information on manure application
- Location of sensitive receptors
- Nolte's grazing plan
- Domestic well information
- Pesticide and fertilizer use, in particular, planned chlorothalonil use

AR 33.

### **iii. Nolte's Third Data Submittal**

In response to DNR's second round of questions, Nolte:

- Submitted a map covering four structures within 1,000 feet of the Project (AR 45)
- Submitted a domestic well map (AR 46)
- Reiterated the existence of, but did not provide, a grazing plan for the Project site (C31)
- Referenced county-level and statewide studies on groundwater recharge (C34, 38)
- Provided a list of hundreds of pesticide products registered for use in Minnesota (AR 43-44)

On February 25, 2020, having gained very little additional information, DNR deemed Nolte's EAW data submittal complete. AR 57. The internal agency spreadsheet used to track responses reflects a single substantive comment on Nolte's third data submittal. AR 53.

### **3. DNR's Interagency Meetings on Cumulative Effects**

DNR held six, brief interagency meetings to discuss how to narrow the scope of the EAW cumulative effects analysis. AR 363-371. The meetings' nearly exclusive focus on drawing geographic boundaries for the EAW cumulative effects analysis shifted from the unfinished EAW assessment of site-specific and local environmental effects started during the data submittal process. AR 19; 23; 30; 53; 363-371.

Two presentations during the meetings showed that shallow and deep aquifers near the Straight River "act like one aquifer" although they are considered separate. AR 263 at DNR04653; AR 270 at DNR05593; AR 369. Handwritten scrawl also outlines a limited discussion of how to assess potential cumulative air quality effects. AR 372 at DNR06774, DNR06777, DNR06780, DNR06788. Notes also state that DNR has previously required aquifer tests during environmental review. AR 372 at DNR06764, DNR06769, DNR06797.

### **4. DNR's Partial Aquifer Pump Test**

On March 18, 2020, DNR sent final aquifer pump test design specifications to Nolte, which Nolte requested in January, and reiterated testing was not required as part of the EAW. AR 128; AR172. DNR's design specifications required only that Nolte pump a single Project well and did not require gauging of surface water resources. AR 172 at 2;

AR 753 at 7. Absent a deadline from DNR, Nolte consultants elected to begin the test approximately one week before DNR published the EAW. AR 178 at DNR03743; AR 647 at DNRAMEND21095.

## **5. DNR's First Draft EAW for Interagency Review**

DNR circulated two draft EAW documents. AR 157; 188. On March 4, 2020, Jill Townley circulated the first EAW draft to agency officials with a note stating, “[t]his document is a very rough draft. Due to tight time constraints, there are still sections that are under development by DNR.” AR 153. DNR gave recipients 1.5 weeks to comment. AR 147; 153.

### **i. MDH, PCA and DNR Comments on First Draft EAW**

MDH identified several potentially significant air, water and public health effects related to pesticide use from the proposed Project. MDH employee, Deanna Scher, noted, “[i]f they will be growing potatoes, they will be applying fungicides.” AR 131 at 23. Ms. Scher further noted that some pesticides pose greater drift risks and risk will be magnified with aerial application. AR 131 at 28. Ms. Scher also highlighted the unique volatilization risks from fumigants and California’s recommended quarter mile buffer. AR 131 at 28. Ms. Scher further raised specific drift concerns related to chlorpyrifos and chlorothalonil use, noting higher inhalation toxicity. AR 131 at 29. Regarding neonicotinoids, MDH noted that Poncho 250 can leach to groundwater and more information is needed about pesticide treatment of potato seed pieces. AR 131 at 23. Ms. Scher also commented that nitrate and pesticide movement should be considered separately, because they vary in

their leaching abilities and movement in surface water. AR 226 at DNR04405, cmt. 14; AR 226 at DNR04405, cmt. 15.

DNR officials echoed concerns regarding unaddressed potential effects of pesticide use, questioning whether the EAW needed to be more specific about pesticide use, aggregation and potential risks and recommending inclusion of a list of chemicals to be used at the site. AR 131 at 27-29; AR 222 at DNR04377; AR 224 at DNR04401. A DNR official also pointed out that MDA water quality certification<sup>2</sup> does not ensure site-specific protections against nitrate and pesticide contamination, but rather assures the use of BMPs expected generally to help protect water resources. AR 131 at 10.

PCA also recommended the EAW include a paragraph regarding nitrate surface water contamination in the Straight River from the agency's draft report. AR 181 at 14; AR 348; AR 349 at DNR06268.

MDH noted potentially significant decline or contamination of nearby wells and potential depletion of wetland and the river. AR 226 at DNR04405, cmt. 1. PCA questioned whether the pump test would actually determine impacts to nearby surface water resources, questioned whether DNR had given the consultant any direction and suggested including test specifications in the EAW. AR 131 at 22, 24.

## **6. DNR Final Draft EAW for Interagency Review**

On March 29, 2020, DNR emailed agency staff. Citing COVID delays and “the complexity of [the] EAW”, DNR stated that reviewers would now only have 1.5 days to

---

<sup>2</sup><https://www.mda.state.mn.us/environment-sustainability/minnesota-agricultural-water-quality-certification-program>

conduct a final review of pesticide, nitrate, geology and water EAW sections. AR 187 at DNR03823. DNR further indicated that it aimed “to resolve all agency concerns pre-publication ..... (Skype preferred over email)” and only “action-oriented comments” would be accepted because “[t]he time for consideration has passed ...” AR 187 at DNR03822-DNR03824.

MDA submitted no comments on the final draft of the EAW. AR 192. Two DNR officials submitted organizational comments. AR 195 at DNR04226; AR 199 at DNR04252. One PCA official emailed regarding tree stump removal. AR 197 at DNR04246. MDH’s comments were limited to a handful of minor corrections. AR 193.

## **7. The EAW**

On April 6, 2020, the EQB published DNR’s EAW in the EQB register. AR 381. Public comment ran from April 6 - May 6, 2020. AR 381. Among other areas, the EAW addresses pesticides, water quality and water quantity.

### **i. Pesticides**

The EAW provides a high-level overview of pesticide chemistry, pesticide exposure pathways and general pesticide BMPs spread throughout Section 11(b)(iv)(2), Section 12(c)), Section 13(c),(d)) and Section 16(c). General pesticide BMPs mentioned in the EAW include application in accordance with label requirements and material safety data sheets, water quality BMPs, seed treatment BMPs and standard-level integrated pest management. The EAW lists hundreds of pesticides registered for use in Minnesota. AR 374 at 27, 29, 32, 34-35; 375 at Attachment D. After stating that Poncho 250 is highly toxic to pollinators and aquatic invertebrates, the EAW contains only two additional

sentences discussing potential effects in Sections 12 (c), 13 (c) and 16(c). AR 374 at 29, 30, 32, 34. The EAW includes one paragraph noting that MDA has detected 45 pesticides or breakdown products at 40 monitoring sites throughout Wadena and neighboring counties but fails to discuss 26 pesticide drift complaints.<sup>3</sup> AR 110; AR 374 at 27. Finally, based on an erroneous assessment that there are zero residences within ¼ mile, the EAW identifies a “low/negligible” human health risk from chemical drift. AR 374 at 35.

## **ii. Water Quality**

Maps included in the EAW show over 500 acres of wetlands within a ½ mile radius and over 200 acres of wetlands within a ¼ mile radius of Project irrigation fields, including public waters. AR 374 at 6-7, 19. However, the EAW does not discuss potential drift, contamination or depletion effects to water resources. AR 374.

The EAW notes that the Minnesota Public Well Index identifies fourteen domestic wells within one mile of the Project and notes an additional 23 domestic wells identified through survey. AR 374 at 21. However, the EAW provides no assessment of potential depletion or contamination effects to surrounding residential wells. AR 374.

The EAW mentions but fails to accurately incorporate and discuss applicable watershed reports and omits, save an attachment reference, assessment of severe nitrate

---

<sup>3</sup> From 2009-2014, in Wadena and neighboring counties there were: 15 investigations of pesticide drift complaints, 10 financial penalties to application companies and 1 non-financial penalty. And from 2015-2017 there were: 11 pesticide misuse complaints, field investigations of 7 out of 11 complaints and 2 warning letters and no financial penalties. AR 110.



contamination in the Straight River. AR 374 at 27, 28; AR 611; AR 374, Attachment E at 12.

The EAW water resources section also identifies general BMPs included in Nolte's MDA water certification agreement and cross references general soil health principles. AR 374 at 18, 27, 28. Although DNR received five copies of the SWCD's irrigation conservation plan, the EAW does not address it. AR 15; AR 28; AR 37; AR 48; AR 50; AR 374. DNR also failed to incorporate or discuss a site-specific nitrate management plan, manure management plan or draft permit mitigation measures. AR 374.

### **iii. Water Quantity**

The EAW accurately states that an aquifer pump test is necessary to assess potentially significant water depletion impacts to residential wells, wetlands and the Redeye River. AR 374 at 25, 26, 27. However, the EAW erroneously misstates seven times the nature and scope of the aquifer pump test that DNR designed for the Project. AR 172; AR 374 at 25-27, 30; AR 484 at 43-45. Read together, misstatements regarding an aquifer pump test in the EAW misleadingly provide that all three wells would be pumped and monitored during the permitting application process so that potentially significant effects could be determined before DNR issued permits for continuous pumping. AR 374 at 25-27, 30.

## **8. Comments on the EAW**

After DNR issued the EAW, the agency began accepting public comments. Out of 98 comments, DNR deemed 77 to be non-substantive. AR 426-627; AR 711 at 3, ¶ 17. Neither MDH nor MDA submitted comments. AR 426-627.

#### **i. PCA's EAW Comment**

PCA submitted a comment providing significant corrections and noting concerns. AR 611. Specifically, PCA noted: 1) the Watershed Restoration and Protection Strategies (WRAPS) Report for the Redeye River found dissolved oxygen fails to meet water quality standards in some reaches; 2) changing perennial vegetation (i.e. forest cover) to agricultural land use is a primary resource concern; and 3) elevated levels of chlorothalonil and chlorpyrifos have been documented in pollinator combs up to several miles away from farms in Central Minnesota. AR 611.

PCA did not dismiss potentially significant local groundwater quality, surface water quantity or residential well concerns. Instead, the agency issued a qualified statement regarding the limited potential for significant *cumulative* impacts to surface water quality within DNR's newly defined cumulative effects boundary. AR 611.

#### **ii. Relators' EAW Comments**

Relators' comments echoed agency concerns regarding potentially significant effects discussed during preparation of the EAW and previous environmental reviews of irrigation projects in the Pineland Sands. AR 19; AR 30; AR 53; AR 484 at 7-8, 10-11, 26-27, 38-40; AR 497.

#### **1. Local Water Quantity Effects to the Redeye River and Wetlands**

In an expert report, Dr. George Kraft, stated the EAW“...fails to provide any meaningful discussion of the likely impacts of pumping on water levels and streamflows ...”. AR 486 at DNR08386.

Minnesota Licensed Geologist, Jeff Broberg, elaborated on specific additional information needed to assess local water quantity risks, noting that the Wadena County Geologic Atlas maps are not appropriate for field-scale analysis. AR 497 at 12. Broberg concluded that DNR had insufficient information to answer the basic question of whether pumped aquifers are being mined or are going to start sucking water from the shallow drinking water aquifer. AR 497 at 13.

## **2. Local Water Quality and Quantity Impacts to Residential Wells**

Broberg noted the surprisingly “high density of wells in this sparsely populated region” surrounding the Project. AR 497 at 25. He also pointed out that “little information exists about half the wells [identified in the EAW]” because they are not listed in the County Well Index. AR 497 at 25. Broberg concluded that without additional information regarding the 23 wells not identified in the County Well Index, it is impossible to determine the depletion risk and public health threat. AR 497 at 25. Broberg concluded that without additional testing to identify recharge characteristics, there is “significant risk of well interference within a mile or more.”AR 497 at 26.

## **3. Local Nitrate Fertilizer and Pesticide Groundwater Contamination**

Dr. Kraft noted that “[t]he EAW lacks any evaluation of the potentially significant nitrate loads to groundwater and surface water.” AR 486 at DNR08387. Based on a thoroughly laid out site-specific assessment, Dr. Kraft concluded that:

With the strictest adherence to minimum University of Minnesota fertilization recommendations, and ignoring manure and plowdown losses of alfalfa-fescue N and supplemental nitrate applications after heavy rainfall, **the proposed rotation will likely still have a  $N_{load}$  double to quadruple the  $N_{load}$  consistent with keeping nitrate-N levels in groundwater below the Safe Drinking Water Act limit of 10 mg/L.**(emphasis added).

AR 486 at DNR08389.

Elaborating further on potential nitrate water contamination, Dr. Kraft noted that site-specific manure assessment is needed because manure may add more nitrate to groundwater than commercial fertilizer depending on timing of application. AR 486 at DNR08388.

Broberg cited and discussed recent scientific studies supporting Dr. Kraft’s assessment of the potentially significant nitrate groundwater contamination. AR 497 at 21-24.

#### **4. Insufficient Mitigation Measures/ BMPs**

In his report, Dr. Kraft stated that it is “empirically faulty” to assume that DNR’s proposed general BMPs will prevent unsafe nitrate leaching. AR 486 at DNR08389.

Broberg, citing relevant studies of irrigated row crop operations on sandy soils, commented that “even with nitrogen BMP’s and good feedlot/pasture management the groundwater becomes irreversibly contaminated with nitrate.”AR 497 at 21. Broberg specifically noted that cover crops provide “a short-term ephemeral benefit that does not

protect the groundwater over years of farming.” AR 497 at 21. Citing additional studies, Broberg noted that “the beneficial effects of perennials [are] negated following just 1 to 2 years of corn.” AR 497 at 22. And he concluded that the data shows “unhealthy contamination occurs in a short time in shallow aquifers” and there is “an irreversible impact on groundwater quality with continued cropping.” AR 497 at 22.

### **5. MDA’s Pineland Sands Byron Township Study**

Relators specifically requested that DNR address MDA’s own 2020 Byron Township Study of nitrate contamination beneath irrigated row crops in the Pineland Sands. AR 669. Broberg noted that the study shows “the significant environmental effects of a single center pivot irrigation system,” reflecting contamination substantially above the Safe Drinking Water Act limit even under close crop supervision. AR 497 at 27. Broberg discussed how the MDA study showed offsite contamination migration and identified that “nitrate migration in groundwater beneath a single center pivot field could be discharging hundreds to thousands of acre feet of nitrate contaminated groundwater.” AR 497 at 27. Finally, Broberg pointed out that MDA’s study showed that the BMPs used resulted in “a negative net [economic] return in five out of six years.” AR 497 at 27.

EWG also noted that nitrate contamination effects from the Project would likely be worse than those measured in MDA’s study because the study did not monitor groundwater beneath irrigated potatoes, which are substantially more nitrate intensive. AR 484 at 19.

### **6. Pesticide Drift Impacts on Neighbors**

Toxic Taters Coalition and Pesticide Action Network (PAN) commented extensively on potentially significant and unsafe local pesticide drift effects from the Project, citing PAN's 2012 study of pesticide drift in the Pineland Sands. AR 482 at DNR08322. Relators noted studies showing significant drift incidents occurring between 300 feet to 1 mile away from application sites and also noted problematic application methods including chemigation and soil fumigants. AR 482 at DNR08322- DNR08323. Finally, Relators pointed out that DNR had erroneously assessed a "low/negligible" risk of pesticide drift to surrounding residences, because the agency completely ignored several residential buildings surrounding the Project site. AR 482 at DNR08324.

## **7. Neonicotinoid Effects on Water Resources and Pollinators**

Dr. George Kraft also commented on potential neonicotinoid water contamination and associated threats to aquatic and terrestrial invertebrates. AR 486 at DNR08389.

## **9. DNR's ROD Drafting**

After DNR received comments, it began internally preparing the ROD. In an internal comment document, DNR states that "[Nolte] admitted potential of future leasing" but then notes that if Nolte says he does not have a "formal side agreement or letters with RDO to lease land" the relationship with RDO may be "too speculative." AR 629 at DNRAMEND20224, cmt. 87a. Follow-up email correspondence between Nolte and MDA reflect that Nolte provided two responses regarding his relationship to RDO. AR 666.

Respecting potential residential well contamination, Ms. Walker stated, "[w]e do not know whether nearby wells are at risk of nitrate or pesticide contamination

specifically from the proposer's use." AR 629 at DNRAMEND20223, cmt. 84 d. DNR official Steve Colvin later commented on the high risk to several domestic wells and potential inability to mitigate effects to the same. AR 757 at DNR10199, DNR10211.

Regarding comments on regional manure impacts and nitrate groundwater contamination mitigation, DNR notes that it needs sources to support its claims. AR 629 at DNRAMEND20223-DNRAMEND20224, cmt 85a, 85b, 85e. Concerning the MDA Byron Study, DNR states, "[w]e need something from MDA (data, in writing) that confirm that nitrate concentrations have notably reduced." AR 629 at DNRAMEND20223.

Ms. Townley questioned whether there would be an increase in pesticide use due to the proposed crops. AR 752 at DNR10024. And, in email response to DNR questions about the EAW's erroneous pesticide drift analysis, MDH notes it will "scrap the ¼ mile thing altogether." AR 680. In response to DNR's suggestion that the ROD dismiss association between Wadena County's elevated cancer rates and pesticide use, MDH agreed to *exclude* references to "several studies and meta-analyses [finding] associations between pesticide exposure and non-Hodgkin's lymphoma." AR 698.

After DNR staff incorporated a summary of the aquifer test results into the ROD, DNR Environmental Review Unit Supervisor, Jill Townley commented on the internal draft:

What might these results tell us about water quality? ...

What can be done about [the high risk to several nearby domestic wells]?  
How many wells? ...

What might we be able to say about impacts to redeye or wetlands? ...

So there is a potential of just issuing permit without knowing potential impacts?

AR 752 at DNR10016-DNR10017.

Commenting on the pump test's failure to evaluate impacts to wetlands and the river, the Assistant Commissioner, stated, "I think we need to say why it wasn't done" and "... some will argue this is justification to order an EIS...." AR 761 at DNR10348. General Counsel responded, "[w]e have done this on numerous occasions when we are not clear about what the impact might be to fens or wetlands." AR 761 at DNR10351. General Counsel repeatedly asserts the need to show reasonable certainty with respect to mitigation." AR 761 at DNR10348. Assistant Commissioner Richards also noted the need to cite "specific nitrate plans." AR 761 at DNR10364.

## **10. ROD Content**

On June 18<sup>th</sup>, 2020, DNR issued its ROD and Negative Declaration. AR 711. Based on findings of fact outlined below, DNR concluded that water resource, contamination, wildlife/ habitat and air effects from the project will be "limited in extent, temporary, or reversible" and "ongoing public regulatory authority and specific measures identified [] can be expected to effectively address [water resources, contamination and air] effects." AR 711 at DNR09471-DNR09473.

### **i. Phased Action**

The ROD states the Project is not associated with RDO's expansion action based solely on representations from Nolte and DNR's inapt 2018 environmental review decision. AR 711 at 1-2, 14-15, 18.



## **ii. Water Quality**

In Section 31 on water quality, DNR does not address potential local effects to wells, wetlands or the Redeye River. AR 711 at 19-22. Instead, it cites references used for drawing cumulative effects boundaries, notes the primacy of other agencies, discusses the lack of available monitoring data, generally references the Groundwater Protection Rule, and references Nolte's Water Quality Certification. AR 711 at 19-22. The section also states the potential for nitrate and pesticide contamination to "originate beneath the cropped project site and [] migrate offsite. AR 711 at 21.

## **iii. Mitigation**

In Section 28, DNR states that BMPs included in Nolte's MDA water quality certification agreement are reasonably certain to occur. AR 711 at 17-18. DNR states nitrate groundwater contamination lower than that measured in MDA's Byron study has been recorded. AR 711 at 18. DNR generally references EPA pesticide evaluation and MDA BMPs. AR 711 at 18. DNR concludes Section 28 by noting that the irrigation conservation plan contains "options and recommendations" and does not discuss site-specific manure or nitrate management plans. AR 711 at 18.

## **iv. Water Quantity/Aquifer Test**

In Section 22, DNR lists potentially significant local water quantity effects including: 1) potential for "moderate" impacts to the Redeye River (AR 711 at 7); 2) unknown risks to Redeye River and wetlands from pumping the northern well (AR 711 at 7); 3) "high risk" of well interference for several nearby domestic wells from pumping one or more wells (AR 711 at 5); 4) insufficient data to determine risk of interference

with additional residential wells (AR 711 at 8); and 5) zero information to help evaluate the risk to 11 domestic wells. (AR 711 at 6). Section 22 recommends several general permit conditions. AR 711 at 6.

#### **v. Pesticide Drift**

DNR acknowledges in Section 27 the comment that DNR wholly ignored several residences in determining a “negligible/low” risk of human health effects from pesticide drift and then reaches the same conclusion again without additional analysis. AR 711 at 16, 29. DNR falsely states that non-Hodgkin’s Lymphoma is “not associated with the use of pesticides.” AR 711 at 16.

#### **vi. Pollinators**

In response to specific pollinator concerns, DNR references the EAW’s three-sentence, non-species-specific assessment in the ROD. AR 711 at 11, 28-29.

### **11. Finding of Fact Sheets for Project Permit Applications**

Three Finding of Fact (FOF) sheets for Project permit applications state that Nolte plans to grow alfalfa, corn and soybeans. AR 213 at 1; AR 214 at 1; AR 215 at 1.

Although the fact sheets omit potatoes, they reflect an unchanged total water appropriation amount. AR 213 at 3; AR 214 at 3; AR 215 at 3. The FOF also state that DNR waived requirements that Nolte identify all residential wells within a mile and assess reasonableness of proposed irrigation. AR 213 at 2; 214 at 2; 215 at 2. All three FOF also identify at risk residential wells. AR 213 at 4; AR 214 at 4; AR 215 at 4. The FOF for the northern well states that the aquifer pump test could not be applied to the permit application and safe yield cannot be determined. AR 213 at 3-4. DNR fisheries

recommended conditional approval only if cumulative appropriations will not affect surface water resources. AR 213 at 4; AR 214 at 4; AR 215 at 4.

### STANDARD OF REVIEW

This Court reviews an agency decision to ensure that the agency has taken a “hard look” at the salient issues and has “genuinely engaged in reasoned decision-making.” *Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. Of Comm’rs*, 713 N.W.2d 817, 832 (Minn. 2006) (*CARD*). Agency decisions are reversed when “they reflect an error of law, the findings are arbitrary and capricious, or the findings are unsupported by substantial evidence.” *Id.* A decision is arbitrary and capricious if an agency a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; c) offered an explanation that runs counter to the evidence; or d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency’s expertise.” *Id.* Substantial evidence is “1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2) more than a scintilla of evidence; 3) more than ‘some evidence’; 4) more than ‘any evidence’; and 5) evidence considered in its entirety.” *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977).

This Court does not defer to agency “[i]nterpretation of statutes and rules and the application of statutes and rules to undisputed facts”, which are “questions of law that [the Court] review[s] de novo.” *In re Envtl. Assessment Worksheet for the 33rd Sale of State Metallic Leases in Aitkin*, 838 N.W.2d 212, 216 (Minn. Ct. App. 2013).

## ARGUMENT

### I. DNR'S SEPARATION OF THE PROJECT FROM RDO'S 7,000-ACRE PHASED EXPANSION ACTION VIOLATES MEPA.

In ordering the EAW and denying an EIS, DNR defined the Project as separate from RDO's 7,000-acre phased expansion action. AR 711; AR 789. DNR's separation of the Project from RDO's expansion action is unsupported by substantial evidence, arbitrary and capricious and an error of law.

This Court has declared that a project's definition is a threshold issue requiring interpretation of MEPA statute and rules and is a question of law it reviews *de novo*. *In re Minn. Power's Petition for Approval of the Energy Forward Res. Package*, 938 N.W. 2d 843, 849 (Minn. Ct. App. 2019). This Court has jointly interpreted definitions in Minn. R. 4410.0200, Subd. 65 and Minn. R. 4410.0220, Subd. 33 to define "project" for purposes of environmental review as "a definite, site-specific action that contemplates on-the-ground environmental changes, including changes in the nature of the use." *Minnesotans for Responsible Rec. v. Dep't of Natural Res.*, 651 NW 2d 533, 540 (Minn. Ct. App. 2002) (*MRR*). Whether a project is part of a larger phased action is part and parcel of the project definition analysis. *See* Guide to Minnesota Environmental Review Rules 9 (May 2010) ("Once an RGU has determined that a project exists, it must then determine how big the project is.").<sup>4</sup>

---

<sup>4</sup>May 2010 Guide to Minnesota Environmental Review Rules (2010), <https://www.eqb.state.mn.us/sites/default/files/documents/Guide%20to%20MN%20ER%20Rules-May%202010.pdf>.

MEPA requires evaluation of phased actions as a single project. Minn. R. 4410.1700, Subp. 9, Minn. R. 4410.1000, Subp. 4 (2018). MEPA regulations specifically provide the elements of a phased action: 1) two or more projects; 2) undertaken by the same proposer; 3) with environmental effects on the same geographic area; and 4) which are substantially certain to be undertaken sequentially over a limited period of time. Minn. R. 4410.0200, Subp. 60 (2020). A proposer can be a single person or a person who directs others to undertake a project. Minn. R. 4410.0200, Subp. 68 (2020).

**A. Substantial evidence does not support DNR's decision to separate the Project from RDO's 7,000-acre expansion action.**

Regarding the evidence in the record concerning the first two elements of a phased action, Relators provided in their comments, and DNR had in its possession during environmental review, substantial evidence that the Project is part of a 54-part phased action directed by RDO since 2015. AR 484 at 13-14; AR 20 at ¶ 21 (e); AR 799 at DN RAMEND21456; AR 805 at DN RAMEND21473; AR 812 at DN RAMEND21500; AR 210; AR 212. Around 2014, after earlier doubling the capacity at its potato processing facility, RDO bought nearly 7,000 acres of forestland in one large purchase and began deforesting the Project site. AR 484 at 9-10, 12-14; AR 752 at DNR10019. At around the same time, RDO submitted applications for the three Project irrigation wells simultaneously with 51 other applications, covering the 7,000-acre area that the company proposed to deforest and convert to irrigated potato production (see Figure 4). AR 484 at 13-14; AR 489 at 34.

In 2015, DNR twice ordered environmental review covering the entire Pineland Sands region for RDO's application package as a whole. AR 484 at 3, n. 8; AR 484 at 14; AR489 at 34. To avoid ordered environmental review, RDO *temporarily* whittled down its application package, eventually agreeing to *temporarily* excise 52 of its original applications, including those for the Project site. AR 484 at 3, n. 8; AR 484 at 14. When DNR approved the first two of RDO's requested irrigation permit applications, the agency deemed them a phased action. AR 484 at 16.

Unable to get the Project irrigation permits without environmental review, RDO turned around and, while still owning the Project site, directed Nolte, under a sham land sale transaction, to reapply for Project permits and lease the land back to RDO for potato farming. AR 203 at ¶ 21 (e); AR 206; AR 210; AR 212. At the same time, RDO continued to slowly reapply for additional permits (see Figure 4). AR 62 at DNR00995; AR 64; AR 90.

In DNR's own comment request on Nolte's renewed Project permits, DNR indicated that Nolte acted as agent of landowner, RDO, and DNR officials commented that the permits should be evaluated in relation to RDO's 2015 applications. AR 799 at DNRAMEND21456; AR 805 at DNRAMEND21473; AR 812 at DNRAMEND21500; AR 801 at DNRAMEND21469; AR 808 at DNRAMEND21488; AR 814 at DNRAMEND21513.

RDO's other agents also acted on behalf of Nolte, further establishing RDO's continued direction of the Project. Notably, RDO's outside and in-house counsel interceded with DNR on Nolte's behalf as he worked to obtain permits. AR 210 at

DNR04334. “Nolte’s” engineering consulting team twice offered erroneous RDO aquifer pump tests in an attempt to circumvent site-specific testing. AR 26, 49. Additionally, RDO continued to pay thousands of dollars of taxes on the property after “selling” to Nolte and directing him to reapply for Project permits. AR 206 at DNR04329. And, RDO holds the physical copy of the warranty deed Nolte offered as proof of his “outright” ownership, strongly indicating that RDO still maintains a security interest in the Project site. AR 212.

Regarding the third element of phased action, EQB guidance clarifies that “[t]he same geographic area is affected if the effects of any potentially significant impacts overlap. The project sites do not need to be adjacent, or even nearby, if the impact zone is large.” Guide to Minnesota Environmental Review Rules 9 (May 2010).<sup>5</sup> The phased action will impact the region’s drinking water aquifer, connected deep aquifers and river systems, contiguous pine forest habitat and pollinators (see Figures 2, 3, 4). AR 349; AR 484 at 12; AR 497 at 21-23, 26-27; AR 611. DNR itself determined in previous environmental review orders for RDO’s 2015 applications that the Pineland Sands is the relevant geographic area for reviewing RDO’s phased action, which has sites clustered across the region (see Figure 4). AR 374 at 38-39.

Substantial evidence also satisfies the fourth element of phased action. EQB provides the following factors for determining factor four: 1) detailed plans and

---

<sup>5</sup>May 2010 Guide to Minnesota Environmental Review Rules (2010), <https://www.eqb.state.mn.us/sites/default/files/documents/Guide%20to%20MN%20ER%20Rules-May%202010.pdf>.

specifications have been prepared for future stages; 2) infrastructure/ facilities have been built to serve future stages; 3) initial stages prejudice decisions about future stages; 4) proposer has constructed other previous stages in the area; and 5) any other factor that impacts certainty of the future stages. Guide to Minnesota Environmental Review Rules 9 (May 2010).<sup>6</sup>

First, in 2015, RDO submitted detailed plans and specifications for future stages of irrigated farming in the form of 54 well construction and irrigation permit applications, which identified proposed construction and operation of irrigation wells (see Figure 4). AR 484 at 3, n. 8; AR 484 at 14. Second, when RDO doubled its capacity and demand for potatoes at its Park Rapids processing facility, it built infrastructure to support future stages. AR 484 at 9-10. Third, RDO's substantial land purchase investment and infrastructure investment prejudice the company toward the development of future stages. AR 484 at 12-13. Finally, RDO has continued to slowly develop and implement related project sites, as permitted by DNR. AR 62; 64; 90.

Based on the forgoing, DNR's determination that the Project is not a part of RDO's expansion plan is unsupported by substantial evidence in the record and constitutes reversible error.

**B. DNR arbitrarily and capriciously separated the Project from RDO's 7,000-acre expansion action.**

---

<sup>6</sup>May 2010 Guide to Minnesota Environmental Review Rules (2010), <https://www.eqb.state.mn.us/sites/default/files/documents/Guide%20to%20MN%20ER%20Rules-May%202010.pdf>.



In defining the Project as separate from RDO's 7,000-acre expansion, DNR arbitrarily ignored substantial evidence demonstrating phased action. DNR also arbitrarily responded to Realtors' comments. In its ROD, DNR states that "information submitted with the Citizen's Petition ... does not support the conclusion that the Project is in fact an RDO project" because Nolte told DNR that no written agreement to "farm for or exclusively sell potatoes to RDO" exists. AR 711 at 18. Similarly, DNR found that absent acknowledgment from Nolte of an existing written agreement between himself and RDO, the agency cannot find phased action. AR 711 at 15.

Although this Court has permitted agencies to rely solely on a proposer's word regarding the scope of a project, it has done so only when opponents cited no other evidence to the contrary. *In re Minn. Pipe Line Co.*, 2008 Minn. App. Unpubl. LEXIS 675 at, \*32-33 (Minn. Ct. App. June 10, 2008). Here, unlike *In Re Pipeline*, substantial evidence of phased action fills the record and renders the agency's reliance solely on Nolte's fickle word arbitrary and capricious.

Not only is there substantial indirect evidence in the record undercutting Nolte's latest proclamation, Nolte himself has repeatedly admitted to DNR that he would be working with RDO to grow potatoes on the Project site. AR 210 at DNR04334. Additionally, the record reflects that Nolte never disavowed his stated intent to work with RDO. In telling DNR he did not have a current written agreement, Nolte stated that it was his "official" position while also stating his "unofficial" position was that it was "none of anyone's business." AR 666. Taken together, the facts in the record render DNR's complete reliance on Nolte's vacillating word arbitrary and capricious.

Moreover, this Court has expressly rejected reliance on a proposer's word, standing alone, when a project site's physical capacity has the potential to be larger or more environmentally impactful than what a proposer claims or states in permit applications. *See, Berne Area Alliance for Quality Living v. Dodge Cnty. Bd. Of Comm'rs*, 694 N.W.2d 577, 582-83 (Minn. Ct. App. 2005) (*Berne*). Judge Minge's concurring opinion in *Berne* further suggests that this Court should consider economic pressures to utilize a project site.

Here, substantial evidence in the record, including Nolte's own repeated statements to DNR, suggest that the Project site is intended to be used for irrigated potato production, a uniquely chemically intensive type of agriculture. AR 131 at 28; AR 210 at DNR04334. DNR's PowerPoint presentation, included with Relators' comments, reflects that Nolte stands to make 8 to 14 times more profit from growing potatoes. AR 432 at DNR08074. The physical capability of the site and the substantial economic pressure to grow potatoes, further establishes that DNR's solitary reliance on Nolte's word was arbitrary and capricious. AR 432 at DNR08074.

The evidence in its entirety regarding phased action permits only one rational conclusion: RDO proposed a 7,000-acre phased expansion action consisting of 54 permit applications and assessments in 2015, and since that time, RDO has continued to direct implementation of project phases including the Project site. DNR has knowingly allowed continued illegal implementation of the phased action, without environmental review, despite acknowledging that RDO's phased action may be slowly and irreversibly degrading the region's natural resources. AR 62 at DNR00995. Should the Court allow

DNR's illegally fragmented approach to stand, rivers, wetlands, pollinators and forests in the Pineland Sands will continue to suffer a slow death by a thousand cuts, while individual rural communities battle the immediate threats of drinking water insecurity and contamination and toxic pesticide drift.

**C. DNR erred as a matter of law when it separated the Project from RDO's 7,000-acre expansion action and failed to respond to the substantial evidence in the record establishing a phased action.**

DNR also erred as a matter of law in defining the Project as a standalone operation. In its environmental review decisions, the Court has emphasized a focus on on-the-ground project realities rather than narrow agency processes. *See e.g. Berne*, 694 N.W.2d at 583; *MRR*, 651 N.W.2d at 536, 539-40. MEPA explicitly requires an agency determine whether a project requires environmental documents by referencing "the physical activity to be undertaken and not [] the governmental process of approving the project." Minn. R. 4410.0200, Supb. 65 (2020).

In this case, contrary to black letter law, in ordering the EAW and defining and assessing the Project, DNR narrowly confined its analysis to the related Nolte irrigation permit requests. AR 374; AR 789 at 12 ¶ 1-3. DNR also, in defining the Project, excluded RDO's operations based solely on another narrowly defined RDO permit action, RDO's four permit amendment requests in 2018, for which DNR declined to exercise environmental review. AR 789 at 12 ¶ 1-3. DNR failed to evaluate the Project's connection to RDO's related, ongoing and well-identified 2015 proposal. AR 789. RDO's 2015 application package identifies the location of 54 proposed irrigated farming sites, including the Project site, and contemplates the construction and operation of irrigation

wells and the conversion of forestland (see Figure 4). AR 484 at 13-14. MEPA regulations and relevant case law required DNR to at least consider RDO's related proposed well construction and physical land conversion and irrigation activity as part of the EAW. Accordingly, DNR legally erred when it relegated discussion of the same to an encyclopedic overview in a "Regional Environmental Topics" attachment. AR 375, Attachment E at 3-5. Moreover, DNR further violated MEPA, when it failed to provide any specific response to the substantial evidence in the record that the Project is part of RDO's expansion action.

As DNR's decision to separate the Project from RDO's 2015 phased expansion action was an error of law, this Court, in exercising its de novo review, should reverse the agency's Negative Declaration.

## **II. DNR'S NEGATIVE DECLARATION BASED ON ITS DETERMINATION THAT THE PROPOSED PROJECT DOES NOT HAVE THE POTENTIAL FOR SIGNIFICANT ENVIRONMENTAL EFFECTS VIOLATES MEPA.**

In denying an EIS, DNR found the Project poses no significant environmental effects. AR 711 at DNR09471-DNR09473. DNR's decision is an error of law, unsupported by substantial evidence and arbitrary and capricious.

MEPA requires a reviewing body complete an EIS for a project if it has the potential for significant environmental effects. Minn.Stat. 116D.04, Subd. 2a (2019); *see also* Minn.R. 4410.1700, Subp. 1 (2018). Under MEPA, a reviewing body must consider the following factors in determining whether a project has the potential for significant effects:

- A. type, extent, and reversibility of environmental effects;
- B. cumulative potential effects of related or anticipated future projects;
- C. the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority; and
- D. 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 project proposer, including other EISs.

Minn. R. 4410.1700, Subp. 7 (2018).

**A. DNR erred as a matter of law in failing to consider Dr. Kraft's expert report establishing the potential for significant local water quality effects.**

In violation of MEPA, DNR entirely failed to consider the expert report of Dr. George Kraft, submitted as part of Relator EWG's EAW comment. AR 486 at DNR08385-DNR08398; AR 711. In making an EIS determination, a reviewing body must specifically respond to all substantive and timely comments on the EAW. Minn. R. 4410.1700, Subp. 4 (2018). Dr. Kraft is one of the foremost regional experts on groundwater contamination beneath irrigated vegetable crops grown in sandy soils. AR 486 at DNR08393-DNR08398. DNR not only failed to provide a specific response to Dr. Kraft's report, DNR does not mention it once in over 12,000 pages of record material.

Devastatingly, Dr. Kraft's analysis, which assumes the use of best management practices (BMPs), shows that groundwater contamination beneath the Project site will likely be ***double to quadruple*** the Safe Drinking Water Act limit of 10 mg/L. AR 486 at DNR08385-DNR08398. Potential groundwater and drinking water contamination at two to four times the health limit established by the Environmental Protection Agency represents a potentially significant environmental effect. It also presents a serious public health threat for the high density of neighbors whose private residential wells surround

the project site (see Figure 6). AR 486 at DNR08418-DNR08421; AR 497 at 25. DNR's complete failure to address Dr. Kraft's opinion and specifically respond to substantive comments constitutes reversible legal error.

**B. DNR's decision that the Project does not have the potential for significant local water quality effects is arbitrary and capricious.**

In its Negative Declaration, DNR arbitrarily and capriciously concluded that water resource contamination and depletion, pollinator harms and pesticide drift from the Project will be "limited in extent, temporary, or reversible" and "ongoing public regulatory authority and specific measures identified can be expected to effectively address [water resources, contamination and air] effects." AR 711 at DNR09471-DNR09473.

In the directly applicable *Trout* case, this Court found MDA's refusal to order an EIS, in the face of evidence demonstrating a proposed irrigation operation in the Pineland Sands had the potential for significant environmental effects, to be arbitrary and capricious. *Trout Unlimited v Minn. Dept. of Ag.*, 528 N.W.2d 903, 909 (Minn. Ct. App. 1995). This Court held that a proposed irrigation operation in the Pineland Sands one-third the size of the proposed Project had the potential for significant effects and in deferring monitoring and analysis to the permitting process, the MDA commissioner "abandoned his duty to require and EIS" and made a "mockery of the EAW as a decision-making tool." *Id.*

In *Trout*, MDA, as DNR has done in this case, disregarded potentially significant effects raised by jurisdictional agencies and commenters, deferred study of the same to

the permitting process and relied on general mitigation measures. *Id.* at 909. In reaching its decision, the Court in *Trout* noted potentially significant effects from the 97-acre irrigation operation in the Pineland Sands 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.

Here, PCA, MDH, individual DNR officials and Relators have renewed the same potentially significant water quality and quantity and pesticide effects recognized in *Trout*. *Id.* at 906-909. AR 482, 484, 497. Relators further buttressed these concerns, many of which are now well-documented water pollution realities to the north and south of the project site (see Figure 2), with additional evidence. AR 484 at 7, 8, 10-11, 26, 38-39; AR 486 at DNR08358-DNR08389; AR 497 at 21-24, 26-27.

Minnesota geologist expert, Jeff Broberg, stated MDA's 2020 Byron Study results in the Pineland Sands show: 1) groundwater nitrate contamination above the Safe Drinking Water Act limit will occur just 1-2 years after conversion of forest to irrigated crop land; 2) downgradient migration of nitrate beneath a single center pivot field could result in a contamination plume occupying hundreds to thousands of acre feet of groundwater and 3) recommended BMP implementation is cost prohibitive as well as ineffective at preventing nitrate contamination above the health risk limit. AR 497 at 26-27. Dr. George Kraft further noted that MDA's study results are consistent with his

projections regarding groundwater nitrate contamination *double to quadruple* the Safe Drinking Water Act limit. AR 486 at DNR08388.

DNR staff comments in the record underscore Relators' concerns. One DNR subject-matter expert noted, "[w]e do not know whether nearby wells are at risk of nitrate or pesticide contamination from the proposer's use." AR 629 at DNRAMEND20223, cmt 84d. Another agency official noted that he was unsure how "[wells] could be modified to address nitrates." AR 757 at DNR10199, DNR10211.

Ultimately, the record reflects that DNR focused heavily on drawing narrower cumulative effects boundaries, while completely failing to complete an analysis of potentially significant local groundwater quality effects or related contamination effects to private wells and connected surface water resources. AR 364-372; AR 374 at 19-28, 35; AR 711 at 5-8, 17-18, 20-21. As a result, in its ROD, DNR arbitrarily and obtusely replied to Relators' comments stating, "[g]iven the number of variables involved in predicting groundwater quality in the environmentally relevant area, it is unlikely that a modeling exercise would produce definitive results that could be relied upon in decision making." AR 711 at 20. With respect to Relators' specific concerns regarding the data and findings of MDA's Byron Township Study DNR asserted, without supporting references, that "nitrate concentrations below those reported in the Byron Study have been observed following implementation of best management practices." AR 484 at 17-19; AR 497 at 26-27; AR 711 at 18.

Failing to cite references or Relators' expert report and also contradicting the agency's own in-house expert, DNR further concluded that given the size of the project



area and Nolte's Water Quality Certification, "the Project is not anticipated to significantly contribute to any increase in nitrate concentration in nearby wells or cause those wells to exceed the Drinking water standard of 10mg/L." AR 711 at 20-21. DNR attempted to justify its arbitrary responses and lacking assessment of potentially significant local water quality effects by noting that the agency "does not retain sole or even primary jurisdiction over water quality in Minnesota." AR 711 at 20.

DNR's conclusion that the Project does not have the potential for significant water contamination effects is arbitrary and capricious. DNR reached its conclusions by ignoring Relators' site-specific expert report and other discussed scientific studies and sidestepping Relators' comments on the state's own nitrate groundwater contamination assessment in the Pineland Sands. DNR also omitted consideration of state studies of surface water contamination from irrigated agriculture immediately to the North and South of the Project site. AR 349; AR 611.

**C. DNR arbitrarily and capriciously dismissed Relators' comments regarding ineffective mitigation.**

DNR's failure to address Relators' substantial evidence of ineffective mitigation is arbitrary and capricious. In *CARD*, 713 N.W.2d at 835, the Minnesota Supreme Court held that mitigation measures may only be considered as offsetting potentially significant effects if they are "specific, targeted and are certain to be able to mitigate the environmental effects." Although complete mitigation plans are not required and mitigation measures need not be mandatory mitigation must be discussed "in sufficient detail to ensure environmental consequences have been fairly evaluated." *Minn. Ctr. For*

*Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 468 (2002) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S 332, 352 (1989)).

Broberg cited and discussed several recent and directly relevant studies quantifying the ineffectiveness of proposed BMPs including cover crops. AR 497 at 21-23. The studies Broberg discussed show that in sandy soils like those occupying approximately 99.7% of the Project site, BMPs used on irrigated fields provide only short-term ephemeral benefits and do not protect groundwater long-term. AR 497 at 21-23. Dr. Kraft further noted that it was empirically faulty to rely on DNR's proposed general BMPs. AR 486 at DNR08389.

EWG further commented that the BMPs contained in Nolte's MDA Water Quality Certification agreement cannot reasonably be considered specific and targeted protection measures because the agreement addresses Nolte's haying and grazing operation with a *dryland* crop rotation completely different than the *irrigated* crop rotation proposed for the Project site. AR 4 at DNR00060; AR 484 at 40-41. Buttressing EWG's concerns, DNR staff noted that Nolte's Water Quality certification agreement ensures the use of BMPs that protect water resources *generally*, not BMPs that ensure site-specific protections. AR 131 at DNR01754.

DNR arbitrarily responded, and in some cases provided no response, to Relators' specific evidence regarding the ineffectiveness of proposed mitigation measures. AR 497 at 21-23; AR 486 at DNR08385-DNR08386. In its ROD, DNR simply repeated the same general BMPs referenced in the EAW. AR 711 at 17-18, 20-21, 25-27, 35. DNR further inaptly responded to Relators' concerns regarding BMP ineffectiveness by stating that

proposed BMPs are certain to occur, because they are provided for by contract. AR 711 at 17-18. DNR's reliance on general BMPs, absent any assessment of potentially significant local water quality effects, puts the proverbial cart before the horse and runs afoul of this Court's most lenient interpretations of sufficient mitigation. DNR's response is arbitrary and capricious, because it entirely failed to consider the specific mitigation concerns raised by Relators. For the reasons set forth herein, this Court should reverse the DNR's decision on the basis it was arbitrary and capricious.

**D. Substantial evidence in the record does not support DNR's proposed mitigation measures.**

DNR failed to provide or discuss, in its ROD, any of the site-specific mitigation documents that it repeatedly requested from Nolte. DNR did not, for example, discuss a site-specific manure management plan or nitrogen management plan and provided only recommended permit conditions. AR 711 at 6, 17-18. These are significant omissions in light of Dr. Kraft's expert assessment that that manure loading could "potentially contribute[] more nitrate to groundwater than commercial fertilizer ..." AR 486 at DNR08388. Moreover, DNR admitted that the Project's "site-specific" irrigation conservation plan contains only "options and recommendations." AR 711 at 17-18.

Site-specific mitigation documents missing from the record further support a finding that DNR's conclusion regarding sufficient mitigation is reversible error, unsupported by substantial evidence. *See Reserve Mining*, 256 N.W.2d at 825. Upon reviewing the extensive record in its entirety, reasonable minds would not accept as adequate DNR's conclusion because DNR fails to offer more than a scintilla of evidence

in support. In contrast, the evidence Relators submitted to DNR provides substantial evidence to order an EIS due to the Project's potentially significant environmental effects and the ineffectiveness of proposed general mitigation measures.

**E. DNR erred as a matter of law in finding that Project does not have the potential for significant water quantity effects.**

DNR also legally erred in concluding that the Project does not pose potentially significant water depletion effects to residential wells, wetlands and the Redeye River and in concluding analysis of the significance of the same can be deferred to the permitting process. AR 486 at DNR08386; AR 497 at 12, 25-26; AR 711 at 5-8; AR 753 at 1, 2, 25-27. In cases where information necessary to understand the potential for or significance of environmental effects is lacking but could be reasonably obtained, Minn. R. 4410.1700, Subp. 2a, requires a reviewing agency to extend the EAW process and gather additional information or make a positive declaration and include within the scope of the EIS appropriate studies to obtain the lacking information.

In *Pope County Mothers v. Minn. Pollution Control Agency*, 594 N.W. 2d 233, 237 (Minn. Ct. App. 1999), this Court held PCA's negative declaration to be arbitrary and capricious because the agency deferred modeling and analysis of potentially significant greenhouse gas emissions to the permitting process when the agency could have reasonably obtained the information as part of the EAW process. Likewise, in *Trout*, this Court reversed MDA's negative declaration and ordered an EIS, holding that "[t]he very purpose of an EIS [] is to determine the potential for significant environmental effects *before* they occur." *Trout*, 528 N.W.2d at 909.

In evaluating RDO's proposed 2012 Winnemucca Farms irrigation project, DNR correctly interpreted MEPA requirements, as Relators do in this case. AR 77 at DNR01112-DNR01113. The agency stated that complete aquifer pump testing of all wells should be required during the EAW process to determine the extent of potentially significant water depletion effects on surrounding surface waterbodies and to give the public an opportunity to comment on the same:

Prior to continuous pumping, all wells should be evaluated with resource aquifer tests ... In addition, staff gages ... should be installed in the wetlands to determine the sustainability of this pumping. ... While DNR Appropriation of Water applications require this testing to inform appropriate permit actions, the EAW process should disclose all potential project related impacts. Since the project has the potential for impacts to extend offsite into public use areas, this is especially important.

AR 77 at DNR01112-DNR01113.

Dr. George Kraft noted that Project pumping of 100 million gallons per day will cause declines in aquifers, connected wetlands and the Redeye River and information in the EAW is insufficient to assess the extent of these effects. AR 486 at DNR08386. In addition, Broberg stated that the county-level geologic atlas that DNR cited in the EAW failed to provide site-specific information and also noted a high risk of residential well-interference within a mile or more of the Project site. AR 497 at 12, 25-26.

DNR's own partial aquifer pump test report and the ROD identify unknown and potentially significant local water depletion effects from Project pumping, which require further evaluation. DNR's aquifer pump test report and the ROD note: 1) unknown risks to Redeye River and wetlands from pumping the northern well; 2) estimated "moderate" risk of depleted streamflow in the Redeye River; 3) "high risk" of well interference for

several nearby domestic wells from pumping one or more wells; 4) insufficient data to determine risk of interference with additional residential wells; and 5) *zero* information for evaluating the risk to 11 residential wells, including the closest adjacent residential wells located on the neighboring organic farm. AR 711 at 5-8; AR 753 at 1, 2, 25-27.

The record reflects that DNR could have easily obtained the information necessary to fully understand well-identified and potentially significant water drawdown effects. AR 128; AR 172. DNR provided partial aquifer pump test specifications to Nolte in January 2020, nearly four months before publication of the EAW. AR 128; AR 172. As part of its specifications, DNR could have required Nolte to pump all three wells individually and also concurrently, while gauging wetlands and the river in order to completely evaluate potentially significant effects to surrounding water resources and residential wells. AR 19 at DNR00208, cmt. 56; AR 77 at DNR01112-DNR01113; AR 753 at 7. Instead, DNR required Nolte only pump one well, completed in the deeper of two buried leaky aquifers, and did not provide a date certain for test completion. AR 172; AR 647 at DNRAMEND21095. Nolte elected to complete the partial aquifer pump test just one week before DNR published the EAW. AR 647 at DNRAMEND21095. Despite its apparent efforts to exclude pump testing and assessment of the same from environmental review, DNR disingenuously claims in its ROD that the aquifer pump test was completed “concurrently” with environmental review. AR 711 at 5.

Given the well-identified potentially significant drawdown effects to surface water resources and residential wells from Project pumping and DNR’s ability to easily

evaluate the same as part of the environmental review process, DNR's decision to defer monitoring and assessment to the permitting process constitutes a reversible error of law.

DNR's determination that monitoring and assessment during the permit period will be sufficient to address potentially significant water depletion effects to water resources is further legally erroneous, because it ignores that DNR is prohibited from using its regulatory authority to address significant interim effects to surface water resources. Specifically, absent direct well interference, the agency cannot amend an irrigation permit during irrigation season. Minn. Stat. § 103G.271 Subd. 3. (2017); AR 711 at 5, 35.

Relevant MEPA provisions require adequate pump testing be included as part of the environmental review process—not confined to the permitting process—when information generated by testing is necessary to fully identify the potential for and significance of environmental effects. Minn. Stat. 116D.04, Subd. 15 (2109). DNR's erroneous reading of a bright and impermeable line between permitting and environmental review tainted the agency's EAW process and led to the legally erroneous decision to defer monitoring and assessment of potentially significant effects to the permitting process. DNR's derogation of its duty to order an EIS to assess potentially significant surface water effects constitutes further reversible legal error.

**F. DNR's determination that the Project does not have the potential for significant pesticide drift effects to nearby residences or pesticide effects to pollinators is an error of law and arbitrary and capricious.**

DNR's failure to address evidence of potentially significant pesticide drift effects to neighbors, including an organic farm, water resources and pollinators is both an error of law and arbitrary and capricious. AR 711 at 34; AR 482; AR 486 at DNR08389.

Toxic Taters, discussing Pesticide Action Network's (PAN) 2012 air quality study of the Pineland Sands area, noted that PAN found pesticide residues in 224 of the 340 field samples. AR 482 at DNR08322. Commonly detected were chlorpyrifos and chlorothalonil, which the EAW states may be used on potatoes and alfalfa. AR 482 at DNR08322. PAN detected chlorothalonil and chlorpyrifos in 64% and 33% of samples, respectively. AR 482 at DNR08322. Toxic Taters further commented that the EAW arbitrarily asserted a "low/negligible" residential pesticide drift risk based on the wholly erroneous conclusion that zero residences exist within a quarter mile of the Project site. AR 482 at DNR08324.

Toxic Taters' comments confirm PCA's vociferous comments from 2013 that more thorough review of proposed chlorothalonil use, especially crop duster application, is needed for proposed irrigation sites. AR 484 at 47.

Dr. Kraft also discussed a study that found neonicotinoid pesticides in groundwater and surface water at concentrations that have potential negative consequences for aquatic and terrestrial invertebrates. AR 486 at DNR08389. The study specifically discusses air and water pesticide contamination from neonicitinoid treated seeds, like those proposed to be used on the Project site. AR 374 at 29; AR 486 at DNR08389.



Agency comments in the record provide further support for Relators' comments that the EAW failed to sufficiently assess the potential for significant site-specific pesticide drift effects. MDH and DNR officials advocated for and attempted to incorporate a more site-specific pesticide risk evaluation of the Project. AR 131 at 27-29; AR 222 at DNR04377; AR 224 at DNR04401. And, PCA commented on unaddressed pesticide drift impacts to pollinator combs. AR 611. Additionally, the record reflects that the state has recorded 26 pesticide drift complaints from 2009-2014 in Wadena and neighboring counties. AR 110.

Instead of providing a specific response to Relators' and PCA's concerns and cited studies identifying potentially significant pesticide drift effects on pollinators, DNR bypassed the comments altogether and cross-referenced three one-sentence, non-species-specific generic conclusions included in the EAW. AR 486 at DNR08389; AR 611; AR 711 at 11, 28-29. Although DNR acknowledged Relators' comment regarding its erroneous determination of a "low/negligible" pesticide drift risk to surrounding residences, DNR also failed to specifically respond. Instead of reevaluating local risk of pesticide drift based on an accurate residence count, DNR resorted to generally citing past and pending EPA bystander reviews and referred Relators to the EPA website. AR 482 at DNR08324; AR 711 at 17. The record reflects that DNR resorted to generics in its ROD because after correctly identifying several residential structures within or just outside ¼ mile of the Project site (See figure 7), MDH decided to "scrap" the site-specific buffer assessment altogether. AR 680.

In a similarly unfounded decision, DNR and MDH officials decided to omit from the ROD a discussion of scientific studies confirming associations between pesticide exposure and non-Hodgkin's lymphoma, after an EAW commenter noted concerns about elevated cancer rates in Wadena County. AR 698. On top of omitting a discussion of relevant studies, DNR affirmatively lied in the ROD, stating non-Hodgkin's lymphoma is "not associated with the use of pesticides." AR 711 at 16. Based on the foregoing, DNR erred in concluding the Project does not have the potential for significant pesticide drift effects.

### **CONCLUSION**

The proposed Nolte Project is one segment of RDO's 7,000-acre phased deforestation and irrigated potato expansion action in the Pineland Sands aquifer area. The Project segment, standing alone, has the potential for significant environmental effects, including ground and drinking water contamination *double to quadruple* the Safe Drinking Water Act limit, water drawdown in public watercourses and residential wells and harmful pesticide drift. In separating the Project from RDO's massive irrigated farmland expansion action and making a Negative Declaration on the need for an EIS, DNR erred as a matter of law and made an arbitrary and capricious decision unsupported by substantial evidence. Because DNR's decision constitutes reversible error, Relators respectfully request the Court reverse DNR's Negative Declaration and order an EIS for the entire 7,000-acre phased action. In the alternative Relators request that the Court order an EAW for the 7,000-acre phased action or an EIS for the Project site. If the Court reverses DNR's Negative Declaration, Relators further request that it order DNR to

rescind irrigation permits, which the agency issued before completing required environmental review.

Respectfully submitted,

Dated: November 13, 2020

By: /s/ 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

Dated: November 13, 2020

By: /s/ Marshall H. Tanick #108303  
Meyer Njus Tanick, PA  
Teresa J. Ayling #0157478  
330 Second Ave. So. Suite 350  
Minneapolis, MN 55401  
(612) 341-2181  
mtanick@meyernjus.com  
tayling@meyernjus.com

Dated: November 13, 2020

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

**ATTORNEYS FOR RELATORS**

## **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 a proportional font. The length of this brief is 13,727 words. This brief was prepared using Microsoft Word for Mac, 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 alterations to a brief filed electronically must be separately served and filed in the form of an errata sheet.

Dated: November 13, 2020      By: /s/ 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

Dated: November 13, 2020      By: /s/ Marshall H. Tanick #108303  
Meyer Njus Tanick, PA  
Teresa J. Ayling #0157478  
330 Second Ave. So. Suite 350  
Minneapolis, MN 55401  
(612) 341-2181  
mtanick@meyernjus.com  
tayling@meyernjus.com

Dated: November 13, 2020      By: /s/ James P. Peters #0177623  
Law Offices of James P. Peters, PLLC  
20020 S. Lakeshore Dr.  
Glenwood, MN 56334  
(320) 424-2326  
jim@peterslawfirm.us